Neutral Citation Number: [2008] IEHC 322

THE HIGH COURT

2008 No. 643 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

PAUL CLIFFORD

APPELLANT/ACCUSED

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA SUSAN McLOUGHLIN)

RESPONDENT/PROSECUTOR

Judgment of Mr. Justice Charleton delivered on the 29th day of October, 2008

1. This is the opinion of the High Court in answer to a case stated by Judge Patrick McMahon under s. 2 of the Summary Jurisdiction Act 1857, as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961, whereby a judge of the District Court may seek advice as to whether he was correct in law in convicting the appellant/accused Paul Clifford in respect of the charges that were before him. There were two such charges before the learned judge of the District Court on the 1st May, 2007. These, in essence, were:-

> 1. That Paul Clifford committed an offence contrary to s. 6 of the Criminal Justice (Public Order) Act 1994, on the 1st October, 2006, at Kilmainham Garda Station, a public place, by using or engaging in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or being reckless as to whether a breach of the peace may be occasioned;
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> 2. That Paul Clifford committed an offence contrary to s. 13 of the Criminal Justice Act 1984, on the 1st October, 2006, in Kilmainham while being a person released on bail, and having entered into a recognisance on the 29th July, 2006, to appear at Dublin District Court No. 44 in the Dublin Metropolitan District on the 31st July, 2006, he failed to appear before that court in accordance with his recognisance.

2. The issues in this case relate to the proper construction of the two offences that are the subject of these charges.

Public Order Charge: Facts

3. There seems to have been some background to this case which was not adduced in evidence before the District Court. I infer that at some time prior to his visiting Kilmainham Garda Station, the accused believed that a mobile phone had been seized from him by the gardaí, for whatever reason. On the 1st October, 2006, the accused entered that Station and made a fuss at the public office. He was accompanied by two friends – one male, one female. He appeared to be drunk and he started abusing the gardaí present. He was shouting about a mobile phone that he said had been seized from him earlier on by the gardaí. He continually demanded that it should be returned to him. In support of this, he kicked and banged the door in the public office. The accused was handed the computer chip from this mobile phone, the SIM card, which would identify him as the caller if inserted into another mobile phone, and would store certain information in relation to messages and contact details. This was not good enough for him. The accused said he would "get Garda Susan McLoughlin" and he further said that "it would not be him who would finish her off". Other members of the public, apart from the people who were accompanying him, were present during this incident. The accused was arrested, the gardaí being of the opinion that he was committing an offence contrary to s. 6 of the Public Order Act 1994. Under cross-examination, the two garda witnesses told the District Court that none of the people present attempted to become involved in the fracas and that they shied away from any confrontation. They accepted that it was not at all likely that a breach of the peace would occur in consequence of the behaviour of the accused. They specifically said that neither of them, as members of An Garda Síochána, would have breached the peace in response to his behaviour. A direction was therefore sought to acquit the accused on the close of the prosecution case on the basis that there was no case to answer. It was submitted that there was no evidence upon which a court could find, either directly or by inference, that the accused intended to provoke a breach of the peace or that he was reckless as to whether a breach of the peace might have been occasioned.

4. The learned District Judge rejected these submissions. The accused did not give evidence. He was convicted, the court being satisfied that he had committed the offence.

Illegal Behaviour

5. The Criminal Justice (Public Order) Act 1994, creates an offence in s. 6 which carries a penalty on summary conviction of a fine not exceeding the equivalent of £500.00 or imprisonment for a term not exceeding three months, or both. This is a mild penalty. A traditional model of criminal offence is created by s. 6(1) incorporating, as it does, an external element coupled with a requirement that the prosecution prove intent or recklessness, the mental element. The section provides:-

> "6(1) It shall be an offence for any person in a public place to use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned."

6. The elements of this offence require the prosecution to prove that the relevant conduct occurred in a place which the public use as of right or to which they habitually have resort; that the accused used insulting words or behaviour either generally or towards some particular person or that he engaged in threatening or abusive behaviour; and that, in doing so, he intended to provoke a breach of the peace or he was reckless as to whether a breach of the peace may be occasioned in consequence of his conduct.

7. The common law offence of breaching the peace was not abolished by this section. Instead, the ease of proof of the mischief of abusive behaviour in public was reformed by relieving the prosecution, where they charge under the section, of proving that a breach of the peace actually occurred. In the charge before the District Court it was only necessary to prove a particular form of conduct accompanied by the mental element of intent or recklessness, as set out in the section. A breach of the peace implies conduct which goes beyond boisterousness. Instead, the offence involves a situation which imminently threatens a person, through the conduct of those involved in the breach of the peace, but not necessarily directly, of being harmed through an assault, an affray, a riot, an unlawful assembly or any other serious disturbance; *R. v. Eroll Howell* (1981) 71 Cr. App. r 31 per Watkins L.J.. In England, a threat of destruction of property in the presence of its owner is regarded as being sufficient to prove a breach of the peace as, it was reasoned in *Howell*, wrecking somebody's property in his presence is likely to provoke a serious response. This is correct. In *Thorpe v. Director of Public Prosecutions* [2007] 1 I.R. 502 at 512, Murphy J. offered the following analysis of the common law offence of breach of the peace:-

> "*Glanville Williams*: Arrest for Breach of the Peace (1954) Crim. L.R. 578 pointed out that, apart from arrest for felony, the only power of arrest at common law is in respect of breach of the peace. However, there was a surprising lack of authoritative definition of what one would suppose to be a fundamental concept in criminal law. While a breach of the peace is supposed to underlie every crime, the narrower meaning encompasses a riot or an unlawful assembly which has not yet become a riot. There may also be a breach of the peace without any general disorder where a unilateral battery or an assault is committed.
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> Each of the instances involves some danger to the person, and it is submitted that this is the general meaning of a breach of the peace in criminal law.
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> In English law, if there is no threat to the person it seems that a threat to property should generally be regarded as insufficient though it may well be that a threat to attack a dwelling house is looked upon with special severity and so is always a breach of the peace if the attack is imminent."

8. It is apparent to me, from these helpful discussions of the crime of breach of the peace, that it occurs where a person finds himself, or herself, in a situation where they reasonably fear that if they do not withdraw from it quite promptly, they may either be assaulted or that the disturbance in respect of which the accused stands charged may create the risk of a response which is disorderly and in consequence potentially violent whereby, through direct or indirect means, bystanders may be caught up in violence. In this context, shoving, flying missiles, stampeding by a few people or a section of a crowd, and fighting within a group, constitute examples of the kind of indirect violence that may ensnare the uninvolved and so constitute a breach of the peace.

9. It was, perhaps, to bypass these uncertainties of proof and definition that specific forms of conduct are proscribed in the external elements of the definition in s. 6 of the Criminal Justice (Public Order) Act 1994. Any one of a number of external acts perpetrated by the accused at Kilmainham Garda Station could reasonably be regarded by a court as constituting threats, or insulting words, or abuse. Threatening to kill someone, or to finish them off, or to have them finished off, clearly fits within that analysis. I do not regard it as helpful to attempt to give a separate definition in relation to every word used in the section, or to explain it disjunctively. By using plain words in the English language, the Oireachtas required the District Court, in looking at any particular set of facts, to ask itself whether threatening words or behaviour were used, or whether the accused was abusive, or whether he was insulting. If he was, then the external element of the offence is perpetrated.

Intent

10. An intent to commit the external element of an offence occurs where an accused person goes about the conduct in question with the purpose of bringing about the wrong. So, a person murders another person, within the definition of s. 4 of the Criminal Justice Act 1964, where he unlawfully kills another person, which is the external element, intending to kill them or intending to cause them serious injury, this being the mental element as defined under the section. Here, an intent to provoke a breach of the peace, the mental element encapsulated within s. 6 of the Criminal Justice (Public Order) Act 1994, requires that, before conviction, the court should be satisfied beyond reasonable doubt that in doing what he did by way of abusive words or behaviour, or other conduct within the section, the accused's purpose was to provoke a breach of the peace. In this context, provoke is an ordinary word and may be explained, if explanation is necessary, as to inspire or to bring about. So, the issue is: did the rowdy person intend to provoke a breach of the peace? It is not necessary to prove that he succeeded. If he acted in order to provoke the gardaí into an unseemly response of manhandling him gratuitously, that is an example of direct intention. It is a universal principal of criminal law that a person may be taken to intend the natural consequences of what they do. Intention may thus be inferred from conduct provided, on the building blocks of the case proved by the prosecution, that inference can fairly be drawn beyond reasonable doubt. As there was no evidence to suggest that the accused in this case intended to do anything other than provoke the gardaí, because that is the natural result of his behaviour, that inference might be, but not necessarily must be, drawn. There was no necessity, in the context of the facts before him, for the learned District Judge to deal with oblique intention, whereby a person may go about a particular intentional course of conduct but not necessarily intend the consequence that is brought about. Here, the necessity to consider oblique intention might have arisen should the accused have gone into evidence, or have made a statement on arrest, to the effect that he had no intention of provoking anything but was merely intent on getting his precious mobile phone back. In which case, it might be wondered how his methodology might have helped in that quest. For the sake of completeness, however, a further word on intention, direct and oblique, is needed.

11. A person may intend to blow up a plane in flight and so kill the passengers. That is direct intention. A person may claim to intend only to blow up a suitcase in a plane in flight but hope, that through some miracle, all the passengers in the plane will survive. It might usefully be noted, on the relevant case law, that the closer the impugned conduct comes to inevitably causing the consequence charged, as for instance in that example intending the death of the plane passengers, the more readily a court may feel able to infer that intention, in the example given of causing death, against the accused. The more obscure the consequence, the less readily can the inference of an intention in that regard be made. In no instance, whether of direct intention or oblique intention, is the inference that the accused intended either an act or its consequences automatically to be inferred from particular behaviour. In each instance, it is a matter of judgment for the court. Intention, in this context, has nothing to do with motive. The motive in destroying the luggage in the plane may be, for instance, to hide a serious act of bank fraud. That is irrelevant to any definitional element of the charge. If the purpose of the accused was to blow up the suitcase, then his motive is irrelevant. His having a motive is a matter which the prosecution are entitled to prove in support of their contention that the accused perpetrated the offence, either as to its external or mental elements, or both. Absence of motive may assist in showing a doubt that the accused is guilty. Motive is, therefore, a relevant item of proof.

12. The fact that it may be very difficult for a particular accused to achieve the wrong which is the subject matter of the charge does not mean that he did not have the intent to bring it about. To return to the explosion on the plane example, it might be very difficult, for instance, to mix a viable bomb from a number of small vials of liquid, within the current guidelines for what a passenger can carry in their hand luggage, that have been brought onto a plane by a number of persons; but that does not mean that an accused may not have acted with the purpose of combining these liquids together, or with other substances, to make an explosive. His making a bomb on a plane may lead to an inference that he intended to explode it and kill himself and the passengers. That deduction may be made, depending on the facts proven, by the court of fact on all the elements proved by the prosecution but it does not have to be made. There may be evidence suggesting an alternative of a hijacking or a violent protest about some political matter. This may be likely or unlikely, but in considering all of the evidence, the court of trial is looking at what is necessarily to be inferred as to the purpose of the accused from the accused's conduct and is also looking at what possible alternatives may reasonably arise to operate as a doubt in the accused's favour. If he is consciously doing whatever he can to bring about the criminal wrong in question, that means it is his purpose. That constitutes an intent to commit the offence. The fact that the consequence is very difficult, or is very easy, to bring about, on the facts proved in an individual case by the prosecution, is a matter upon which an argument may be made to the court of trial as to whether the accused had that intent, or did not have that intent. All of this is a matter for the construction of the relevant evidence. Again, based on the example given, the fact that the accused did everything

logically necessary to cause an explosion on board an aircraft may, but not must, lead to an inference that this was his purpose. The fact that the scale of that explosion was highly likely to destroy the plane may, but not must, lead to an inference that that was his purpose. That fact that people die when a plane explodes in mid air may, but not must, lead to an inference that he intended to kill. At the other end of the scale, the fact that it was not likely that the accused could, with the materials he and his accomplices had in their hands, cause an explosion may, but not must, be a matter from which an inference may be drawn against his ever having had such an intent or of intending any consequence to such an explosion.

13. It is always a matter of looking at the building blocks of the case that the prosecution present before the court; of seeing which of these have been proven beyond reasonable doubt; and of construing that evidence in the context of the ultimate question before the court as to whether the prosecution have proved the external and mental elements of any particular offence to the requisite standard of proof.

Recklessness
14. Recklessness consists of an accused subjectively taking a serious risk, involving high moral culpability, that his conduct will bring about the wrong defined by the charge. Here, the wrong defined by the charge in terms of recklessness is as to whether a breach of the peace may be occasioned, that is brought about, by his conduct. Recklessness involves a subjective element in Irish law, and so it is different from criminal negligence which is the mental element of one aspect of criminal negligence manslaughter. For an accused to be reckless, it must occur to the mind of accused that his conduct will bring about the consequence impugned but, nonetheless, he proceeds to act. Moral culpability is necessary in this context because all life is a risk. To decide to build a major tunnel through a mountain involves a risk of accidental death to the workers. Where all proper precautions are taken, there is no moral culpability should someone die in an accident. Failing to avoid a serious risk of which you are aware can involve a high degree of moral fault. An example incorporating the necessary elements in recklessness of the subjective taking of a serious risk in culpable circumstances is this. A man is driving a car at speed along a country road and sees a stop sign at a crossroads. He knows that a car may cross the road in front of him but, notwithstanding that risk, he powers ahead without stopping, causing death or injury. He may in these circumstances be charged with manslaughter as his mental state is even more serious than the mental element of criminal negligence required for that offence. That man is reckless as to the death or injury caused. Section 2.02(2)(c) of the Model Penal Code is generally accepted as being the definition of recklessness in Irish law:-

> "A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree."

15. The reason why an acquittal was argued for in this case is that all of the members of An Garda Síochána giving evidence had stated that they were unlikely to have responded to abuse from the accused by a breach of the peace. That, it seems to me, is beside the point. The issue was: what did the accused intend by his conduct? Members of An Garda Síochána are not in a special category. It may be that some of them received training in behaviour in riot situations and it may be speculated, as well, that they are screened before entry on the basis of exceptional fortitude. I do not believe, however, that a court could ever be safe in imagining that any particular category of persons, whether nuns, judges, or members of An Garda Síochána, could not be provoked by abuse, by being threatened with death, or by having a prized possession smashed up in front of them. The reasoning, in that regard, in the context of a different wording, of the Queens Bench Division in *DPP v. Orum* [1989] 1 W.L.R. 88 at 93, I find to be persuasive. I therefore quote with approval the following passage from Glidewell L.J.:-

> "I find nothing in the context of the Act of 1986 to persuade me that a police officer may not be a person who is caused harassment, alarm or distress by the various kinds of words and conduct to which section 5(1) applies. I would therefore answer the question in the affirmative, that a police officer can be a person who is likely to be caused harassment and so on. However, that is not to say that the opposite is necessarily the case, namely, it is not to say that every police officer in this situation is to be assumed to be a person who is caused harassment. Very frequently, words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom. It may well be that in appropriate circumstances, magistrates will decide (indeed, they might decide in the present case) as a question of fact that the words and behaviour were not likely in all the circumstances to cause harassment, alarm or distress to either of the police officers. That is a question of fact for the magistrates to be decided in all the circumstances: the time, the place, the nature of the words used, who the police officers are, who else was present and so on."

Much of the argument in this case centred around particular authorities from the neighbouring kingdom which were based on forms of words different to that in question here. The issue here is as to whether this accused intended to provoke a breach of the peace or took an advertent serious risk in morally culpable circumstances that his conduct might occasion a breach of the peace. That is different to the wording of the section applied in the *Orum* case. It is also different to the wording of the United Kingdom Public Order Act 1936, which criminalises a particular kind of conduct which is defined as being "likely to provoke a breach of the peace". The example of this kind of conduct exemplified in *Jordan v. Burgeoine* [1963] 2 Q.B. 744, was of a racist who addressed a crowd containing many persons of the Jewish faith and other people of sensible but strong views saying, in the most obnoxious way, that "Hitler was right", and other crazed sentiments of that kind. Again, it is of little assistance. Clearly, that behaviour is likely to lead to serious trouble.

16. It suffices for me to advise the learned District Judge that there was ample evidence upon which both the external and mental elements of the offence could be found to have been proved by direct testimony or inference.

Failure to Appear
17. Section 13 of the Criminal Justice Act, 1984, for the first time, made it an offence to fail to honour the terms of bail and appear from time to time to answer a criminal charge. Prior to 1984, accused persons who failed to appear before a court in accordance with a recognisance entered into by them could merely be the subject of a warrant of arrest under common law. Section 13 provides:-

> (1) If a person, who has been released on bail in criminal proceedings, fails to appear before a court in accordance with his recognisance, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding twelve months or to both.
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> (2) It shall be a defence in any proceedings for an offence under *subs. (1)* for the accused to show that he had a reasonable excuse for not so appearing.
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> (3) For the purpose of s. 11 an offence under this section shall be treated as an offence committed while on bail.

(4) Where a person has failed to appear before a court in answer to his bail and the court has directed that a warrant be issued for the arrest of that person by reason of his failure to answer his bail, a member of An Gardaí Síochána may arrest such a person notwithstanding that he does not have the warrant in his possession at the time of the arrest.

(5) Where a person is arrested pursuant to subs. 4, the member arresting him shall as soon as practicable produce and serve on the said person, the said warrant.

According to the Case Stated, the prosecution case in respect of this charge consisted of one witness. A Garda gave evidence on oath that, having arrested the accused on another unrelated matter, she checked the Pulse data base (the Garda computer) and found a record that there was an outstanding bench warrant issued in respect of the accused for failing to appear in Court 44 in the Dublin Metropolitan District on 31st July, 2006. She gave evidence that she executed this warrant and then charged the accused with this offence contrary to s. 13 of the Criminal Justice Act, 1984. She accepted that she had not been present in Court 44 on 31st July, 2000 and, therefore, she was not present when the accused did not show up for the court proceeding and she was not aware of the recognisance entered into two days earlier on the 29th July, 2006. No question was put to the Garda on behalf of the accused as to whether she had not served the warrant on the arrested person. A direction was sought at the close of the prosecution case that there was no case to answer. Fundamental to the argument was that there had no admissible evidence that the accused had entered into a recognisance on 29th July, 2006 to appear at District Court 44 two days later. The learned District Judge rejected this argument because the executed warrant, in respect of which the arrest was made, was present on the District Court file before him. In that regard, I take the learned District Judge as having regard to that warrant, issued by the court of which he was a judge, as evidence.

18. The relevant order of the court commanding that the accused should be arrested has not been appended to the Case Stated. However, it is accepted by both sides that the form in the file before the learned District Judge stated the relevant District Court area, the prosecutor, the accused's details and recited that the accused had been charged with a particular offence. This offence was unrelated to either of these two charges, which are the subject of this Case Stated. The form continues:-

> "And whereas the accused was admitted to bail by recognisance on [29th] day of [July, 2006] conditioned for his/her appearance at the sitting oft the District Court at [Dublin District Court No. 44 in the Dublin Metropolitan District on 31st July, 2006] at [a particular time] a.m./p.m. and at every place and time to which during the course of the proceedings the hearing might be adjourned until the accused's presence was no longer required to answer the said charge, and whereas the accused has failed to appear at the time on a date and at a place at which he/she was bound so to do by the condition of that recognisance, and whereas the recognisance has this day been produced to me at a sitting of the court before which the accused was bound to appear, this is to command you to whom the warrant is addressed to arrest the accused… of [a particular address] and to bring him/her before me or another Judge of the District Court to be dealt with according to law".

19. The order of the District Court in respect of this accused was dated and signed.

20. I am satisfied on this basis that this accused was identified by evidence as being the person in respect of whom an order of arrest in the correct form had been issued. It is clear, in addition, that no case was made whereby the learned District Judge could reasonably have come to the conclusion that the accused had not broken a recognisance in failing to appear or that the accused was not the person to whom that order of arrest referred. In addition, no evidence as to the existence of the special defence, as provided for in this section, of having a reasonable excuse for not appearing, was put forward.

21. Under s. 13 of the Courts Act, 1971, the District Court is a court of record. This means that every record made by the District Court proves the facts therein stated. In addition, the learned District Judge is presumed to be, and was in fact, no doubt, familiar with the procedures of the court. Under O. 22, r.2 of the District Court Rules, 1997 a person who has been released on bail and who is entered into a recognisance but fails to appear may be the subject of a warrant in Form 22.3 of Schedule B. This is the form just recited. In addition, s. 14(1) of the Courts Act, 1971 as inserted by s. 20(b) of the Criminal Justice (Miscellaneous Provisions) Act, 1997 provides:-

> "In any legal proceedings, regard shall not be had to any record, relating to a decision of a Judge of the District Court in any case of summary jurisdiction, other than an order which, when the order is required, shall be drawn up by the District Court Clerk and either –
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> (a) signed by the Judge who made the order, or
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> (b) affixed with the seal of the District Court in respect of the District Court area in which the order was made or, where the order was made by the judge of the District Court sitting in Dublin Metropolitan District, affixed with the seal of that district, or ,
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> (c) a copy thereof certified in accordance with rules of court."

22. It would therefore have been possible for the defence to call for the relevant order and to make a challenge to it. The order, however, was such that the learned judge was entitled to have regard to it - the record of the court proving itself. In so far as it has been argued that a breach of fair procedures occurred due to the failure of the prosecution to draw specific attention to the order, or to hand it in either from the body of the court or from the witness box, it seems to me that this is not a breach of fair procedures. The accused was legally represented, and had the right to speak, or to call for the warrant, or to give evidence or to challenge any essential element of the charge through cross-examination. The defence could have examined a copy of the relevant arrest warrant and could have challenged it, if that were reasonably possible, as to its form or as to its applicability to the charge. The accused could have gone into evidence and say that he never entered into such a recognisance, or that he was not the person described in the warrant or that he had a family emergency and immediately informed the court of it. He did not.

Answers

23. The answers to questions posed appear to me, therefore, to be:-

> (a) A person charged with an offence contrary to s. 6 of the Criminal Justice (Public) Order, Act, 1994 must be proved to have engaged in threatening abusive or insulting behaviour or to have used insulting words or behaviour and the inference that he intended to provoke a breach of the peace or that he was reckless that the breach of the peace might be occasioned in consequence of his behaviour depends upon a finding of fact on all of the evidence.

(b) It is always possible, provided the evidence is sufficient, and the court is satisfied to move to convict the accused because sufficient proof exists of guilt beyond reasonable doubt, to infer an intention or recklessness if the conduct of the accused is, on the all the evidence admissible in the case, sufficient to support that.

(c) Where a person is charged with an offence contrary to s. 13 of the Criminal Justice Act, 1984 it is admissible evidence for the court to have regard to its own warrant to arrest the accused and the facts therein set out.

(d) There is nothing to suggest that the learned District Judge applied the law incorrectly in relation to any of the charges.