MARK HARRIS v. HER MAJESTY'S ADVOCATE

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General

Lord Nimmo Smith

Lady Paton

Lord Carloway

Lord Clarke

[2009] HCJAC 80

Appeal No: XC143/09

OPINION OF THE COURT

delivered by THE LORD JUSTICE GENERAL

in

APPEAL

by

MARK HARRIS

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

Appellant: Shead; Bruce Short & Co., Dundee

Respondent: W.J. Wolffe, Q.C., A.D., Balfour; Crown Agent

22 July 2009

Background

[1] The hearing of this appeal took place on 21 and 22 July 2009. Having heard and considered the submissions of parties, on 22 July 2009 we allowed the appeal and stated that we would give our reasons in writing at a later date. These reasons are set out below.

Introduction

[2] The appellant has been charged on indictment before the Sheriff Court in Dundee. He has raised preliminary pleas to the relevancy of the indictment, in particular to two charges of breach of the peace contained within it. These charges are in the following terms:

"(13) on 5 November 2007 at Police Headquarters, Dundee you MARK HARRIS did conduct yourself in a disorderly manner and during the course of various conversations, did state to Gary Brown, Inspector, Tayside Police, Dundee, then engaged in the execution of his duty, that you had engaged a Private Investigator to obtain information about said Inspector and that you knew (a) where said Inspector resided; (b) where his mother resided and (c) details of a mortgage application pertaining to said Inspector and did place said Inspector Gary Brown in a state of fear and alarm and did commit a breach of the peace;

(14) on 5 December 2007 at Police Headquarters, Dundee you MARK HARRIS did conduct yourself in a disorderly manner and during the course of various telephone conversations with Paul Romanowski, Detective Constable of Tayside Police, Dundee, state that you knew (a) where said Detective Constable resided; (b) where his mother worked; (c) where his father worked prior to his retirement; (d) personal details pertaining to said Detective Constable's brother; (e) that said Detective Constable played rugby for a particular team and (f) details of the amount of mortgage pertaining to said Detective Constable's house and did warn said Detective Constable, who was engaged in the execution of his duty in the course of an enquiry involving you, to stay away from you and to stay away from your bank manager and did thus place said Paul Romanowski in a state of fear and alarm and did commit a breach of the peace."

[3] At a first diet on 26 February 2009 the sheriff repelled the preliminary pleas in relation to each of these charges. Against that decision the appellant, with leave,

appealed. The case raises important questions about charges of breach of the peace, including questions about the soundness of the decision and reasoning in Young v Heatly 1959 JC 66 as an authority on the point. A bench of five judges was therefore constituted to hear the appeal. It was agreed that the Advocate depute would present his submissions on behalf of the Crown, the respondent in the present appeal, prior to those of the appellant being heard.

Submissions by the Advocate depute

[4] The Advocate depute submitted that the sheriff had been correct to dismiss the pleas to the relevancy. The "essence" of breach of the peace was outlined in Smith v Donnelly 2002 JC 65: it was conduct which presented as genuinely alarming and disturbing, in its context, to any reasonable person (per Lord Coulsfield at paragraph 17). The Crown did not have to prove actual alarm, although the fact that it was averred was a relevant factor in this case. That objective test had been approved by a full bench in Jones v Carnegie 2004 JC 136 (per the Lord Justice-General (Cullen) at paragraph 2) and, as regards article 7 of the Convention, by the European Court of Human Rights (Lucas v United Kingdom (2003) 37 EHRR CD 86). In so far as it had interpreted Smith v Donnelly as applying a conjunctive test which required, in addition, proof that the conduct threatened serious disturbance to the community, the decision in Paterson v HM Advocate 2008 SCCR 327 should be overruled (cf the Lord Justice-General (Hamilton) at paragraph 23). That conjunctive test involved a logical fallacy: it required a presumption that certain behaviour might compel "reasonable men" to take the law into their own hands. Part of the purpose of the law was to protect individuals' peace of mind: it was sufficient that the behaviour might objectively cause "personal fear" to the person at whom it was aimed (cf Ferguson v Carnochan (1889) 16 R (J) 93, per the Lord Justice-Clerk (Macdonald) at page 94). Proof of actual alarm or disturbance to the lieges was not required (Raffaelli v Heatly 1949 JC 101; Young v Heatly 1959 JC 66; Jones v Carnegie). Nor should it be decisive that the conduct was discoverable, or that it took place in a public place rather than private premises. In any event, the authorities on discoverability often involved the accused acting alone (Bryce v Normand 1997 SLT 1351; cf Thompson v MacPhail 1989 SCCR 266); in the present case, the conduct was openly directed at individuals (cf Young v Heatly; Paterson v HM Advocate).

[5] The behaviour libelled in the charges which the appellant faced was sufficient to meet the objective test. While it averred "disorderly conduct" the Crown was entitled to rely exclusively on what the appellant had allegedly said (cf McGraw v HM Advocate 2004 SCCR 637). Consideration of the context was crucial to the objective test and would prevent undue interference with freedom of expression. In the circumstances of the present case the appellant's comments were in the nature of a veiled threat. The purpose of that threat might be relevant in assessing objectively the likelihood of genuine alarm, but, unlike an attempt to pervert the course of justice, it was not of the essence of the crime of breach of the peace and did not have to be averred (cf Kenny v HM Advocate 1951 JC 104). The Advocate depute did however concede that the appellant might have been charged with other common law crimes, such as an attempt to pervert the course of justice or of uttering threats.

[6] Esto the conjunctive test was the correct approach, the Advocate depute submitted that the circumstances of the present case met it. While he did not contend that police officers were likely to take the law into their own hands, he submitted that the nature of the conduct, particularly the references to family members, was such that an ordinary person might fear for the safety of the officers and of those close to them. Construed in that way, the test did not require the Crown actually to prove that it was likely that a disturbance would develop: the jury could infer that, objectively, that would be the likely result should the behaviour continue.

Submissions on behalf of the appellant

[7] On behalf of the appellant, Mr Shead submitted that the Crown's main argument was an attempt to fill a perceived lacuna in the criminal law. However, there were areas into which the criminal law did not intrude and where further development was a matter for Parliament (cf Webster v Dominick 2005 1 JC 65, per the Lord Justice-Clerk (Gill) at paragraph 59). There had to be limits to the crime of breach of the peace: a clear link between conduct committed in private and its possible discovery was required before it could be considered criminal (Borwick v Urquhart 2003 SCCR 243, per Lord Coulsfield at paragraph 3, following Smith v Donnelly; cf Webster v Dominick per Lord Gill at paragraph 56). The conduct had to be linked to a breach of the "public peace": for that reason

Young v Heatly might represent an improper extension of the law. Although a fixed line could not be drawn between public and private conduct, the element of time was crucial: too broad a temporal window between the conduct and its potential discovery rendered the prospect of a breach of the public peace too remote. Contrary to the submissions of the Advocate depute, the decision in Jones v Carnegie did not cast doubt on the operation of the conjunctive test: the purpose of that appeal was to consider the test, a full bench being constituted for that reason (cf paragraph 1, per the Lord Justice-General (Cullen)); the test was specifically referred to in the submissions of counsel; and the decision confirmed that, where conduct took place in private, there had to be a realistic risk that it would be discovered (per the Lord Justice-General (Cullen) at paragraph 12). It was now established that the correct approach was to apply that test (Paterson v HM Advocate, per the Lord Justice-General (Hamilton at paragraph 23; cf MacDonald v HM Advocate 2008 SCCR 181).

[8] Applying the conjunctive test, it was clear that the sheriff had been in error in refusing the pleas to the relevancy. There was prima facie no link between the conduct complained of and any potential breach of the public peace: nothing in the averments suggested that a crime had been committed. There were a number of relevant considerations: there were no specific allegations of the "disorderly conduct" averred, reliance being placed solely on the words allegedly uttered; the locus was police headquarters in Dundee; and despite the averments of "fear and alarm" there was no clear specification of any threats. The comments regarding the appellant's bank manager were, at most, a warning and hardly redolent of the sinister threat suggested by the sheriff. Esto a threat could be inferred, there was no pressing need for charges of breach of the peace to be brought. As had been accepted, there were possible alternative charges, such as an attempt to pervert the course of justice or the crime of threats itself, albeit any alternative charge might have to specify the nature and purpose of the threats (cf Kenny v HM Advocate).

[9] Mr Shead submitted that we should apply the test set out in Smith v Donnelly, uphold the appeal and, in terms of section 74 of the Criminal Procedure (Scotland) Act 1995, remit the case to the sheriff with a direction to dismiss the charges as irrelevant.

Discussion

[10] In Chapter XVI of Vol. I of his Commentaries Hume deals with the crime of mobbing. The following chapter opens as follows (page 439):

"In familiar discourse, and sometimes, but rather improperly, in the proceedings of the inferior courts, which have the ordinary cognisance of such disturbances, the name of riot is also given to a mere brawl, or occasional quarrel and strife, among persons who were not assembled with any mischievous purpose. If, however, a contest of this sort happens in such a place, or is carried to such a length, as to disturb and alarm the neighbourhood, this seems to be cognisable at instance of the public prosecutor, as a breach of the public peace; to the effect at least of inflicting a fine and imprisonment, and exacting caution from the offenders, for their good behaviour for the future."

So, at that time breach of the peace was treated as in effect a lesser form of mobbing and rioting, the essence of it being conduct such as to disturb and alarm the neighbourhood.

[11] When in Smith v Donnelly this court came to review the law of breach of the peace with a view to deciding whether it was of sufficient certainty to meet Article 7 of the European Convention on Human Rights, it took as its starting point what was said by Lord Justice-Clerk Macdonald in Ferguson v Carnochan (1889), variously reported but found in the official reports at 16R (J) 93, where the offender in the early hours of a Sunday morning was overheard by constables from the street making a noise and disturbance and using loud language in his licensed premises. This persisted for some time and was continuing when an hour later the constables, from some thirty yards off, heard him cursing and swearing. The Lord Justice-Clerk, finding that on the facts disclosed a breach of the peace could be inferred, 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."

His Lordship, under reference to Matthews & Rodden v Linton, where shouting and bawling accompanied fighting in a private house, said:

"... as fighting inside of a house can affect persons outside only in so far as it causes noise in the street, I take it that the case of Matthews & Rodden would have been held equally relevant without the allegation of fighting."

Lord McLaren, concurring, observed:

"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, accompanied always by the qualification that it is to the alarm and annoyance of the public. Articulate noises in crowds 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 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."

Lord Rutherfurd Clark concurred.

[12] It is quite clear from these observations ("breaking up of the social peace"; "cause serious disturbance to the community"; "alarm and annoyance of the public"; "some mischief may result to the public peace") that affecting the community was regarded as an essential element in the constitution of this crime.

[13] It is thus unsurprising that when Lord Coulsfield, delivering the opinion of the court in Smith v Donnelly, came to draw on Lord Justice-Clerk Macdonald's observations, he said at paragraph [17]:

"... 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."

That paragraph ends with the sentence:

"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."

That last sentence is essentially concerned with the serious character of the conduct in question ("genuinely alarming and disturbing ...") and cannot properly be understood as departing from or qualifying the community aspect referred to earlier in the paragraph. In the penultimate sentence the court, referring to Lord McLaren, notices that he says "that a reasonable apprehension of disturbance to the public peace is necessary to the proof of the crime".

[14] When in Lucas v United Kingdom the European Court of Human Rights was considering the relevant domestic law it quoted, at page CD87, two of the three passages mentioned from paragraph [17] in Smith v Donnelly and paraphrased the penultimate sentence by stating that the High Court "considered ... that a reasonable apprehension of disturbance to the public peace is required". In Lucas, which involved a demonstration on a public road, there was a clear public element. The argument under Article 5 appears to have concentrated rather on that aspect of the definition which involved the conduct presenting "as genuinely alarming and disturbing, in its context, to any reasonable person" (page CD89); but it is clear from the discussion of Articles 10 and 11 (page CD90) that public safety and/or the prevention of disorder were part of the context.

[15] In Jones v Carnegie a full bench was asked - by the first appellant - to review the correctness of Smith v Donnelly. Again the context was disorderly behaviour on a public roadway. Although in paragraph [2] the court quotes only the final sentence from paragraph [17] of Smith, there is no suggestion that it disapproved of the "conjunctive" approach to the definition advanced in the earlier part of the paragraph. We are satisfied that this court in Paterson v HM Advocate at paragraph [23] correctly interpreted Smith v Donnelly as advancing a conjunctive test. We are also satisfied that that test correctly reflects the established law.

[16] If, as we hold it to be, it is necessary to constitute breach of the peace that the conduct, in some sense, must "threaten serious disturbance to the community", it is difficult to see how a statement made in private by one person to another can, without more, constitute that offence. That brings us to Young v Heatly. There a deputy headmaster of a technical school was charged with four separate offences of breach of the peace. Each involved a different youth, all four being pupils at the school. The youths were seen separately in the teacher's room. Sexually improper remarks were made to each of them. The teacher was convicted in the Burgh Court of all four charges (with certain restrictions). He appealed unsuccessfully to the High Court. The leading opinion was delivered by Lord Justice-General Clyde. On the material part of the appeal he said:

"Breach of the peace, however, is an offence the limits of which have never been sharply defined. It is so largely in each case a question of circumstances and of degree. It is well settled that it can take place in a private house - Matthews & Rodden v Linton [3 Irv. 570]. Moreover, although normally evidence of alarm on the part of third persons is produced in cases of this sort, such evidence is not essential. As Lord McLaren said in the case of Ferguson v Carnochan [2 White, 278, 16R (J) 93, at pp.94-95] (at p. 282): '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.' In the later case of Raffaelli v Heatly [1949 J.C. 101] there 'was really no evidence at all that there was anybody alarmed or that anything took place that might be reasonably expected to alarm anybody' - see Lord Justice-Clerk at p. 104. Yet the conviction was sustained. As the Lord Justice-Clerk said, '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.' Lord Mackay (at p. 105) referred to the argument that it was essential that the witnesses should say that they personally were alarmed or that they were annoyed, and he then observed: 'I do not think the definition allows that. If acts are repeated and are calculated to cause alarm and annoyance and are indecorous, I think that is enough.' 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.

The present case, in my opinion, does fall within this special category. The disgusting nature of the suggestions made, the fact that they took place within a matter of hours with a series of adolescent boys, and the fact that they were made to pupils by a depute headmaster to whom they would normally have looked for help and guidance - all these facts would in the special circumstances of this case justify the inference which the judge clearly drew, and would entitle him to hold a breach of the peace proved. But such a result could not have followed apart from these special circumstances."

[17] A number of observations may be made on these passages. First, although in 1959 the limits of breach of the peace may not have been "sharply defined", the subsequent incorporation of the Convention has required that "any law creating a criminal offence must meet a certain standard of clarity and comprehensibility" (Smith v Donnelly at paragraph [8]). Secondly, while a breach of the peace can be committed by conduct in a private house, it was, as the cited case (Matthews & Rodden v Linton, as explained by the Lord Justice-Clerk in Ferguson v Carnochan) makes plain, the noise thereby created in the public street ("whereby the lieges were annoyed and disturbed") which made that conduct criminal. Thirdly, the passage cited from Lord McLaren in Ferguson v Carnochan is taken from White's report, not the official report where the sentence reads:

"It is enough that offensive language should be uttered 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."

It is reasonable apprehension of mischief to the public peace which is of the essence of the crime. Fourthly, the passage in Raffaelli v Heatly first quoted is taken from a recital of counsel's submission. When the Lord Justice-Clerk came to address the particular circumstances he relied upon, among other facts, the fact

that a female neighbour was upset. While actual alarm on the part of any individual may not be required, circumstances such as amount to breach of the peace are "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" (page 104). The public element is again emphasised. Fifthly, Lord Mackay's cited observation from Raffaelli (at page 105) was clearly made in the context of public order and/or (public) decorum. Indecorous words or conduct in private was not under consideration. Sixthly, the discussion by Lord Justice-General Clyde does not face up to the contention advanced, according to the note of argument at page 68, by counsel for the appellant that it was essential to breach of the peace that there should be acts which produce or are likely to produce alarm in the minds of the lieges (that is, the public).

[18] While Lord Carmont agreed with the Lord Justice General, it may be noted that Lord Russell, while also agreeing, said "... I cannot say that the issues raised in this case are free from difficulty".

[19] Lord Justice-General Clyde's observations in Young v Heatly were noticed in Smith v Donnelly. The reference to conduct being "flagrant" was said to support the view that, if there was no evidence of actual alarm, conduct of that character was required to justify a conviction. At paragraph [20] it was said:

"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."

The latter sentence is somewhat obscure but it may sound a cautionary note that, where the conduct is in private, it is of particular importance to bear in mind the essential character of the crime. The court, as constituted in Smith v Donnelly, had no power to overrule Young v Heatly.

[20] In Jones v Carnegie (a full court decision) Young v Heatly was again mentioned but the essence of the challenge by the first appellant to it among other decisions was that actual alarm was necessary (paragraph [5]). At paragraph [12] reference was made to the discussion at paragraph [20] in Smith v Donnelly and it was said:

"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 the conduct complained of took place in private, there requires to be evidence that there was a realistic risk of the conduct being discovered."

[21] We shall return to the matter of "discovery". But it will be recalled that Jones v Carnegie was (like Smith v Donnelly) concerned with conduct in a public place and it was accordingly unnecessary directly to address the correctness or otherwise of Young v Heatly. In the present case that is not so. Accordingly, it is appropriate to review the decision and reasoning in that case.

[22] Having so reviewed it, we are satisfied that the reasoning was unsound. Essentially, it failed properly to take into account the true nature of breach of the peace as a crime which has at least a public element. Authorities before it (such as Ferguson v Carnochan and Raffaelli v Heatly) and authorities since (such as Smith v Donnelly and Paterson v HM Advocate) have emphasised that element. The reasoning in Young v Heatly ignores it. That reasoning we disapprove and the decision we overrule.

[23] In the present case it is averred in charge (13) that the statements complained of were made to a police inspector at a police station and that the making of them placed him in a state of fear and alarm. In charge (14) it is averred that the statements were made to a detective constable in telephone conversations made with that officer when at a police station. While other officers may have been present when the statements were made to the inspector and other officers may have overheard, at least in part, the telephone conversations, the Advocate depute was at pains to emphasise that it was not suggested that any

of the officers involved might, having heard the statements, have been provoked to react by taking the law into his own hands or that otherwise there could have been any apprehension of a disturbance to the public peace. The contention advanced was that, provided the words spoken were, objectively speaking, disturbing or alarming in their context, that was sufficient without more to constitute breach of the peace. Nor, although the phrase "in a disorderly manner" was, as a matter of style, averred in each charge, was it suggested that the manner in which the words were uttered was in fact disorderly. Thus, as we understood it, the contention would have been the same if the words had been uttered outwith the hearing of any other person and in a wholly calm and orderly fashion.

[24] On that hypothesis the situation is on all fours with that in Young v Heatly, other than as to the content of the utterances and that in one the words were spoken to police officers and the other to young males, and for the reasons given in disapproving Young v Heatly the contention advanced is, in our view, unsound - in particular, there is no recognition of the need that the offending conduct should, in some sense at least, cause or threaten disturbance to the public peace. Tested logically, the argument would entail that any utterance made privately to another individual which was, objectively speaking, disturbing or alarming would be sufficient to constitute the crime. As Lord Clarke pointed out in the course of the discussion, the Crown's contention would, if sound, mean that the making of a statement privately, say by a journalist to a politician, that he intended to publish true but embarrassing details about that politician's past conduct would, assuming the content to be such that his exposure would cause genuine alarm to the politician, constitute the criminal offence of a breach of the peace. The Convention implications of such a result are too obvious to need elaboration. In our view, absent a public element, that offence is not committed.

[25] It is unnecessary for the purposes of this opinion to seek to give definitive guidance as to what public element would be sufficient. Disturbance or potential disturbance of even a small group of individuals in a private house - as in Paterson v HM Advocate - may suffice. 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 (Jones v Carnegie at paragraph [12]).

[26] It would be wrong to leave this case without observing that, as the Advocate depute accepted, the conduct here complained of might, with some elaboration, have given rise to a relevant charge of a different kind - in particular of an attempt to pervert the course of justice. The common law of threats might possibly also have been invoked. But, for the reasons which we have given, charges (13) and (14) do not relevantly instruct offences of breach of the peace.

[27] At the conclusion of the discussion we intimated that the appeal would be allowed with a direction to the sheriff to dismiss these charges as irrelevant. This opinion explains why we took that course.