

APPEAL COURT, HIGH COURT OF JUSTICIARY

Appeal No: 407/00

OPINION OF THE COURT

delivered by LORD COULSFIELD

in

NOTE OF APPEAL

by

PAMELA SMITH

Appellant;

against

PROCURATOR FISCAL, Dumbarton

Respondent:

Lord Coulsfield

Lord Osborne

Lord Caplan

Appellant: Shead; More & Co.

Respondent: Murphy, A.D.; Crown Agent

28 September 2001

[1]The appellant was charged by the respondent on a complaint in the following terms:

"On 15 February 1999 on the A814, North Gate entrance to H.M. Naval Base, Clyde, District of Argyll and Bute, you Pamela Smith did conduct yourself in a disorderly manner, lie down on the roadway, disrupt the free flow of traffic, refuse to desist when requested to do so and commit a breach of the peace."

[2]The appellant first appeared in the District Court at Helensburgh on this charge on 2 June 1999. After sundry procedure, in the course of which the appellant indicated that she wished to raise a devolution issue, a diet of debate on a preliminary plea was held on 25 January 2000. After hearing parties, the magistrate decided that no devolution issue had been shown to exist but granted the appellant leave to appeal.

[3]The appellant's minute was in the following terms:

"That devolution and the Scotland Act mean that Scots law must be aligned with the European Convention for the Protection of Human Rights with effect from 23 May 1999; that under the European Convention for the Protection of Human Rights there cannot be a charge which does not clearly define what the limits of acceptable behaviour are, and that the charge of breach of the peace is an all-encompassing charge which has been used to cover any type of behaviour deemed inappropriate in various circumstances and is therefore too vague to be aligned with the European Convention for the Protection of Human Rights."

[4]In his report, the magistrate narrates fully the debate which took place before him. The debate ranged quite widely but as the argument in the appeal was confined strictly to the point raised in the appellant's

minute, it is not necessary to narrate the debate before the magistrate. On the particular point, what the magistrate said was as follows:

"I was satisfied that breach of the peace is the common law charge which has been used in Scots law for several hundred years. I did not accept that breach of the peace was a new crime to the law of Scotland which only emanated since the alleged actions of the accused on 15 February 1999. I therefore decided breach of the peace was not a retrospective charge and therefore did not contravene Article 7 of the European Convention of Human Rights."

[5]The magistrate then referred to Article 10 of the Convention and to an argument on the part of the appellant that her freedom of expression, by way of peaceful protest, was being infringed. The magistrate cited Article 10(2) and concluded:-

"I decided that anyone acting in the same manner as the appellant has allegedly done could disrupt national security, since I am told the Base can hold Trident nuclear weapons. Also the alleged actions of the appellant in lying on the road to protest could put public safety at risk in respect of not only the drivers on the road but also the persons protesting lying on the road. The rights and freedoms of others would also be contravened by people lying on the road preventing them from having freedom of movement. I therefore concluded that the charge of breach of the peace did not contravene Article 10 of the European Convention on Human Rights, as it was allowed under Article 10 paragraph 2."

[6]Counsel for the appellant informed us that this was the first case in which the question whether the charge of breach of the peace was compatible with Article 7 of the Convention had been directly raised. He submitted that Article 7 was directed to the provision of effective safeguards against arbitrary prosecution and pointed out that no derogation from the Article was permissible under Article 15. A person must be able to know from the text of the law and the court's interpretation of it what acts are criminal. The way in which breach of the peace had come to be defined by the court in Scotland was so wide as to violate Article 7 in that a citizen could not know with reasonable certainty what actions would breach criminal law. Counsel referred to the decision of the European Court of Human Rights in *S.W. v. The United Kingdom* (22 November 1995: Series A volume 335 p. 41). He submitted that there was uncertainty as to where the limits of breach of the peace lay, even though it might be dealing with concrete examples, and a legitimate doubt could exist as to whether conduct constituted a breach of the peace. From the appellant's own point of view, that was, as she had said to the magistrate, exemplified by her own experience because she had sometimes been arrested and prosecuted and sometimes not when engaging in protest behaviour of very much the same kind. The case of *Steel and Others v. The United Kingdom* 1998 E.H.R.R. volume 28 p. 603 explained what sort of assessment was necessary for the court's application of Article 7. Turning to Scots domestic law, counsel referred to *Raffaelli v. Heatley* 1949 J.C. 101, *Montgomery v. McLeod* (1977) S.C.C.R. Supp. 164 and *Butcher v. Jessop* 1989 S.C.C.R. 119. The last case showed that there was no need for specification in the charge. *McMillan v. Normand* 1989 S.C.C.R. 269 was another example of stretching the test set out in the earlier cases, and in particular in *Raffaelli supra*. The question of *mens rea* was also uncertain as was illustrated by *Hughes v. Crowe* 1993 S.C.C.R. 320. *Mackay v. Heywood* 1998 S.C.C.R. 210 illustrated the difficulties which could arise because of changes in what was understood to be the appropriateness of using particular language in particular situations. *Cameron v. Normand* 1992 S.C.C.R. 866 was another illustration of the vagueness of the definition of the crime in terms of causing upset or annoyance. The result was that the test for the existence of the crime set out in the earlier authorities had been developed and expanded to a point at which it was meaningless and consequently incompatible with the Convention. It followed that it was *ultra vires* for the Lord Advocate to proceed to trial in this case.

[7]The advocate depute submitted that the issue in this case was not truly an issue under Article 7 alone, but he accepted that there was a European issue in relation to the definition of crime which underlay a number of articles of the Convention. A crime not capable of proper definition would not be compatible with the Convention, but that was not the position in relation to this charge since there was a clear definition of breach of the peace. The appellant had pointed out a number of ways in which the crime might be committed but

none of these struck at the central definition. That was illustrated by *Cameron v. Normand* to which the appellant had referred and by *McMillan v. Normand* 1989 S.C.C.R. 269, both of which showed that, although there might be new ways of committing a well understood crime, the central test had not changed. Any doubtful cases or cases which might reflect a *de minimis* approach were merely cases about the application of the definition. It had been said in *Montgomery v. McLeod* that there was no limit to the kind of conduct which might constitute breach of the peace but that was not to say that there was no limit to the charge. The limits were also illustrated by *Young v. Heatley* 1959 J.C. 66.

[8]The Convention requires that any law creating a criminal offence must meet a certain standard of clarity and comprehensibility, whether the law is found in a statute, or statutory instrument, or as part of the common law. Article 7 of the Convention provides:

"1.No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2.This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[9]In its judgment in *S.W. v. The United Kingdom supra* the court said:

"34.The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or in other public emergency. It should be construed and applied, as follows from its object and purpose in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

35.Accordingly, as the court held in its *Kokkinakis v. Greece* judgment of 25 May 1993 (Series A No. 260-A page 22 section 52), Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles, it follows that an offence must be clearly defined in the law. In its aforementioned judgment the court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The court thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability...

36.However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

[10]In *Steel and Others v. The United Kingdom supra* the European Court of Human Rights considered a number of cases in which applicants had been charged and detained and, in some cases, bound over in terms of section 5 of the Public Order Act 1986 on charges of breach of the peace or of conduct likely to cause such a breach. In paragraphs 25 and following of its judgment, the court considered English authority as to the

nature of the crime of breach of the peace in that jurisdiction. The point was made that a comprehensive definition of the term "breach of the peace" had rarely been formulated, but the court accepted, on the basis of recent authority that there was likely to be a breach of the peace whenever harm was actually done or was likely to be done to a person, or in his presence to his property, or whenever a person was in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. The court also accepted, as an addition to that definition, that the conduct in question did not itself have to be disorderly or a breach of the criminal law: it was sufficient, that, if persisted in, its natural consequence would be to provoke others to violence and so some other danger to the peace would be established, subject to the rider that if the violence likely to be provoked would be wholly unreasonable there would not be a breach of the peace. On that understanding of the meaning of breach of the peace in English law, the court proceeded to state:

"54. The court recalls that the expression 'lawful' and 'in accordance with a procedure prescribed by law' in Article 5(1) stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary. In addition, given the importance of personal liberty, it is essential that the applicable national law meets the standard of 'lawfulness' set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

55. In this connection, the court observes that the concept of breach of the peace has been clarified by the English courts over the last two decades, to the extent that it is now sufficiently established that a breach of the peace is committed only when an individual causes harm, or appears likely to cause harm, to persons or property or acts in a manner the natural consequence of which would be to provoke others to violence. It is also clear that a person may be arrested for causing a breach of the peace or where it is reasonably apprehended that he or she is likely to cause a breach of the peace. Accordingly, the court considers that the relevant legal rules provided sufficient guidance and were formulated with the degree of precision required by the Convention."

These passages explain the test which requires to be applied in considering whether the crime of breach of the peace, as known in Scotland, is sufficiently well defined to meet the requirements of lawfulness. The definition of that crime in Scotland is, of course, different from that in England.

[11] Both counsel for the appellant and the advocate depute took the case of *Raffaelli v. Heatley supra* as the starting point for consideration of the modern law of breach of the peace. There is, however, in our view, something to be gained by looking first at the earlier decision in *Ferguson v. Carnochan* 1889 16 R. (J.) 93 which was a prosecution of a man who had used loud language and oaths and imprecations in a street in a Burgh early on a Sunday morning. In the course of his opinion Lord Justice Clerk Macdonald said:

"Breach of the peace consists in such acts as will reasonably produce alarm in the minds of the lieges, not necessarily alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking up of the social peace. The words 'to the alarm of the lieges' in a charge of breach of the peace mean that what is alleged was likely to alarm ordinary people and if continued might cause serious disturbance to the community."

[12] Lord Maclaren said (at p. 94):

"The clearest case of breach of the peace consists in engaging in hostilities either in the street or in a private ground, for I agree that it makes no difference whether the offence be committed in a public or private place, provided the lieges be alarmed. But breach of the peace is not confined to acts of this description. Breach of the peace means breach of public order and decorum. All accompanied always by the qualification that it is to the alarm and annoyance of the public. Articulate noises and cries not calculated to be offensive to anyone have been held not to amount to breach of the peace. On the other hand, where the brawling is of such a kind as to be offensive and alarming, it is not necessary that those who hear it should be alarmed for themselves. It is enough that offensive language should be uttered in a noising and clamorous manner so as to cause

reasonable apprehension in the minds of those who hear it that some mischief may result to the public peace."

[13]In *Raffaelli v. Heatley supra* the accused was charged with conducting himself in a disorderly manner by peering in at a lighted window of a dwellinghouse at about 11.50 p.m. and putting residents in the street in a state of fear and alarm and committing a breach of the peace. It was established that the appellant had walked down the street and stared through a chink in curtains into a room in a dwellinghouse in which there was a light and he had done so on two occasions. On his behalf, it was submitted that that was all that had been proved, since there was no evidence that any person had been alarmed or upset or that anything took place that might reasonably be expected to alarm anyone. Having set out the argument for the appellant, Lord Justice Clerk Thomson said (at p. 104):

"It is usual to charge this offence as a breach of the peace, because it is a species of disorderly conduct; where something is done in breach of public order or decorum which might reasonably be expected to lead to the lieges being alarmed or upset or tempted to make reprisals at their own hand, the circumstances are such as to amount to breach of the peace."

[14]The Lord Justice Clerk went on to comment on the evidence and on the evidence of one female witness in particular and to hold that that evidence, taken in conjunction with the whole circumstances, warranted the conclusion that there was a breach of the peace. Lord Mackay gave an opinion to the same effect, but employed the phrase "to the alarm and annoyance of the public".

[15]*Young v. Heatley supra* was a case in which a teacher was charged with making improper remarks of a sexual nature to pupils in the school. The point considered was whether it was necessary that there should be any evidence of alarm either to the pupils or to anyone else. Lord Justice General Clyde, at p. 70, said that breach of the peace was an offence the limits of which had never been sharply defined because it was so largely a question of circumstances and degree in each case and went on to refer to various authorities including *Ferguson v. Carnochan* and *Raffaelli v. Heatley supra*. Having done so, he said:

"It follows therefore that it is not essential for the constitution of this crime that witnesses should be produced who speak to being alarmed or annoyed. At the same time, however, I consider that a very special case requires to be made out by the prosecution if a conviction for breach of the peace is to follow in the absence of such evidence of alarm or annoyance. For then the nature of the conduct giving rise to the offence must be so flagrant as to entitle the court to draw the necessary inference from the conduct itself."

[16]There have, of course, been a very large number of decisions of the High Court on appeals from courts of summary jurisdiction dealing with charges of breach of the peace in many different situations. Counsel appearing in this case, however, agreed that the essential nature of the charge as it is understood in Scotland is to be found in these authorities, if it is to be found anywhere. The first question for us, therefore, is whether these authorities can be seen as providing a definition of a crime which is of sufficient certainty to meet the requirements of the Convention. In our opinion, they do provide such a definition. The requirement which is found in English law, that there should be harm or a threat of harm to person or property, is not part of the law of Scotland. In the absence of that requirement, we agree that there must be sufficient clarity as to what it is that is required in Scots law to constitute the crime.

[17]The crime of breach of the peace can be committed in a wide variety of circumstances, and, in many cases, it is a relatively minor crime. It has therefore been said, more than once, that a comprehensive definition which would cover all possible circumstances is neither possible nor desirable. Equally, in our view, it is neither possible nor desirable to derive a comprehensive definition from a close analysis of the facts of individual cases in which it has been held that a breach of the peace had been committed. If, however, we take as our starting point what was said by L.J.C. Macdonald in *Ferguson v. Carnochan supra* it is, in our view, clear that what is required to constitute the crime is conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community. The opinions in *Ferguson* are reported differently in 19 R. (J.) and in 2 White 278 but so far as the Lord Justice Clerk is concerned the differences

not appear to us to be material for the present purpose. It is true that, as has been pointed out, Lord Maclaren referred to breach of public order and decorum and to annoyance to the public: and that these phrases were taken up in the opinions in *Raffaelli v. Heatley*. On that basis it has been suggested that since a very wide range of types of conduct could be seen as an annoyance to someone or in some circumstances, there is no sufficient certainty as to what the essential element is. We have come to the conclusion that that criticism is not made out. If words like annoyance or upset or breach of decorum are taken in isolation they might, it is true, be taken as applicable to something minor in the way of conduct which could be considered inappropriate or irritating. If, however, the opinions in the leading cases are read as a whole, we think it sufficiently clear that something substantially greater than mere irritation is involved. Lord Maclaren himself does not speak of "annoyance" in isolation but of "alarm and annoyance" and says that a reasonable apprehension of disturbance to the public peace is necessary to the proof of the crime. What is required, therefore, it seems to us, is conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person.

[18] That interpretation is supported by the fact that, as Lord Justice General Clyde pointed out, if there is no evidence of actual alarm, the conduct must be "flagrant" if it is to justify a conviction. "Flagrant" is a strong word and the use of that word points to a standard of conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances. The point can be further reinforced by reference to some older authorities. In *Buist v. Linton* 1865 5 Irv. 210, a complaint that an accused did "annoy and interrupt" two persons and "did use opprobrious epithets towards them whereby they were annoyed and disturbed" was held irrelevant. In *Banks v. McLennan* (1876) 3 Couper 359 a complaint of disorderly conduct "by using insulting and abusive language of an individual" including calling the individual a thief was held irrelevant, the court observing that a conviction would be an interference with the liberty of the subject which it could not sanction. *Kinnaird v. Higson* 2001 G.W.D. 16-592 is a modern instance in which the court held that the mere fact that bad language has been used does not justify a conviction for breach of the peace. We therefore conclude that the definition of the crime found in the principal authorities does meet the requirements of the Convention.

[19] The appellant argued, however, that subsequent decisions have either widened the definition of the crime or shown that the definition is so meaningless as to be capable of infinite extension, or, indeed, both. In considering this argument, we are not in a position to review any earlier decisions of this court. At one stage, it was suggested that it might be appropriate to convene a larger court to review some of the decisions but we do not think that it is necessary to take that step. While there are cases in which a breach of the peace has been held established on grounds which might charitably be described as tenuous, none of the later decisions, as we read them, has attempted to redefine or modify in any way the central statements of the nature of the crime found in *Ferguson*, and the other cases cited. Given the nature of the charge, and the need to apply it in a wide variety of circumstances, it is inevitable that there will be cases which are at or near the borderline and decisions will have to be taken upon those cases as they arise. That is, however, not an uncommon situation in dealing with criminal law which is not statutory, and, provided that the central statements of the nature of the crime are kept in mind we do not see any need for a comprehensive re-examination of the authorities which have ensued since *Young v. Heatley*. As we have said, we would not favour any attempt to derive a definition or redefinition of breach of the peace from close analysis of the facts of particular marginal decisions.

[20] Having said that, however, it may be of some assistance to comment on some recurrent themes. As we have observed, there are both old and recent authorities which support what might be called a robust approach to cases involving the use of bad language. Secondly, there have been repeated instances in which refusal to co-operate with police or other officials has led to a charge of breach of the peace: but such a refusal, even if forcefully or even truculently stated, is not likely to be sufficient in itself to justify a conviction. Thirdly, there have been cases in which actions done or words spoken in private have been held to amount to breach of the peace, or conduct likely to provoke such a breach, more because of some perceived unpleasant or disgusting character than because of any real risk of disturbance. In such cases, it is perhaps particularly necessary to bear in mind what the essential character of the crime is. Fourthly, there

will be cases in which the court will require to bear in mind the importance of freedom of expression, an issue which now involves reference to Article 10 of the Convention. However, no argument was addressed to us in regard to Article 10, and we think it better not to attempt to discuss it in this case. We would add that it seems to us that, notwithstanding the decision in *Butcher v. Jessop supra*, that a charge of breach of the peace in statutory form is sufficient to meet the requirements of notice it will normally be proper, now that regard must be had to the Convention, to specify the conduct said to form the breach of the peace in a charge, as indeed is common practice already.

[21]One further point may be worth making. In the argument before the magistrate, the appellant, as an experienced protester, made the point that she had sometimes been subject to police action and sometimes not in respect of very similar conduct. That may have been so, but police officers do have a certain discretion to act or not act in difficult circumstances and their action or inaction cannot be taken to reflect on the central question of the definition of breach of the peace.

[22]In the whole circumstances, we are satisfied the appellant's argument is not well-founded and we shall refuse this appeal.