Neutral Citation Number: [2014] IEHC 181

THE HIGH COURT

[2013 No. 1741JR]

BETWEEN

KEVIN McINERNEY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS, DISTRICT JUDGE COUGHLAN, IRELAND, ATTORNEY GENERAL AND JUDGE RAYMOND GROARKE

RESPONDENTS

THE HIGH COURT

[2013 No. 627JR]

BETWEEN

BRENDAN CURTIS

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND, ATTORNEY GENERAL

AND DISTRICT JUDGE VICTOR BLAKE

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 9th day of April, 2014

1. In these two judicial review applications the applicants seek a declaration that the remaining portion 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") is unconstitutional and did not survive the enactment of the Constitution. As originally enacted, s. 18 of the 1935 Act created three separate, if overlapping, offences, namely, offending modesty, causing scandal or injuring the morals of the community.2. In a judgment delivered by me on 26th July 2013, *Douglas v. Director of Public Prosecutions* [2013] IEHC 343, [2013] 2 I.L.R.M. 324, I held that the other component offences of that section as enacted ("cause scandal or injure the morals of the community") were hopelessly and irremediably vague and did not meet the test for legal certainty in criminal matters articulated by the Supreme Court in *King v. Attorney General* [1981] I.R. 233. It was in those circumstances that I concluded those particular provisions of s. 18 of the 1935 Act were manifestly unconstitutional and were inconsistent with Article 15.2.1, Article 15.5.1, Article 38.1, Article 40.1 and Article 40.4.1 of the Constitution.

3. I also held that these two offences could be severed from the other offence, namely, that of offending modesty. There was no appeal against this decision. In these proceedings, therefore, the applicants challenge the constitutionality of the only offence created by s. 18 remaining after the decision in *Douglas,* namely, that of offending modesty.

4. As the law stood immediately prior to the decision in *Douglas*, s. 18 of the 1935 Act (as amended) had provided:-

> "Every person who shall commit, at or near and in sight 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." (emphasis supplied)

5. The italicised words were held by me to be unconstitutional in *Douglas*. In the wake of that decision s. 18 of the 1935 Act then read:

"Every person who shall commit, at or near and in sight 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 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]."

6. The words in square brackets had been previously 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.

7. It is against this general background that the facts of the present applications can be considered. In essence, however, these applications can be regarded really as the merely the sequels to my earlier decision in *Douglas* and this present judgment should accordingly be read in conjunction with that earlier decision.

The case against the applicants

8. In considering the background facts to this application, I will take the cases in reverse order. The second applicant, Mr. Curtis, is charged with the offence of offending modesty under s. 18(1) of the 1935 Act. The case against him is that on 26th May 2013 at Camden Place in Dublin city centre he removed his penis from his trousers as groups of females walked past him. The charge against him under s. 18(1) was adjourned by District Judge Blake pending the outcome of the present proceedings.

9. The first applicant, Mr. McInerney, was originally charged with all three offences under s. 18, i.e., offending modesty, causing scandal and injuring the morals of the community. The case against him is that on 3rd September 2011 while sitting in his car at Rathfarnham Shopping Centre in Dublin he was observed masturbating while members of the public passed by. The specific charge against him is that:

> "on 3rd September 2011 at Rathfarnham Shopping Centre, Butterfield, Dublin 14….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, masturbate in such a way as to offend modesty/cause scandal/injure the morals of the community."

10. The first applicant was convicted of this offence by the District Court in February 2013 and he received a sentence of three months' imprisonment. The Circuit Court heard an appeal from this decision on 8th October 2013, i.e., a few months after the decision in *Douglas* had been delivered. On that day, the President of the Circuit Court, Mr. Justice Groarke, permitted the prosecution to amend the summons by deleting the words "cause scandal" and "injure public morals", so that the remaining particulars of the charge was that the accused had "offended modesty." On the suggestion of the prosecution (or so I have been informed), it was agreed that the appeal would stand adjourned pending the outcome of the present challenge to the constitutionality of the remaining part of s. 18(1) of the 1935 Act.

11. There is no question but that the shopping centre cark park 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 offence of offending modesty contains sufficiently clear criteria for the purposes of this constitutional challenge.

12. Before considering the possible merits of any challenge to the constitutionality of s. 18 of the 1935 Act, it is necessary first to address the questions of *locus standi* and the presumption of constitutionality.

Whether the applicants have the requisite *locus standi* to challenge the constitutionality of s. 18 of the 1935 Act in the light of Douglas?

13. In *Douglas*, I held that the plaintiff had the requisite standing to challenge the constitutionality of the relevant offences because he had actually been charged with offences under the section. In this regard it mattered not that the plaintiff might have been charged with other offences or that his conduct might have been legitimately criminalised under some re-cast version of the section.

14. As I explained in my judgment ([2013] 2 I.L.R.M. 324, 332-323):

> "….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. ……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."

15. At the hearing before me the correctness of my conclusion on the standing issue in *Douglas* was not seriously put at issue. It follows, therefore, that as both applicants have, after all, been charged with the offence of offending modesty under s. 18 of the 1935 Act, they have the requisite standing to challenge the constitutionality of the remaining portion of the section for all the reasons which I set out in my judgment in *Douglas*.

Whether s. 18 of the 1935 Act enjoys a presumption of constitutionality

16. In *Douglas* I held that s. 18 of the 1935 Act does not enjoy a formal presumption of constitutionality. While it was true that the penalty provisions of the section had been amended by a post-Constitution enactment, namely, s. 18 of the 1990 Act, this did not have the effect of changing the nature of the offence. In line with the test posited by Finlay C.J. in *Electricity Supply Board v. Gormley* [1985] I.R. 129, I held that the amendments did not have the effect of changing or expanding the nature of the offence

17. Again, therefore, for all the reasons I set out in *Douglas*, I propose to proceed on the basis that s. 18 does not enjoy a formal presumption of constitutionality, even if the onus of establishing that the remaining provisions of the section is unconstitutional continues to rest with the applicants.

18. Before turning to a consideration of the constitutionality of the remaining portions of s. 18, it is necessary first to recapitulate some of the key constitutional principles. Much of what follows, therefore, involves a re-statement and repetition of a good deal of what I have already said in *Douglas.*

Legal certainty and the operation of the criminal law

19. At the heart of the applicants' challenge is that the offence of offending modesty created by s. 18 is so vague and uncertain in its remit and potential application that it is 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."

20. 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."

21. 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.

22. 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

23. 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 to 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, [2013] 2 I.L.R.M. 276. The principles and policies test is not simply some formalistic technical doctrine designed to ensure that what are in truth legislative powers are not improperly transferred to the executive branch by the vesting of wide powers to make of statutory instruments without appropriate legislative safeguards. It is rather a cornerstone of democratic control of the executive and judicial branches by the legislative branch pre-supposed by Article 5.

24. This was the very point which was made by Kelly J. in *Collins v. Minister for Finance* [2013] IEHC 530 where he stated that the *Cityview Press* doctrine:

> "was not, however, some technical artifice which has been imposed by an inflexible and formalistically minded judiciary. The *Cityview Press* test is rather instead a key element of the separation of powers and the rule of law by ensuring that the legislative branch retains proper control of executive discretion by providing for the clear articulation of proper legislative standards in each Act of the Oireachtas conferring such authority."

25. In *Collins* Kelly J. further noted that budgetary allocation was a key feature of parliamentary process, specifically with regard to the role of the Dáil and its members:

> "It may be recalled that Dáil Éireann is described by Article 15.1.2 as a House of Representatives of the people. Budgetary allocation and the raising of taxation are, therefore, not only integral features of the operation of the democratic nature of the State prescribed by Article 5, but represent key features of the representative duty of each Dáil Deputy. It is by these decisions that the Dáil (and the wider Oireachtas) shape the very society in which we live. It is for this reason that the individual members of the Dáil are directly answerable to the People in the electoral process provided for in Article 16.
>
> Budgetary allocation is, therefore, a fundamental responsibility which Articles 5, 11, 17 and 28 of the Constitution cast upon the Dáil and its individual members. This constitutional responsibility may under no circumstances be abrogated, whether by statute, parliamentary practice or otherwise. It must be stressed in this regard that Article 28.4.1 requires that the Government "shall be responsible to Dáil Éireann"."

26. The same may be said by analogy with regard to the duty cast upon the Oireachtas with regard to the criminal law. Just as in the case of budgetary allocation, decisions in relation to the content and scope of the criminal law are fundamental choices which equally "shape the very society in which we live". These are choices which Article 5 and Article 15.2.1 cast upon the Oireachtas and its individual members. In line, accordingly, with what was said in *Collins*, this represents a fundamental constitutional responsibility of both Houses and its members which equally may not be abrogated.

27. 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.

28. 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

29. 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."

30. 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.

31. 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 the "offending modesty" provision

32. Counsel for the State parties, Ms. Donnelly S.C., submitted, however, that in contrast to the offences of causing scandal and

injuring the morals of the community which were at issue in *Douglas*, the offence of offending modesty contained clear and recognisable standards, even if in some respects the *application* of those standards to the facts of any given case was liable to some element of subjective judgment and even if the community's sense of those self-same standards varied from generation to generation. While acknowledging that an accused charged with such an offence could not opt for jury trial – as the offence is simply triable summarily - she submitted that the offence of offending modesty had to be measured by the standards of right thinking members of the community and not merely by reference to the subjective judgment of the District Judge trying the offence.

33. Here it must be stressed that the two terms at the heart of the offence – namely, "to offend" and "modesty" – are themselves not terms of art and are unknown to the criminal law. It is true that the criminal law is replete with references to cognate words to that of "to offend" – such as "offence" and "offender" – but the use of this term in the adjectival sense in which it is here employed conveys no definite or fixed legal meaning, at least in the context of the criminal law. The use of the term "offending" in juxtaposition to the word "modesty" does, however, convey a sense of breaching or violating some moral or societal standard or convention, rather than articulating some fixed standards which are cognisable by reference to accepted criminal law principles by reference to which the citizens can regulate their conduct.

34. The use, moreover, of the word "modesty" in this s.18 context seems to refer to behaviour that is considered objectionable by reference to conventional social values and norms, even if those social norms may change from generation to generation. While the reference to immodest behaviour in this sense has something of an old-fashioned ring to it, it would seem now generally to refer to the wearing of revealing or inappropriate clothing in a manner which invites societal disapproval.

35. It is nevertheless difficult to avoid the conclusion that the Oireachtas here sought to criminalise conduct which might be thought to breach societal norms of decorum and social convention, especially perhaps – although not perhaps exclusively – in matters of dress. While this in and of itself is not constitutionally objectionable, yet it must be said that in the absence of clearly articulated legal standards and further statutory definitions of this phrase, the parameters of the offence remain entirely elusive.

36. There is little agreement in this society as to what conduct or behaviour might be said to be immodest in this sense. Given that there is no option for jury trial in respect of this offence, by what objective standards could a District Judge determine what was or was not immodest? Just as importantly, even if there was agreement as to what these norms of social behaviour in relation to modesty actually were, it is not clear whether the offence consists of offending against these norms *simpliciter* and, if so, how it could be ascertained whether one had "offended" against these norms in this sense.

37. In that respect, the *actus reus* of the offence is hopelessly unclear. Here it may be observed that the offence is couched at a purely abstract level and there is, in particular, no requirement that the accused must have engaged in conduct which is calculated to give offence to those who happen to witness it.

38. Just as was the case with Douglas, there was much debate at the oral hearing regarding comparisons with other offences. Ms. Donnelly SC invited comparison with the offence of dangerous driving, which she instanced as an example of a similarly abstractly worded offence whose parameters might change over time. The language of s. 53(1) of the Road Traffic Act 1961 – which creates the offence of dangerous driving - is nonetheless instructive:

> "A person shall not drive a vehicle in a public place at a speed or in a manner which, having regard to all the circumstances of the case (including the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be therein) is dangerous to the public."

39. It is true that the examples of what might constitute dangerous driving have altered over time. Thus, the drivers of 1961 could not have been distracted by mobile telephony in the same way as the drivers of 2014 might well be. Yet the principles articulated by s. 53(1) of the Road Traffic Act 1961 are clear and straightforward: it applies (i) to persons driving a vehicle in a public place; (ii) at a speed or in a manner which is dangerous to the public and (iii) such dangerousness to be measured by reference to all relevant circumstances, including the prevailing road conditions.

40. There is, moreover, general agreement as to what constitutes dangerous driving and, in any event, it is something on which motoring experts and transport engineers can give an informed opinion, if necessary by reference to the precise standards articulated in the legislation. The same cannot be said of "modesty" and still less of any act that might be said to "offend modesty."

41. Ms. Donnelly SC also pointed out that Article 40.6.1 of the Constitution envisaged that there would be an offence of publishing or uttering indecent matter. It is certainly true that indecency and immodesty are, to some degree, related concepts. But there are any assistance provided by an analysis of the text of the Constitution really ends. All that Article 40.6.1.i provides is that the publication or utterance of "blasphemous, seditious or indecent matter" shall be any offence. But as the Supreme Court made clear in *Corway v. Independent Newspapers Ltd.* [1999] IESC 5, [1999] 4 IR 485, the mere fact that these three offences are expressly contemplated by the Constitution does not absolve the Oireachtas from the responsibility of articulating clear principles and policies defining the parameters of these offences.

42. In *Corway* the Supreme Court held in effect that the common law offence of blasphemy had not survived the enactment of the Constitution, in part because the scope of that offence was totally unclear. As Barrington J. explained ([1999] 4 I.R. 485, 502):.

> "In this state of the law, and in the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists. As the Law Reform Commission has pointed out neither the *actus reus* nor the *mens rea* is clear. The task of defining the crime is one for the Legislature, not for the Courts. In the absence of legislation and in the present uncertain state of the law the Court could not see its way to authorising the institution of a criminal prosecution for blasphemy against the respondents."

43. The same can just as readily be said of the offence of offending modesty.

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

44. 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.

45. 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."

46. 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.

47. 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'.

48. 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.

49. 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."

50. 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.

51. 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.

52. 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."

53. 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 also provides that there must either be also an intent to provoke a breach of the peace or evidence 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…."

54. One might add that, in line with the reasoning of the European Court of Human Rights 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. This is not true (or, at least, not necessarily true) in the case of the conduct at issue under s.18 of the 1935 Act. Both the gentleman bathers at the Forty Foot and the celebrity fashionista who attends a glamorous social event in a revealing evening dress may all commit offences under the offending modesty provisions of s. 18, even if no one who is present on either occasion is either actually offended in the slightest or would be likely to be so offended.

55. It is true that in *Douglas* I suggested that no true comparison could 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. As I said in that judgment ([2013] 2 I.L.R.M. 324, 342):

> "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*. ….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."

56. As Prendergast has powerfully argued, this aspect of my judgment in *Douglas* may yet have to be re-examined in an appropriate case: see "*Douglas v. DPP* and the constitutional requirement for certainty in criminal law" (2013) 49 *Irish Jurist* 343. It may be that in *Douglas* I was altogether too optimistic regarding the prospects of that particular common law offence surviving an appropriate constitutional challenge or the fact that in that example a jury would determine whether community standards had been violated pointed towards the existence of an objective and ascertainable standard. Yet, as I pointed out in *Douglas*, even that particular safeguard is absent here, so that s. 18 provides that the question of what constitutes offending modesty is to be determined by a judge sitting alone. It is true that this must be determined by reference to objective standards, but since there is no agreement in the community as to what these standards are and as they have no fixed or ascertainable meaning in law, the potential for subjective appraisal is inevitable.

57. But even if these *obiter* observations of mine regarding the constitutionality of the offence of outraging public decency were wrong, this cannot take from my key conclusion, namely, that the present case is indistinguishable from cases such as *King, Corway, Dokie, Douglas* and, for that matter, *Hashman.* The offence of offending modesty is hopelessly and irremediably vague when measured by reference to the *King* principles. The offence lacks any clear principles and policies in relation to the scope of what conduct is prohibited and it invites arbitrary and inconsistent application. In these circumstances the conclusion that the offence offends 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 surviving part of s. 18 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 also hold that the relevant offences contravene Article 15.2.1 and, for that matter, Article 15.5.1.

59. Once, therefore, the only remaining offence to survive the decision in *Douglas* is itself found to be unconstitutional, then it follows that there is nothing of substance left in the section. In these circumstances, severance in the manner which operated in *Douglas* is simply not possible. It follows, therefore, that the remaining portion of s. 18 which was left intact after the decision in *Douglas* must now fall in its entirety as unconstitutional.

60. 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.

Conclusions

61. It remains only to summarise my principal conclusions.

62. First, the applicants have 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 either of them might have been charged with a different offence in respect of this conduct. As I pointed out in *Douglas*, a person charged with such an offence is entitled to object to legislation which is unconstitutionally vague and lacks clear principles and policies.

63. Second, as I also pointed out in *Douglas*, 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 applicants.

64. Third, the offence of "offending" modesty is hopelessly vague and subjective in character and it intrinsically invites arbitrary and inconsistent application. No clear standard of the conduct which is prohibited by law is articulated thereby and the surviving part of s. 18 does not contain any clear principles and policies. In this respect these 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.

65. Fourth, contrary to the position in *Douglas*, the doctrine of severance cannot now sensibly operate and it follows that the remaining parts of s. 18 which survived the decision in that case must fall in their entirety. I will accordingly declare in accordance with Article 50.1 that the remainder of s. 18 of the 1935 Act is inconsistent with the Constitution. The net effect of this declaration is that it must be now held that the entirety of s. 18 of the 1935 Act did not survive the enactment of the Constitution.

66. Fifth, 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.