

[2010] HCJAC 92

Appeal No: XJ493/10

OPINION OF THE COURT

delivered by THE HONOURABLE LORD
BONOMY

in

STATED CASE

by

DAVID HATCHER

Appellant;

against

PROCURATOR FISCAL, HAMILTON

Respondent:

Appellant: Shead; The Barony Law Practice, Edinburgh (for Brian Selby & Co, Motherwell)

Respondent: D Young, A.D.; Crown Agent

7 September 2010

[1] This is the latest in a series of cases since *Smith v Donnelly* 2002 JC 65, 2001 SCCR 800 in which the court has been invited to clarify the definition of the crime of breach of the peace and adjudicate upon the application of that definition in practice. In a number of opinions this Court has affirmed and elaborated on the test, which has come to be known as the "conjunctive test", that requires "conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community". The most recent authorities are opinions delivered after the appellant's trial. In *Harris v HM Advocate* [2009] HCJAC 80, 2010 SCCR 15, in which the long-standing decision in *Young v Heatly* 1949 JC 66, 1959 SLT 250 was over-ruled by a Full Bench, and in *WM v HM Advocate* [2010] HCJAC 75 the Court focused attention on the need for "a public element" in conduct before it can amount to a breach of the peace, and provided some guidance as to circumstances in which conduct in an apparently private place might be said to have a public element. It was inevitable that the debate would soon move to the question whether severe oral abuse of, and unruly behaviour towards, one domestic partner by another over an extended period within the confines of the family home can amount to a breach of the peace, and more particularly whether in a given case that conduct did constitute a breach of the peace. That is the issue focused in this appeal. The appellant maintains that the sheriff should have sustained his motion that there was no case to answer and acquitted him because his conduct lacked any public element.

[2] The charge of which the appellant was convicted was in these terms:

"On 7 January 2010 at 50 Kenilworth Avenue, Wishaw, (he) David Hatcher did conduct (himself) in a disorderly manner, shout, swear, place Lorraine Hatcher in a state of fear and alarm and commit a breach of the peace".

Lorraine Hatcher is the wife of the appellant. Their children aged 12 and 15 were in the house at the time, but in their respective bedrooms. The appellant and his wife had a blazing row in which the appellant was plainly the aggressor. The sheriff made the following findings:

1. The complainer is the wife of the appellant. They have been married for 23 years and have three children, two of whom aged 12 and 13 years, reside with them at home at 50 Kenilworth Avenue, Wishaw. They were in the house with the complainer and the appellant throughout the evening of 7 January 2010 and the early hours of 8 January 2010.
2. The complainer is a technical instructor in an occupational therapy department. The appellant is a teacher. On the evening of 7 January 2010 the complainer told the appellant of her intention to attend an outing with around 31 of her work colleagues for a meal at 5pm on a date shortly after 7 January 2010.
3. The appellant objected to her doing so because of an issue which had arisen when she (the complainer) attended an office party just before Christmas 2009. The appellant had at that time become upset, angry and apprehensive of her fidelity to him due to her meeting another man at that previous evening outing, despite the fact that she had openly told him about the situation and discussed it with him.
4. On 7 January 2010 the appellant persistently questioned the complainer over a period of hours about the further outing and about the original pre-Christmas outing. He became agitated and angry and refused to allow her to go to bed.
5. At points throughout the said period, the appellant shouted at the complainer and at one point called her a fucking whore, a fucking slut and a cunt. The appellant would not allow the complainer to remain in bed by pulling the bed clothes from the bed.
6. The complainer was genuinely upset and alarmed by the use of those words and the appellant's persistent questioning of her over several hours as well as his refusal to allow her to go to or remain in bed. The behaviour and conduct of the appellant throughout the period of several hours and late at night was likely to have caused serious fear and alarm to his 12 and 15 years old children present in the house. The conduct of the appellant was severe enough to cause alarm to an ordinary and reasonable person observing the same.
7. As a result of her upset and alarm at the appellant's behaviour, the complainer called police who attended.
8. The appellant behaved in a disorderly manner, shouted and swore at the complainer, placed her and highly probably their children in a state of fear and alarm and committed a breach of the peace.

There was plainly sufficient evidence to satisfy the first part of the test for breach of the peace, that is conduct which was genuinely alarming and disturbing to any reasonable person.

[3] In his submissions for the appellant Mr Shead was content, without conceding the point, to proceed on the basis that there may be circumstances where the risk of discovery might provide the necessary public element in respect of conduct that occurred in a private place. However, even allowing for that, the facts of the present case contained no feature that could be described as a public element. This was in his submission the paradigm case of conduct in private in which the second element of the conjunctive test for breach of the peace was wholly lacking.

[4] In maintaining that the necessary public element was present the Advocate depute relied on the acknowledgement in paragraph 12 of the Opinion in *Harris* that "potential disturbance of a small group of people in a house" may suffice as the public element. He pointed to the narrative of fact, and indeed the findings in fact, in the stated case which recorded the presence of the children, albeit not involved in the incident, within other parts of the house at the time. He also founded upon *McIntyre v Nisbet* [2009] HCJAC 27, 2009 SCCR 506 in which a conviction for breach of the peace was upheld where the accused entered a flat where a woman was being treated by paramedics and swore at them and the woman. Because of the location of the flat the Court decided that it was reasonable to suppose that there would be persons passing by and living nearby, and considered that the possibility that they might have heard the abuse rendered the conduct such as to threaten serious disturbance to the community. The Advocate depute acknowledged that the case was very much dependent upon its own facts; the particular point he sought to draw from it was that the fact that events occurred on private property was not determinative. Equally, the fact that conduct occurred in an apparently open public place was also not decisive; Robinson Crusoe directing a tirade of abuse at Man Friday on an otherwise deserted island would not be guilty of a breach of the peace.

[5] We find considerable force in Mr Shead's submission that in this particular case the evidence does not support a finding that the conduct threatened serious disturbance to the community. Albeit the appellant's conduct caused upset and distress to the complainer, and would have done to any reasonable person, it occurred within areas of the family home exclusively occupied then by the couple and did not threaten the public peace. It occurred entirely in private and was not a public disturbance. That is not to say that the conduct of the appellant should be condoned or tolerated. However, if there is a lacuna in the law and domestic partners are not protected by the criminal law where one abuses the other in a way that would cause serious upset and distress to a reasonable person, but does so in private, then it is for Parliament and not the Court to decide whether the law should be changed to criminalise such conduct. The complainer's evidence was that two of the couple's children aged 12 and 15 were present in the house throughout but were in their respective bedrooms, and she did not think that they were aware of what had happened. That was the only evidence on the subject. We do not consider that entitled the sheriff to hold in finding 6:

"The behaviour and conduct of the appellant throughout the period of several hours and late at night was likely to have caused serious fear and alarm to his 12 and 15 years old children present in the house".

However, even if it did, the threat of such disturbance to the children within the household by an oral tirade of abuse and other unreasonable behaviour extending over a considerable period directed by their father towards their mother does not contain any element that can be characterised as "public". We disagree with the sheriff in the view he expressed when deciding that there was sufficient evidence that the 12 and 15 years old children were entitled to be considered as members of the community or public.

[6] We have reached that conclusion in this case after taking account of the views expressed in other recent cases, including two, *Harris* and *WM*, which post-date the trial in the present case, about marginal circumstances in which a disturbance in a private house might be said to have a public element. In *Harris* reference was made in paragraph 25 to "Disturbance or potential disturbance of even a small group of individuals in a private house" as perhaps being sufficient. Under reference to *Paterson (A) v HM Advocate* [2008] HCJAC 18, 2008 JC 327, 2008 SCCR 605, 2008 SLT 465, the court explained that:

"The conduct need not be directly observable by the third parties (as it was not in that case) but, if in private, there must be a realistic risk of it being discovered"

These remarks in *Harris* were obiter.

[7] In *Paterson* however the court did decide that there would have been sufficient evidence for the public element of the conjunctive test where a 37 year old male visiting friend of the family made unwanted sexual advances towards the 17 year old daughter of the family in the kitchen of the family home while her parents were sitting in an adjacent room. The rationale for that conclusion is set out at paragraph 22 as follows:

"The conduct does not require to cause serious disturbance to the community. It is sufficient that it threatens such disturbance. Such conduct by a mature man towards an adolescent girl was such that, if discovered, was likely to cause a serious reaction among other adults. In these circumstances the nature of the conduct was such that, if proved, it constituted ...breach of the peace".

[8] In *WM* further consideration was given to the concept of "discoverability" in relation to conduct in private. The appellant was convicted of abusing his two sons during contact visits. He also faced two charges of breach of the peace by threatening to harm his sons should they give information about the abuse to any person. The argument presented for the Crown was that there was a real risk that, on the children going home after the incidents, they would report what had occurred to their mother. On such a report being made, there was a risk of serious disturbance. In addressing that submission at paragraph 15 of the opinion the Court said:

"In our view the reference in these passages to discovery is not to be taken as encompassing a third party receiving at a remote place and on a subsequent occasion a report of the earlier actings of an accused. If that were so, there would be almost no limit to the circumstances in which the community element of the crime was met and reporting, or the likelihood of reporting, of an incident many years after the event might be regarded as sufficient. In this case, the sexual abuse and the threat to do harm if information was given to anyone about the sexual abuse were reported by the victims only many years after the event. In our opinion a 'realistic risk of the conduct being discovered' should be understood as referring to the risk of the conduct of the accused being come upon, that is to say being seen or heard, by a third party (or parties) or being brought to their attention, whilst that conduct continues or in the immediate aftermath of the conduct having come to an end...The risk of third parties at some remote location being informed of the conduct subsequently will not, at least ordinarily, suffice. There may, however, be borderline cases where the reporting to third parties is so immediately related in time and place to the conduct complained of that it can be regarded as part of the same event".

[9] As well as referring to *Paterson*, the learned sheriff relied on the opinion of the Full Bench in *Jones v Carnegie* 2004 JC 136, 2004 SCCR 361, 2004 SLT 609 to support his rationale for holding that the evidence was sufficient, which he expressed in these terms.

"Other persons present in the house, that is the 12 and 15 years old children in this case, are entitled to be considered as members of the community or public all of which is clear from ... *Jones* ... and ... *Paterson* ...".

We have already indicated above how the circumstances in *Paterson* differ from those in the present case. The particular passage in *Jones* that the learned sheriff must have had in mind is at paragraph 12 as follows:

"However we would caution that where conduct complained of took place in private there requires to be evidence that there was a realistic risk of the conduct being discovered".

In our opinion that statement, which was obiter in circumstances which have no direct bearing on the present case, does not support the view that every child within a family environment is a member of the community or public in the sense understood for breach of the peace, nor that any significant behaviour that threatens or causes disturbance to other members of the family within the household must inevitably satisfy the second part of the conjunctive test for breach of the peace.

[10] As the cases referred to demonstrate, conduct in a private house may occur in circumstances which provide the necessary public element. What is envisaged in these cases is that conduct in private will raise the realistic risk of the public peace being disturbed. Not surprisingly none of the cases involves conduct occurring, and having its potential effects, exclusively within a family. *WM* and *Paterson* involve an estranged partner and a family friend respectively. That does not mean to say that a breach of the peace cannot be committed by conduct directed by one member of a family towards another within their dwellinghouse. As has been said repeatedly, whether there is a breach of the peace depends on the circumstances in which the conduct occurs.

[11] It follows that the first question posed in the stated case relating to sufficiency of evidence falls to be answered in the negative. We shall accordingly quash the appellant's conviction.