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IMPORTANT NOTE: as explained in paragraphs 2 and 41, this is an ANONYMISED EXTRACT from a longer FULL judgment. The effect of the orders made by the court is as follows:

1. This ANONYMISED EXTRACT judgment may be published immediately, in this form, without any alteration or redaction
2. However, nothing else may be published which names any of the defendants or would otherwise be likely to lead members of the public to identify them.
3. The FULL judgment may not be published at all until the conclusion of certain proceedings in the Crown Court.
4. When those proceedings have been concluded, the FULL judgment will be published in substitution for this ANONYMISED EXTRACT, and the prohibition in 2 above will cease to apply.

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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT

Case No
[2025] EWCA Crim 769

Wednesday 7 May 2025

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE GOSS

MRS JUSTICE McGOWAN DBE

R E X

- v -

AFY, BQF, BRS, AKK, AIK, AKR

Counsel appeared on behalf of the Applicant Crown

Counsel appeared on behalf of the Respondent AFY

Counsel appeared on behalf of the Respondent AKR

The Respondents BQF, BRS, AKK and AIK were not represented

J U D G M E N T – A N O N Y M I S E D E X T R A C T
(Approved)

Wednesday 7 May 2025

LORD JUSTICE HOLROYDE:

1. This is a prosecution appeal, brought pursuant to section 58 of the Criminal Justice Act 2003, against a judge's ruling that six defendants charged with an offence contrary to section 78(1) and (4) of the Police, Crime, Sentencing and Courts Act 2022 had no case to answer. The trial judge purported to give leave to appeal. In the ordinary way, in an appeal of this nature it is preferable for questions of leave to appeal to be left for consideration by this court. A judge who considers it appropriate to grant leave to appeal must ensure compliance with the requirements of Criminal Procedure Rule 38.5. It does not appear that that was done in this case. We shall accordingly treat this as an application for leave.

2. By virtue of section 71 of the Criminal Justice Act 2003, reporting restrictions apply to this hearing. For that reason, the names of the respondents have been anonymised for listing purposes by the use of random letters of the alphabet. In addition, we have made an order pursuant to section 4 of the Contempt of Court Act 1981 postponing any reporting of this hearing. We shall consider those restrictions further at the conclusion of our judgment.

3. For convenience we shall refer to the appellant as "the prosecution" and to the respondents as "the defendants". We shall refer to section 78 of the 2022 Act simply as "section 78".

4. The defendants took part in a protest at the entrance to private premises. The essence of their argument on the submission of no case to answer was that there was no evidence of an essential element or ingredient of the offence charged. The appeal therefore raises an important issue as to the proper interpretation of section 78.

5. We shall first address that issue of principle, and then apply our conclusions to the facts

and circumstances of this case.

6. Omitting some subsections which are not relevant for present purposes, section 78 provides:

"78. Intentionally or recklessly causing public nuisance

(1) A person commits an offence if —

(a) the person —

(i) does an act, or

(ii) omits to do an act that they are required to do by any enactment or rule of law,

(b) the person's act or omission —

(i) creates a risk of, or causes, serious harm to the public or a section of the public, or

(ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and

(c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.

(2) In subsection (1)(b)(i) 'serious harm' means —

(a) death, personal injury or disease,

(b) loss of, or damage to, property, or

(c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.

(3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.

(4) A person guilty of an offence under subsection (1) is liable

—

...

- (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both.

...

- (6) The common law offence of public nuisance is abolished."

It may be noted that neither section 78 itself, nor any other provision of the 2022 Act, contains any definition or further explanation of the terms used in that section.

7. In *R v Smith (Joshua)* [2024] EWCA Crim 1040 ("*Smith*"), at [38] to [39], this court referred to the Law Commission's 2015 Report No 358, "Simplification of Criminal Law – Public Nuisance and Outraging Decency", in which the Commission recommended that the existing common law offence of public nuisance should be replaced by a statutory offence. The court then referred, at [40] of the judgment, to the explanatory notes to the 2022 Act, which confirmed (at paragraph 98) that section 78 gave effect to the recommendations made by the Commission that the common law offence "should be replaced by a statutory offence covering any conduct which endangers the life, health, property or comfort of a section of the public or obstructs them in the exercise of their rights".

8. The court in *Smith* observed, at [42], that Parliament had not adopted the precise wording which the Law Commission had recommended in proposing a new offence.

9. The issues in *Smith* related to the proper interpretation of section 78(1)(b)(i), which does not refer to rights which may be exercised or enjoyed by the public at large. It was in the context of that sub-paragraph that the court, at [44], said that it rejected a submission

"... that the offence of public nuisance could not be committed on private land to which the public would only be admitted upon purchasing a ticket. There is nothing in section 78 which limits its ambit in such a way. The section is concerned with harm to 'the public or a section of the public'. Persons do not cease to be members of the public when they enter (for example) a racecourse or sports stadium."

10. In the present case it is submitted for the prosecution that employees and legitimate visitors to the private premises were exercising a right that may be exercised or enjoyed by the public at large. That is so, it is submitted, even though the right of entry to the premises could be restricted by the owners. The legislation, it is argued, does not require the exercise by the public at large of an unfettered right.

11. For the defendants, it is accepted that the general public may have a right of access to private property, such as a shopping mall, car park or racecourse, and that the general public may have a right of access to private property which is subject to a condition or requirement – for example, the purchase of a ticket. But, it is submitted, the right in question must be one which belongs to all members of the public, even if only a section of the public may be obstructed in their exercise of that right. The public at large, it is submitted, do not have a right of access to private property. Employees, and others authorised or permitted to enter and leave the premises concerned here, it is argued, were exercising private rights.

12. We have reflected on the competing submissions. We have also considered paragraph 3.45 of the Law Commission's 2015 report, in which the Commission made this recommendation:

"In the existing offence, the reference to obstruction of the 'rights' of the public is interpreted broadly, to include the general right of the public to go about its business without interference

or annoyance; it is not confined to specific and enforceable rights such as a right of way. If similar wording is used in the definition of the new offence, it should be interpreted equally broadly: for example, the offence should cover the case of the person who interrupted a boat race by jumping into the Thames."

13. The court is not bound by that view, but we endorse it as a correct approach to the interpretation of section 78.

14. Our conclusions on the issue of interpretation are as follows.

15. First, we are satisfied that a right which "may be exercised or enjoyed by the public at large" means a right which the general public is entitled to exercise or enjoy.

16. The owner of private land or private property may invite or permit particular persons to enter into it. He may grant, or be deemed to grant, a general licence permitting, for example, a delivery man to enter onto his land and knock at the door of his property. But in such circumstances, we accept the defendants' submission that the invitees or licensees would not be exercising or enjoying a right that may be exercised or enjoyed by the public at large.

17. Secondly, however, it does not follow from our first conclusion that the public right must be wholly unqualified in order to come within the terms of the subsection. The public at large have a right to attend places and events or to use facilities and services which are offered to the public at large, and the fact that their right is subject to conditions does not mean that they are not exercising or enjoying a right within the meaning of section 78(1)(b)(ii).

18. To give a common example: if the public are invited to attend a music concert or festival, whether held on public land or in private premises, they will be exercising or enjoying a right within the ambit of the subsection if they do attend; and that is so, even though they can only

exercise the right by paying an admission fee, and even though they may be required to obey rules such as a requirement of a bag search. A person who obstructs their attendance may therefore be guilty of an offence contrary to section 78.

19. Similarly, the public at large have a right to travel on a bus or train; and those who do travel will be exercising or enjoying a right within the ambit of the subsection, even though they have to pay for the service and will be subject to certain rules. A person who obstructs their travel by blocking the road, or by interfering with the railway signals, may therefore be guilty of an offence contrary to section 78.

20. To give one further example, where a landowner allows the public to use a convenient path across his land during the day, but closes and locks gates at each end of the path at night, the public at large have a right within the ambit of the subsection to use the path, even though they can only do so at certain times or for certain purposes, and even though the landowner could if he wished withdraw the right at any time. A person who obstructs the path at a time when it is open to the public may therefore be guilty of an offence contrary to section 78.

21. Thirdly, in considering whether an offence contrary to section 78(1)(b)(ii) may have been committed, it will be necessary to identify the precise nature and location of the act or omission which is said to have obstructed the public in their exercise or enjoyment of a right that may be exercised or enjoyed by the public at large. It may, for example, be appropriate to draw a distinction between an act which obstructs the public before they enter private premises and an act which occurs after they have entered those premises.

22. Fourthly, in section 78(1)(b)(ii) the word "obstructs" does not require proof of an obstruction which wholly prevents the exercise or enjoyment of a public right, or does so for a protracted period. There may, in common parlance, be an obstruction if the exercise of a right

is for the time being made more difficult or less convenient.

23. Fifthly, on a charge of an offence contrary to section 78(1)(b)(ii), it is not an essential requirement that the prosecution prove that any person or group of persons in fact tried to exercise or enjoy the relevant right, but was unable to do so. There may be evidence of obstruction of a right which may be exercised or enjoyed by the public at large, even though at a particular time no one was trying to do so.

24. Having stated those general principles, we turn now to consider their application to the facts and circumstances of this case.

.....

40. Having considered submissions, and bearing in mind the desirability of being able to publish guidance on points of principle relevant to recent legislation on which there is at present little authority, we make the following order.

41. We permit publication of a part judgment, in anonymised form, limited to the court's consideration of points of principle. Save for that limited publication, the restrictions pursuant to section 71 of the 2003 Act will continue in force. In addition, we make an order under section 4 of the Contempt of Court Act 1981, postponing any report of this appeal, or of anything other than the part judgment, until the conclusion of this trial or further order of the Crown Court or of this court.

42. We would be grateful if the transcript of the judgment could be prepared as soon as possible so that the partial version thereof can be prepared and published.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
