

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General

Appeal Nos: XJ264/03

Lord MacLean

XJ266/02

Lord Macfadyen

XJ1102/03

Lady Cosgrove

XJ1101/03

Lord Sutherland

XJ271/02

OPINION OF THE COURT

delivered by THE LORD JUSTICE GENERAL

in

APPEALS by STATED CASE

in the causes

(1) MARGARET CATHERINE JONES

Appellant;

against

PROCURATOR FISCAL, Dumbarton

Respondent;

(2) JANE TALLENTS

Appellant;

against

PROCURATOR FISCAL, Edinburgh

Respondent;

(3) GAYNOR BARRET

Appellant;

against

PROCURATOR FISCAL, Helensburgh

Respondent;

(4) FRANK JAMES CARBERRY

Appellant;

against

PROCURATOR FISCAL, Kilmarnock

Respondent;

and

(5) JOHN PARK

Appellant;

against

PROCURATOR FISCAL, Aberdeen

Respondent:

Appellant (1): Jackson Q.C., McKenzie; McClure Collins

Appellant (2): Scott Q.C., Hood; McCourts

Appellant (3): Ogg, Solicitor Advocate; McCusker McElroy & Johnstone

Appellant (4): Shead, Meehan; Balfour & Manson

Appellant (5): Brown; George Mathers & Co

Respondent: Solicitor General; Balfour; Crown Agent

4 May 2004

[1]In these appeals against conviction for breach of the peace a number of questions have been raised as to the correctness, or of the application, of the decision of the court in *Smith v. Donnelly* 2002 J.C. 65. Accordingly, the appeals have been heard by a court of five judges.

[2]In *Smith v. Donnelly* the court was concerned with an argument that the test for breach of the peace had been developed and expanded to the extent that it was meaningless and consequently incompatible with Article 7 of the European Convention on Human Rights. In rejecting that argument the court held that none of the later decisions had attempted to redefine or to modify the statements of the nature of the crime in *Ferguson v. Carnochan* (1889) 16 R. (J) 93; 2 White 278 or in the other decisions which had been cited. The court stated, by reference to *Ferguson v. Carnochan* that "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" (paragraph 17). The court considered that this interpretation was supported by the fact that, as Lord Justice General Clyde pointed out in *Young v. Heatly* 1959 J.C. 66 at page 70, if there is no evidence of actual alarm, the conduct must be "flagrant" if conviction is to be justified. The court added:

"'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" (paragraph 18).

The court went on to observe, *inter alia*, that a recurrent theme in past decisions was that a robust approach had been taken to the use of bad language and to refusal to co-operate with the police, even if forcefully or even truculently stated (paragraph 20).

[3]The decision in *Smith v. Donnelly* was followed by the decision of the European Court of Human Rights on admissibility in *Lucas v. United Kingdom No. 39013/02*, on 15 March 2003. The court held that the definition of the crime of breach of the peace in *Smith v. Donnelly* was sufficiently precise to provide reasonable foreseeability of actions which might fall within its scope. The court noted that the test employed the standard of conduct which was genuinely alarming and disturbing to any reasonable person. In *Lucas v. United Kingdom* the accused was convicted of breach of the peace and fined £150. She participated in a peaceful demonstration at the naval base at Faslane. The police had told demonstrators to move and warned them that, if they failed to do so, they would be committing a breach of the peace. The accused had been warned personally by two police officers that she would be arrested if she did not move from the road. She refused to do so and was arrested. The justice by whom she was convicted considered that her actions caused traffic to be disrupted, that her actions were intended to cause such disruption and that she failed to desist when requested. He also found that her conduct in being part of a large protest intending to block the public road would be alarming or seriously disturbing to any reasonable person in the particular circumstances. Her conduct in disrupting the traffic could reasonably have been expected to cause any person who observed it, including car drivers, to be alarmed, upset or annoyed and provoke a disturbance.

The appeal of Margaret Catherine Jones

[4]She was convicted of breach of the peace and fined £120 on a charge which alleged that at the south approach road to a naval base at Helensburgh, while acting with others, she conducted herself in a disorderly manner, sat on the roadway while mechanically fastened to a wheelchair and refused to desist when required to do so. According to the findings made by the justice in this case, Ministry of Defence police officers found a number of persons locked together by mechanical means across the road and blocking the traffic. The appellant was sitting on the public road, mechanically linked to a wheelchair by means of a U-lock. She was part of the crowd of persons who were halting the flow of traffic. One of the police officers asked her to desist from her behaviour, and to remove herself from the roadway. She was warned that she would be arrested for breach of the peace if she refused to desist. When she did not do so she was arrested and charged with breach of the peace. It is not in dispute that, according to the evidence, the demonstration was peaceful and that the appellant was not hostile or threatening. The intention of the appellant and the other protesters was to block the base so as to prevent workers from entering or leaving it.

[5]For the appellant Mr. Jackson accepted that the justice had correctly applied the decision in *Smith v. Donnelly*. However, he submitted that the decisions in *Smith v. Donnelly*, *Rafaelli v. Heatly* 1949 J.C. 101 and *Young v. Heatly* had wrongly held that there did not require to be evidence that persons were actually alarmed by the conduct complained of. As a consequence the justice had had to decide whether, in the light of the evidence given by the police officers, the conduct of the appellant was hypothetically alarming.

[6]In support of his submissions Mr. Jackson founded on a passage in the Opinion of Lord M'Laren in *Ferguson v. Carnochan*, as reported in 2 White at pages 281-282. Dealing with persons engaging in hostilities, he observed that it made no difference whether the fight was in a public place or in a private place

"if the lieges are alarmed. The term peace is not used as the antithesis of war. Breach of the peace means a breach of public order and decorum, causing disturbance and alarm to members of the public".

Speaking of brawling and where offensive language was used he observed that

"it is not necessary that those who hear it should be alarmed for their personal safety. It is enough if the conduct of those who are found brawling and using the offensive language is such as to excite reasonable apprehension that mischief may ensue to the persons who are misconducting themselves, or to others".

Mr. Jackson pointed out that in *Young v. Heatly*, page 70, the Lord Justice General had quoted the latter passage but not the former in holding that, while normally there would be evidence of alarm on the part of third persons, such evidence was not essential.

[7]Mr. Jackson submitted that the true position was that the crime of breach of the peace was committed when - (i) there is disorderly conduct that breaches public order and decorum and if there is actual alarm and annoyance - if it is unreasonable for the public to be alarmed and annoyed, there cannot be said to have been a breach of the peace; or (ii) a person conducts himself in a noisy 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 - that is, to persons other than themselves.

[8]Mr. Jackson also pointed out that in a number of decisions such as *Buist v. Linton* (1865) 5 Irv. 210 and *Banks v. McLennan* (1876) 3 Coup. 359, it had been held that insulting, threatening or opprobrious language did not constitute breach of the peace. There was no suggestion in the present case that the justice had considered that "in its context" (the phrase used by the court in *Smith v. Donnelly*) the appellant's conduct had a quality of alarming and disturbing which it would not have had in other circumstances. If the law was as it was stated in *Smith v. Donnelly* and the earlier decisions which he criticised, a person would be unable to know that his conduct might be held to have been "genuinely alarming and disturbing" since that would depend on the view taken by the court.

[9]The crime of breach of the peace appears to have been regarded originally as a lesser form of mobbing and rioting. The subject received only brief mention in *Hume's Commentaries* I, 439, where the author referred to cases in which tumult occurred in such a place or was carried to such a length as to disturb and alarm the neighbourhood. As the common law developed thereafter, it became clear that it was recognised that the crime of breach of the peace covered not only the causing of an actual breach of the peace of a neighbourhood, but also conduct giving rise to apprehension that a breach of the peace might occur. It is in regard to the latter form of the crime that there was considerable development of the law, in the sense that it was applied in a wide variety of situations. All along the courts deliberately refrained from specifying or categorising the type of conduct which would qualify, on the view that it depended on the facts and circumstances of the individual case. The language employed by the court in *Smith v. Donnelly* was plainly intended to emphasise the serious nature of the conduct which would be required in order to justify a conviction. The submission for the appellant in the present case is that the court should have adopted, in effect, a subjective, rather than an objective, test of what was genuinely alarming and disturbing.

[10]We are not persuaded that the submission for the appellant is well-founded. It is not well-founded on authority. An unfortunate feature of the reporting of the decision in *Ferguson v. Carnochan* is that there are differences between the reports as to the terms of the Opinions delivered by the members of the court. This is particularly so in the case of Lord M'Laren. The Opinion of the Lord Justice Clerk (Macdonald) is the more consistent as between the two reports to which we have referred. In 2 White at page 281 he 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 such alarm as causes them to believe that what is being done causes, or will cause, real disturbance of the community, and the breaking up of the peace of the neighbourhood. And I do not doubt that sober and reasonably minded people might be seriously annoyed by a disturbance, such as is set forth in this case, being continued, and that it was a disturbance of the public peace".

In 16 R(J) he stated:

"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".

[11]Whichever of these passages is selected the description of the crime is governed by the phrase "will reasonably produce alarm in the minds of the lieges ... ". We should add that it may well be that it is not correct to regard Lord M'Laren as requiring that there should have been evidence that persons were actually

alarmed by the conduct to which the charge related. He can be understood as referring to the need that the conduct should be serious enough to cause alarm and hence that he is essentially concerned with the nature of the conduct rather than evidence as to its actual effect. The decisions since *Ferguson v Carnochan* do not assist the appellant's submission to any extent, since, as Mr. Jackson frankly accepted, they recognise and proceed upon an objective approach to the conduct of the accused.

[12]Further we are not persuaded that the adoption of the objective approach, in which it would fall to the court to decide for itself, even where there was no evidence to this effect, whether the conduct complained of is genuinely alarming and disturbing, is unacceptable, having regard to Article 5 of the European Convention or otherwise. This aspect of Mr. Jackson's submission was, in effect, an attempt to re-argue the alleged breach of Article 5 which was rejected in both *Smith v. Donnelly* and *Lucas v. United Kingdom*. In the latter decision the European Court specifically noted that the test which was set out by the court in *Smith v. Donnelly* used the objective standard and was sufficiently precise to be consistent with the Article. At the same time we would draw attention to the remarks made by the court in *Smith v. Donnelly* in regard to cases in which the charge relates to actions done or words spoken in private (paragraph 20). There is a danger that, if the nature of the conduct complained of in such cases is considered in isolation, the answer to the question whether there was a breach of the peace might tend to be governed by whether the court regarded the conduct as disgusting or offensive. It is not necessary for this court to go so far as to cast doubt on the soundness of the actual result in *Young v. Heatly*. 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.

[13]We should add that if the crime of breach of the peace were to be limited to cases in which there was evidence of actual alarm or annoyance, whether given by the persons who were alarmed or annoyed or by others, this would represent an unfortunate and unjustifiable narrowing of the common law. The safeguard against any undue expansion of the law is provided by the need, which was emphasised by the court in *Smith v. Donnelly*, for the conduct to be genuinely alarming and disturbing to any reasonable person. Further we are not persuaded that the adoption of a subjective test would provide a satisfactory basis for applying the law. As we have already noted, Mr. Jackson accepted that, even if there were evidence of alarm, this would not be conclusive. Conversely it may be said with some force that the protection of a neighbourhood against breach of the peace should not be inhibited merely because a bystander displayed an over-stoical reaction to the conduct in question.

[14]For these reasons we consider that this appeal cannot succeed.

The appeal of Jane Tallents

[15]The appellant was convicted of breach of the peace. Sentence was deferred for nine months for her to be of good behaviour. According to the terms of the charge of which she was convicted, at the Scottish Parliament chambers in Edinburgh, while acting with others, she conducted herself in a disorderly manner, tied and bound herself to a railing, sang, fell to the ground and refused to walk whereby others required to lift and physically remove her from the premises. She was convicted of the charge under deletion of an allegation that she shouted. The sheriff found as a fact that she was accompanied by a group of companions who were intent on protesting about nuclear weapons. She and her companions stood in the gallery of the chambers and tied themselves to a railing, singing. Her companions chanted slogans. A banner was unfurled. This was during the business of the Parliament which included First Minister's questions. The presiding officer, who was irritated, ordered the adjournment of the Parliament and instructed that the gallery should be cleared. For this purpose gallery attendants were summoned and police officers attended. Members of the Parliament were seated within the chambers below. The appellant was warned about her behaviour. Her cable-tie to the railing was severed and she was removed bodily from the gallery. As she was being removed, she let herself fall to the ground. The protest lasted some 10-15 minutes, during which the proceedings of the Parliament were delayed. It is not in dispute that her conduct was intended to, and did, disrupt the proceedings of the Parliament.

[16]On behalf of the appellant Ms. Scott submitted in the first place that there was no breach of the peace, in respect that the appellant's conduct was not such as to cause alarm to ordinary people and threaten serious disturbance or give rise to any reasonable likelihood of this happening. There was no finding that there was any violence or struggle. It was a peaceful protest. Unlike Mr. Jackson, Ms. Scott accepted that there did not require to be evidence that persons were actually alarmed and annoyed. However, there had to be evidence from which an inference could reasonably be drawn of the likelihood of public disorder cf. *Fisher v. Keane* 1981 J.C. 50. Whether there was a real risk of things getting out of hand, and hence there being an outbreak of public disorder, called for the application of a high test. In the present case, the police were entitled to eject the appellant, in the exercise of their duty to forestall the occurrence of disorder. The appellant did not persist in the conduct complained of, but adopted a purely passive attitude. It was plainly not enough if her conduct caused persons to be irritated. Ms. Scott emphasised that, in the absence of actual alarm, the conduct had to be "flagrant", which created a real likelihood of serious disturbance (see *McMillan v. Higson* 2003 S.C.C.R. 125). Subjective alarm might well not be sufficient (see, for example, *Donaldson v. Vannet* 1998 S.L.T. 957).

[17]Ms. Scott submitted in the second place that there had been a breach of the appellant's rights under Articles 10 and 11 of the European Convention on Human Rights.

[18]Article 10(1) states that everyone has the right to freedom of expression, and that this right is to include freedom to hold opinions and to receive and impart information without interference by public authority. Article 10(2) states:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

[19]Article 11(1) states that everyone has the right to freedom of peaceful assembly and to freedom of association with others. Article 11(2) states:

"No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

[20]Ms. Scott submitted that the prosecution and conviction of the appellant was in breach of the appellant's rights under Articles 10(1) and 11(1) and had not been shown to be justified by reference to Articles 10(2) and 11(2) respectively. Having regard to the terms of section 57(2) of the Scotland Act 1998 the prosecution of the appellant was therefore *ultra vires*.

[21]In developing this submission Ms. Scott referred to a passage in the judgment of the European Court of Human Rights in *Vogt v. Germany* (1996) 21 E.H.R.R. 205. In that case the applicant had complained that her dismissal as a teacher on account of her membership of the German Communist Party was in breach of Articles 10 and 11. Ms. Scott pointed out that at paragraph 61 the court had expressed the view that the reasons which had been put forward in justification of the interference with her right to freedom of expression were "not sufficient to establish convincingly that it was necessary in a democratic society to dismiss her". Ms. Scott also referred to the speech of Lord Bingham of Cornhill in *R. v. Shayler* [2003] 1 A.C. 247. At paragraph 23 he stated:

"'Necessary' has been strongly interpreted: it is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable': *Handyside v.*

United Kingdom (1976) 1 E.H.R.R. 737, 754, para. 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under Article 10(2): *The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245, 277-278, para. 62".

[22]In the present case Ms. Scott submitted that the need for the Parliament to proceed with the First Minister's questions was met by the removal of the appellant from the gallery. The demonstration had had nothing to do with the questions themselves.

[23]Ms. Scott went on to submit that, even if there was shown to have been a pressing social need, the interference with the appellant's rights had to be shown to be no more than was necessary. In this connection Ms. Scott referred to the speech of Lord Hope of Craighead in *R. v. Shayler* at paragraph 61, where he referred to the requirements of proportionality as follows:

"The first is whether the objective which is sought to be achieved - the pressing social need - is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible".

Ms. Scott also referred to the decision of the European Court of Human Rights in *Steel v. United Kingdom* (1998) 28 E.H.R.R. 603. In one of the cases with which that decision was concerned it was held that the arrest and detention of a person who had been distributing leaflets and displaying a banner at a conference in a protest against the sale of fighter helicopters was disproportionate to the aim of preventing disorder or protecting the rights of others (paragraph 110). Ms. Scott did not dispute that in the present case there was an element of disruption of the proceedings in the Parliament, and that the actions of the appellant were intended to cause such a disruption. However, it was not as serious as an obstruction of traffic (as in *Lucas v. United Kingdom*) or an attempt to obstruct a grouse shoot by walking in front of a raised shotgun (which was one of the other cases with which *Steel v. United Kingdom* was concerned).

[24]In support of her submissions Ms. Scott also referred to the interpretation of similar provisions in the Bill of Rights of New Zealand (*Duff v. Communicado Limited* [1995] 2 H.R.N.Z. 370 and *Bradford v. Police* [1995] 2 H.R.N.Z. 405). Lastly, Ms. Scott referred to section 17 of the Police (Scotland) Act 1967. In *Wilson v. Brown* 1982 S.C.C.R. 49, in which the court allowed an appeal by the Crown against the acquittal of a respondent on a charge of breach of the peace by using offensive language and gestures at a football match, the court observed, at page 52, that it was the duty of the police, as keepers of the Queen's Peace, to forestall the eruption of violence whenever possible, and that in the course of that duty they had the power to terminate provocative conduct, if necessary by arrest, before it led to violence. Ms. Scott observed that the police had a discretion as to whether a case should be reported for possible prosecution. They should have made an assessment of the implications of Articles 10 and 11 in the present case. Any breach of the peace that did take place was of a trivial character.

[25]We are satisfied that the sheriff was correct to convict the appellant of a breach of the peace. It is plain, as was stated by the court in *Smith v. Donnelly*, that the question whether certain conduct is genuinely alarming and disturbing depends on the context in which it takes place, and consequently depends on the place, time and circumstances in which it occurs. Thus actions which would not constitute breach of the peace in one context may offend in another. This may be illustrated by a number of decisions. In *Dougall v. Dykes* (1861) 4 Irv. 101, in which the offending conduct consisted in the accused persistently getting up and walking out of a church, to the disturbance and annoyance of the minister and congregation who were assembled for divine worship, Lord Ardmillan observed at page 104 that he could not concur in the view that conduct which may not be a breach of the peace in one place, must therefore be permitted in every other place. The decisions in *Alexander v. Smith* 1984 S.L.T. 176 and *McAvoy v. Jessop* 1989 S.C.C.R. 301 provide examples of conduct which was provocative having regard to the company in which it took place. On the other hand, peaceful protest, in which the accused did no more than hand out leaflets and hold up a banner

where that did not involve any provocation, such as in one of the other cases with which *Steel v. United Kingdom* was concerned, would be unlikely to justify a conviction for breach of the peace.

[26]In the present case the conduct of the appellant interrupted and disturbed not only what was being said and heard in the Parliament but also the good order which would have been expected to be observed while a legislature is in session. The appellant's conduct was such that it was likely to be persisted in unless there was an intervention by officials or police officers. In our view the sheriff was entitled to conclude that her conduct was of such a nature as to be likely to provoke a reaction of alarm and disturbance among reasonable persons.

[27]As regards the appellant's reliance on Articles 10 and 11, it was not disputed by the Solicitor General that the actions which were taken against the appellant, including her prosecution and conviction constituted an interference with her rights to freedom of expression and peaceful assembly. However, we have held that these actions were in accordance with the law. They were therefore "prescribed by law" so far as Article 10 is concerned. They may be properly regarded as pursuing the interests of the prevention of disorder, and accordingly one of the aims set out in Article 10(2). As regards the question whether the actions taken against the appellant were proportionate to the legitimate aim, it is important to bear in mind that they did not constitute a general interference with the appellant's freedom to express her views. They related solely to the context and manner in which she chose to do so. We do not accept the argument that it was sufficient that she was removed from the chambers by the police acting in the execution of their duty. As the Solicitor General pointed out, that has no regard to the need for deterrence either of the appellant or of any other person who might seek to disrupt the proceedings of the Parliament on some other occasion. Article 11(2) does not raise any separate issue.

[28]For these reasons we consider that this appeal is not well-founded.

The appeal of Gaynor Barrett

[29]The appellant appeared on a charge of breach of the peace which alleged that at a roundabout on the shore road at Coulport at Main Gate she conducted herself in a disorderly manner, sat on the road, obstructed the free movement of traffic and refused to desist when requested to do so. She was convicted of the charge, under exception of the allegation of obstruction of the free movement of traffic. She was fined £150.

[30]The justice found that a peaceful protest took place at the entrance gate to the naval base at Coulport. At about 5.30 p.m. the police required demonstrators to move away from the main entrance gate so that normal access to and from the naval base could be restored. The appellant was sitting on the roadway and on two occasions had been asked by the police to desist but refused to do so. She was moved by the police when she did not comply. The justice held in finding 3 that the conduct of the appellant in sitting on the roadway and refusing to move when requested to do so by the police was such as might reasonably be expected to cause any person to be alarmed, upset or annoyed, especially members of the public who were employed in the naval base.

[31]For the appellant Ms. Ogg emphasised that the police witnesses gave evidence that they did not see any traffic being held up: the traffic was being directed round the roundabout, and was entering the site by another entrance. There was no evidence as to when the main gate was to be reopened, and when traffic would resume using the entrance or when it was intended that it would do so.

[32]Ms. Ogg submitted that the conduct complained of was not such as to cause alarm to ordinary persons, and to threaten serious disturbance to the community. There was no evidence of actual alarm, upset or annoyance. There was no evidential basis for finding 3. The case should be distinguished from *Lucas v. United Kingdom*, by reason of the fact that there was no evidence that traffic was being held up. There was no disruption. In this case, which was decided before *Smith v. Donnelly*, the justice had not had the benefit of the remarks of the court in that case, in particular the elucidation of the need, where there was an absence of evidence of actual alarm and annoyance, that the conduct should be "flagrant". The present case was an

example of the type of case referred to in *Smith v. Donnelly* at paragraph 20 where there was refusal to co-operate with police or other officials. It was not enough that conduct could irritate, annoy, upset or arouse disapproval or concern.

[33]Ms. Ogg went on to submit that in any event the measures which had been taken against the appellant interfered with her rights to freedom of expression and peaceful assembly. They had not been shown to be justified by reference to Articles 10(2) and 11(2).

[34]The Solicitor General accepted that the protest had been a peaceful one. However, there had been a deliberate intention to disrupt traffic, otherwise it would have been sufficient for the protesters merely to hand out leaflets and display a banner. In the circumstances it was conduct which could reasonably produce alarm leading to the breaking up of the social peace. The Solicitor General referred the court to *G v. Germany*, Application No. 13079/87, a decision of the European Commission on admissibility, in which it was held that a conviction for non-violent obstruction of traffic on a public road was a proportionate measure prescribed by law and necessary in a democratic society for the prevention of disorder, consistent with Article 11(2). This balanced the public interest in the prevention of disorder against the interests of the demonstrator in choosing a particular form of sit-in. She also pointed out that in *Chorherr v. Austria* (1994) 17 E.H.R.R. 358 it was held that the applicant's arrest and detention after he refused a request by the police to cease his demonstration against the purchase of fighter aircraft during a military ceremony were for the legitimate aim of preserving order. It was pointed out that, while it was for the national authorities to retain a margin of appreciation in assessing the need for an extent of interference, it was for the court to supervise the exercise of that discretion in the context of the relevant law applying the principle of proportionality, taking into account the importance of the freedom of expression in a democratic society. However, it was held that the national authorities had not overstepped that margin of appreciation by arresting the applicant.

[35]The Solicitor General questioned what would have happened if the appellant had been permitted to persist in the conduct which was complained of. She emphasised that whether conduct should be regarded as provocative depended upon the circumstances in which it occurred. While the obstruction of traffic had not yet occurred, the position was that the police were endeavouring to restore access at the end of the working day when workers were intending to return home. The demonstrators, such as the appellant, then refused to co-operate, with the deliberate intention of causing disruption. While it was not a violent action, it was provocative and carried with it the risk of serious disturbance to the community. Simply having the demonstrators detained and removed would not have had a deterrent effect.

[36]We are satisfied that the submissions made by the Solicitor General are well-founded. It is plain that demonstrators such as the appellant had blockaded the main gate for some time during the working day, during which time it was possible for access to and egress from the base to be obtained by another route. However, when it came to the end of the working day the police not unnaturally sought to restore the use of the main gate by workers who were then departing. While this is not a case in which there was evidence of traffic actually having been obstructed, it is obvious that the demonstrators such as the appellant were persisting in a course of conduct which would in due course give rise to obstruction. The justice was entitled to conclude that this would have caused alarm and serious disturbance, especially on the part of those who were affected by the conduct of the demonstrators. As regards the interference with the appellant's rights under Articles 10 and 11 it does not appear to be in dispute that the actions taken against the appellant interfered with her rights under Articles 10 and 11. However, we are satisfied that her conduct was contrary to the law, and that the actions taken against her were in pursuit of a legitimate aim and were proportionate.

The appeal of Frank James Carberry

[37]The appellant was convicted of breach of the peace and was fined £2,000. The only allegation in the charge was that at a farm at Stewarton he conducted himself in a disorderly manner. It may be noted that he was acquitted of another charge in the complaint, which was that he contravened a condition of bail.

[38]The sheriff found that the appellant went to the farm along with a commissioner appointed by an interlocutor of the Court of Session, a messenger-at-arms and his witness. These officials were concerned with the service of a petition and order for interdict and the execution of a commission granted by a Lord Ordinary in the petition which was at the instance of the appellant against a number of persons, including Marie Johnston. The messenger-at-arms had sought the assistance of the police before the officials went to the farm. Two police constables arrived there before anyone else had done. The farm gates were in a wall and could be operated electrically. There was video communication between the gates and the farmhouse which was about one hundred yards away. The appellant had arranged for members of the press to be present. When they tried to approach the house they were told to leave, and did so. The commissioner, the messenger-at-arms and the police officers then approached the farmhouse and engaged in conversation beside it. Marie Johnston came out of the house screaming: "Get him away. He should not be near me". This was a reference to the appellant; it was a condition of bail that he should not approach her. When the police officers heard this they looked back towards the gates and saw that the appellant had climbed onto the wall. He had a video camera in one hand and was waving at Marie Johnston with the other. One of the police officers went and told him to get off the wall and off the premises. He got into his car and left.

[39]For the appellant, Mr. Shead submitted in the first place that a charge of breach of the peace which alleged only that the accused had conducted himself in a disorderly manner was not a proper charge of which he could be convicted.

[40]Mr. Shead pointed out that in *Butcher v. Jessop* 1989 S.C.C.R. 119 it was held that a charge that a football player had committed a breach of the peace by conducting himself in a disorderly manner in a football match was a relevant and sufficiently specific charge cf. *Craig v. Herron* (1976) S.C.C.R. Supp. 152 and *Anderson v. Allan* 1985 S.C.C.R. 399. However, it was significant that the Criminal Procedure (Scotland) Act 1995, unlike its predecessors, did not state that no further specification was necessary than the form of charge set out in schedule 5 to the Act, namely, "You did conduct yourself in a disorderly manner and commit a breach of the peace". In this connection, it was to be noted that, in the context of a local Act, it had been held that "disorderly conduct" could be distinguished from a breach of the peace (*Campbell v. Adair* 1945 J.C. 29 at page 33). Mr. Shead also referred to cases in which it had been held, by reason of the deletions made by the jury in returning a verdict, that there was no crime of which the accused could competently be convicted (*Sayers v. H.M. Advocate* 1982 J.C. 17 and *Kenny v. H.M. Advocate* 1951 J.C. 104). He pointed out that in *Blair v. Keane* 1980 J.C. 19 the court had observed that the sufficient specification of a charge was a matter not to be decided by reference to the practice of prosecutors, but was regulated by the court upon principles of law.

[41]Mr. Shead sought to fortify this submission by reliance on Article 6(3)(a) of the European Convention. He drew attention to the approach which the court had taken in *Campbell v. H.M. Advocate* 2003 S.C.C.R. 779 in treating this as an aspect of the right to a fair trial in accordance with Article 6(1), and so to be read with and in the context of that right. In *McMaster v. H.M. Advocate* 2001 S.C.C.R. 517 the court accepted that there was a right to be informed of the cause and nature of the allegations cf. *Steel v. United Kingdom*. Mr. Shead also referred the court to *Mattochia v. Italy* (2003) 36 E.H.R.R. 47, in which it was held that the provision of full detailed information conveying the charges was an essential prerequisite for ensuring that proceedings were fair (paragraph 59), although the amount varied with the particular circumstances of the case. Mr. Shead pointed out that at paragraph 65 it was said that the fact that the appellant could have sought access to the file in due time did not release the prosecution from its obligation to inform the accused promptly and in detail of the accusation.

[42]As was pointed out by the Solicitor General, the difficulty which confronts the submissions made by Mr. Shead is that, in the light of the provision of section 192 of the 1995 Act, the objection about lack of specification comes too late. In the Sheriff Court the appellant could have argued that the charge did not give sufficient notice of what was meant by "disorderly conduct" in the context of the present case. The prosecutor could have considered whether it was appropriate to meet that objection by giving further specification.

[43]It is, of course, well established that where an appeal court is satisfied that the appellant was convicted of something which was no crime at all, the fact that the point was not taken at first instance as an objection to the charge or to the conviction would be no bar to the appeal court quashing the conviction (*Rodgers v. Howman* 1918 J.C. 88; *McDonald's Limited v. Adair* 1944 J.C. 119; and *Aikenhead v. Cuthbert* 1962 J.C. 12). In this connection the recent decision of the court in *Cochrane v. H.M. Advocate* 2002 S.C.C.R. 1051, which was apparently uninformed of these decisions and the principle on which they are based, is plainly unsound on this point. We were invited to overrule *Cochrane v. H.M. Advocate* and we do so.

[44]Likewise there is no merit in the claim that the appellant was denied a fair trial by reason of a breach of Article 6(3)(a), taken in conjunction with Article 6(1). In accordance with normal practice in this jurisdiction the appellant was provided with a list of Crown witnesses who were available for precognition by the defence. He also had the opportunity, if so advised, of challenging the specification of the charge and seeking to persuade the sheriff that considerations of fair notice indicated that the prosecutor should not be permitted to proceed with the charge in the absence of further specification. Cases which arise in other jurisdictions, such as *Mattoccia v. Italy*, must be understood in the context of the system to which they relate.

[45]Before passing from the point, we would note that the Solicitor General accepted that, notwithstanding the decision in *Butcher v. Jessop*, it would normally be proper for the prosecutor to specify the conduct which was said to form a breach of the peace rather than to rely on the statutory form of charge.

[46]Mr. Shead went on to submit in the second place that the appellant's conviction was not justified. He submitted that it was an unjustified gloss on what was happening at the farm to say that the conduct of the appellant gave rise to fear and alarm. He pointed out that, since the appellant was subject to a condition of bail that he should not approach Marie Johnston, there would be no doubt that she would not be pleased to see him there. She did not give evidence and accordingly the court did not know what was the cause of her distress. Mr. Shead also pointed out that there was no finding by the sheriff that the appellant had actually conducted himself in a disorderly manner. In the result, the appellant may have done no more than irritate Ms. Johnston. He was about one hundred yards away from her. There was nothing to indicate that there was a prospect of him persisting in the conduct complained of.

[47]We are satisfied that the submissions made by Mr. Shead on the merits of the appellant's appeal are well-founded. We appreciate the point made by the Solicitor General that in a number of respects the actions of the appellant could be seen to be provocative. However, standing that Marie Johnston did not give evidence, it is not possible to determine to what extent her reaction was due to the mere fact that she did not want to see him, as opposed to her being alarmed or disturbed by the way in which he was conducting himself. Further we note that the appellant was never nearer her than one hundred yards, and that he responded to the police request to leave.

[48]In these circumstances we are satisfied that the sheriff was not justified in holding that the appellant committed a breach of the peace. We will quash the appellant's conviction.

The appeal of John Park

[49]The appellant was convicted of a breach of the peace. Sentence was deferred for a substantial period for him to be of good behaviour.

[50]According to the findings made by the justices, the appellant's mother was building a wall to separate the driveway which was shared by their house and that of their neighbours, Mr. and Mrs. Dingwall. The appellant's father was using a video camera on the driveway and also from across the street. Mrs. Marjorie Graham, between whom and the Park family there had been a history of dissension, approached, pushing her baby grandchild in a pram. She noticed that the appellant's father was using the video camera, and believed that he was filming her. She called across the road to Mr. Dingwall and asked whether it was legal to film people all the time. The comment was designed to be heard by the appellant's father. She hoped it would stop him doing so in the future. In response to this comment Mrs. Graham was subjected to a torrent of abuse by

the appellant and his parents. All three of them were shouting, bawling, cursing and swearing at her together. The effect of this on Mrs. Graham was that she was very distressed and felt awful and upset. It caused her to break down. She immediately went home, and the incident was reported to the police. Mr. and Mrs. Dingwall were present throughout the incident. The justices found that the conduct of the appellant and his parents was likely to cause alarm or disturbance, in its context, to any reasonable person.

[51]For the appellant Mr. Brown adopted the submissions which had been made by Mr. Shead. He submitted that the remark which had been made by Mrs. Graham had perhaps been provocative. There was no doubt that the appellant had used foul language, which caused her upset and distress, and that Mr. Dingwall was shocked by what he had witnessed. However, this was a relatively minor matter between neighbours. All of them were mature individuals who should have been behaving better than they did.

[52]We are satisfied that the justice was correct to convict the appellant. We accept the submission made by the Solicitor General that it was not disproportionate to regard the appellant's conduct as a breach of the peace. It was plainly conduct which was liable to cause, and did cause alarm and disturbance, and hence give rise to a breakdown in the peace of the community. In this case there was evidence of a bystander being shocked in reaction to the appellant's conduct. This provided the basis for the justice concluding that this was not merely a minor incident but was genuinely alarming and disturbing.

[53]In these circumstances this appeal against conviction is refused.