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Judgment: approved by the Court for handing down | *Delivered:* **20/6/08**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

POLICE SERVICE FOR NORTHERN IRELAND

Complainant/Appellant

-and-

RICHARD SHAW MacRITCHIE

Defendant/Respondent

Before Kerr LCJ, Higgins LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of Mrs Fiona Bagnall, resident magistrate, acceding to an application for a direction of no case to answer made at Belfast Magistrates' Court on 9 October 2007 on behalf of the defendant/respondent, Richard MacRitchie, in relation to a charge of voyeurism contrary to section 67 of the Sexual Offences Act 2003. We shall refer to Mr MacRitchie as 'the defendant'.

[2] The magistrate had been invited by the prosecution to consider by way of alternative to the offence preferred, a charge of attempted voyeurism but she declined to do so, observing that she was unable to conclude that there was

any evidence of the actual state of dress or undress of the injured party that the defendant intended to record. The appeal also challenges this decision. It is asserted that, if the magistrate was correct in deciding that the elements of the principal offence were not present, she ought nevertheless to have permitted the trial of the defendant to proceed on the charge of attempt to commit an offence under section 67.

Factual background

[3] The prosecution evidence in the case was agreed. Statements from various witnesses, including the complainant, were read to the court, as was the record of the defendant's police interview. These established that on 23 October 2006, the defendant had gone to Falls Leisure Centre in Belfast at about 1.30pm and there had a swim. He left the swimming pool about half an hour later and entered one of the cubicles in the changing room area. The cubicles are not segregated – male and female visitors to the centre may use any of them.

[4] After the defendant had dressed he became aware of a pair of clogs in the adjoining cubicle. He took these to belong to a woman. He then placed his mobile telephone underneath the gap between the wall of the cubicles and the floor and inserted it into the neighbouring cubicle, having first activated the video camera facility and pressed the record button. Having recorded certain images he viewed these and then returned the telephone to the adjacent cubicle with the recording facility again activated. At this stage the complainant noticed the telephone and kicked it away. It was then retrieved by the defendant.

[5] The camera recordings from the defendant's telephone were viewed by the magistrate. These showed that the complainant had been wearing her swim suit, a bikini, at the time that the recordings were made. She had stated that before noticing the telephone she had changed from her bikini bottoms to her underwear but no sign of this appeared on the video images that had been recorded on the telephone. It has been suggested that the complainant's kicking the telephone away prevented the image of her normal underwear being captured on video.

[6] The complainant's boyfriend was in the changing area at the time and he was alerted by her to the fact that a telephone had been passed into her cubicle. He confronted the defendant and, after an exchange between them, the defendant reluctantly yielded up his telephone and the offending images were detected. Police officers were summoned and the defendant was arrested. During subsequent interview, he admitted that he had passed the telephone into the adjoining cubicle knowing that a female was likely to be there. He said that he had recorded the images that had been found on the

telephone and said that he did not know why he had done this. He expressed deep regret for having used his telephone to film the complainant.

The relevant statutory provisions

[7] Section 67 of the 2003 Act provides: -

> "*Voyeurism*
>
> (1) A person commits an offence if—
>
> (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
>
> (b) he knows that the other person does not consent to being observed for his sexual gratification.
>
> (2) A person commits an offence if—
>
> (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
>
> (b) he knows that B does not consent to his operating equipment with that intention.
>
> (3) A person commits an offence if—
>
> (a) he records another person (B) doing a private act,
>
> (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
>
> (c) he knows that B does not consent to his recording the act with that intention.
>
> (4) A person commits an offence if he instals equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling

himself or another person to commit an offence under subsection (1).

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years."

[8] The defendant was charged under section 67 (3). The basis of the charge was that he had recorded the complainant doing a private act; that he had done so intending to view the image of her doing that private act; and that he intended to obtain sexual gratification from viewing the image. On his behalf the application for a direction was made on the ground that the act actually recorded was not a private act within the meaning given to it by the legislation. Section 68 (1) defines a private act for the purposes of the Act as follows: -

"*Voyeurism: interpretation*

(1) For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—

(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,

(b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public."

[9] The young woman concerned was clearly in a place which would reasonably be expected to provide privacy. But was she doing a private act? Although she has said that she had changed from her bikini bottoms into her underwear when she saw the telephone for the first time, the video images on the defendant's phone show her clad in her bikini. The argument made on the defendant's behalf, therefore, was that she could not be said to have been doing a private act since swimwear was not underwear. The magistrate,

although she considered that there was *prima facie* evidence that the defendant had recorded images of the complainant for his sexual gratification, decided that she was not doing a private act (within the meaning of the legislation) at the time that the recording was made.

The arguments

[10] For the appellant, Mr Gerald Simpson QC (who appeared with Mr Valentine) submitted that the bikini worn by the complainant was capable of being 'underwear' within the meaning of section 68 of the 2003 Act. He invited us to consider the example of a woman who, having been on a beach wearing a bikini, put on her clothes over her swimsuit and then went to a shop to try on a new dress. He suggested that, if in the changing room she was surreptitiously photographed while wearing her bikini, it would be absurd to say that she was not wearing underwear. Mr Simpson argued that the legislation was clearly aimed at the protection of a person from unwanted observation for sexual gratification when that person was in a place where she would reasonably expect privacy and was scantily clad. He contended therefore that the expression 'underwear' in section 68 should be given a wider interpretation than its literal meaning might imply.

[11] By way of alternative, Mr Simpson argued that the magistrate ought to have allowed the trial to proceed on the basis that there was a clear *prima facie* case against the defendant of having attempted to commit the offence charged. On this point counsel challenged the magistrate's exclusive concentration on the video evidence, pointing out that the complainant had said in her unchallenged police statement that she had removed her bikini bottoms and had put her underwear on when she noticed "a person holding a black Samsung slide-up mobile phone to the left side of my cubicle. The phone and his hand were inside my cubicle. The rear of the camera was facing up, that is the side that pictures or videos are taken from, so that I could not see what was on the screen". The only possible inference to be drawn from this, Mr Simpson said, was that the defendant was attempting to record the complainant at a time when she was removing her bikini bottoms and putting on her underwear but his telephone was not in a position to capture the image of this taking place. Alternatively, it was argued that, even if the complainant was not wearing underwear at the time that the defendant attempted to film her, he was still guilty of attempting to do so. If it was in fact impossible for him to film the complainant in the required state of undress he was nonetheless criminally liable for attempting to do so.

[12] For the defendant Mr Taylor Campbell submitted that the word 'underwear' should be given its ordinary and natural meaning. This was distinct from swimwear. It was to be assumed, he argued, that Parliament had deliberately chosen the word from all possible alternatives. There was no warrant to extend the area of criminality to the use of swimwear.

[13] Mr Campbell accepted that there can be a conviction of an attempt to commit an offence which is in fact impossible. He also accepted that there was evidence of the defendant having done acts which were more than preparatory to the offence of voyeurism. As he put it, the only room for manoeuvre that he had on this issue was that some doubt might attach to the defendant's intention in putting the telephone into the adjoining cubicle. It would depend on the position of the person in that cubicle, the angle at which the camera was held and a myriad of other imponderable circumstances. He suggested that this court should uphold the magistrate's decision because there was a reasonable possibility that the defendant did not intend to film the complainant in a state of undress. One may observe immediately, of course, that this was not the basis on which the magistrate refused to allow the case to proceed on the issue of attempt to commit the offence.

Discussion

[14] In its ordinary connotation underwear means clothing worn next to the skin under outer clothes. Swimwear is not in its normal function underwear. But it seems to us clear that some items of swimwear could be worn as underwear. A woman may choose to wear, for instance, bikini bottoms as underpants. While wearing them for this purpose we are satisfied that if a woman were to be filmed in circumstances where she was entitled to expect privacy, this would constitute an offence under section 67.

[15] At the time that the video images of the complainant were recorded on the defendant's telephone, she was wearing bikini bottoms but it is clear that they were not worn as underwear because her statement makes clear that she changed from these to her usual underpants. Although, on one view, the complainant's evidence could be considered to show that she must have been changing from her bikini to her underwear at a time when the defendant was attempting to film her, this is not unquestionably established. The defendant removed the camera from the cubicle after the initial filming and viewed the images that he had recorded. It is at least possible that the young woman changed from the swimwear to her underwear while this was happening.

[16] On the evidence available to the magistrate, therefore, we consider that she was entitled to conclude that the only images actually recorded by the defendant were of the complainant clad in her bikini. The evidence clearly indicates that throughout the time that she was wearing the bikini, the complainant wore it as swimwear rather than as underwear. We have concluded, therefore, that the magistrate cannot be criticised for having granted a direction of no case to answer on the principal charge of voyeurism. The statutory requirements to ground that charge were not present because the injured party was not wearing underwear at the time she was actually filmed. We do not consider that the meaning of underwear can be extended

to cover swimwear worn on any occasion. For the reasons that we have given, we consider that if it is worn as underwear and for that purpose, it will qualify as underwear within the terms of the Act. Otherwise it does not.

[17] Article 60 (2) of the Magistrates' Courts (Northern Ireland) Order 1981 provides: -

> "Where a person is charged before a magistrates' court with a summary offence, and it appears to the court that the person charged did not commit the offence charged but that he was guilty of attempting to commit that offence, the court may convict him of attempting to commit that offence and may punish him in the same manner as if he has been charged with attempting to commit that offence."

[18] It is now well settled that an attempt to commit an offence that cannot in fact be perpetrated is nevertheless a criminal attempt – see *R v Shivpuri* [1987] AC 1 where it was held that on the true construction of section 1 of the Criminal Attempts Act 1981 the *actus reus* of the statutory offence of attempt required an act which was more than merely preparatory to the commission of an offence and which the defendant did with the intention of committing an offence, notwithstanding that the commission of the actual offence was, on the true facts, impossible. The relevant parts of section 1 of the 1981 Act are: -

> "(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.
>
> (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible."

[19] These provisions are replicated in article 3 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and, as we have said above, Mr Campbell on behalf of the defendant accepted that it was not necessary for the prosecution to prove in this case that the recording of the complainant while she was in fact doing a private act was possible in order to establish that there had been an attempt to commit the offence.

[20] In explaining her decision that there was not *prima facie* evidence of an attempt to commit the offence of voyeurism, the magistrate said this in paragraph 9 of the case stated: -

> "I further concluded that it was not open to me to consider whether or not the defendant's conduct amounted to an attempt to commit the substantive offence. To hold that there was a *prima facie* case of an attempt to commit the substantive offence I would have had to find that there was an intention on the part of the defendant to record the injured party doing a private act as defined by section 68 of the 2003 Act. While I was satisfied that the prosecution had made out a *prima facie* case that the defendant made the recording of the injured party intentionally and for his own sexual gratification, I could not conclude that there was any evidence of the actual state of dress or undress of the injured party that the defendant intended to record. On the facts of this case in the absence of actual evidence that the injured party was in a state of dress or undress consistent with the performance of a private act at the time when the recording was taken or attempted to be taken, I did not consider that it was open to me to consider the case as a case of attempting to commit an offence under section 67 of the Sexual Offences Act 2003."

[21] It appears to us that once the magistrate had concluded that there was *prima facie* evidence that the defendant had intentionally recorded the injured party and that he did so for the purpose of his own sexual gratification, a finding that there was sufficient evidence to allow the case to proceed as an attempt to commit the offence was inescapable. If the defendant made the recording for his own sexual gratification, one may reasonably ask what his intention could possibly be other than to film the complainant in a state of undress. Quite apart from the circumstances in which the telephone was inserted into the cubicle that the injured party occupied, he himself had said during police interview that he believed that it was a woman in the adjoining cubicle and that he took a recording and looked at it and then put his phone back into the cubicle again for the purposes of further recording. His expressed reason for this was that one "would expect to see someone else there and there was the chance that they could be changing".

[22] The absence of evidence that the complainant was in fact undressed is neither here nor there. If it was the defendant's intention to record the

complainant in a state of undress (and we consider that the evidence unmistakably indicated that such was his intention) and if, as his counsel wisely accepted, by inserting the telephone under the cubicle divide with the recording facility activated, he had done an act which was more than merely preparatory to the commission of an offence, the fact that actual recording of the complainant in a state of undress could not be made does not make his endeavour to do so any less of an attempt to commit the offence. There was therefore an undeniable *prima facie* case against him of attempted voyeurism. The magistrate ought to have allowed the case to proceed on that charge.

Conclusions

[23] The case stated posed two questions for the opinion of this court: -

> "(1) Was I correct in law to hold that a person dressed in a bikini does not fall within the definition of 'doing a private act' as defined by section 68 of the Sexual Offences Act 2003?
>
> (2) If so, was I entitled in law to conclude on the facts as found by me that there was insufficient reliable evidence to found an alternative charge of attempting to commit an offence under section 67 of the Sexual Offences Act 2003?"

[24] We will amend these questions to read as follows: -

> "1. If a person is wearing swimwear other than as underwear, is she doing a private act as that is defined in section 68 of the Sexual Offences Act 2003?
>
> 2. Was I correct in law in concluding on the facts as found by me that there was not *prima facie* evidence of the defendant having attempted to commit an offence under section 67 of the 2003 Act?"

[25] We answer both of the reformulated questions 'No' and remit the matter to the magistrate with a direction that she find that there was a *prima facie* case against the defendant of attempted voyeurism contrary to section 67 of the 2003 Act and to proceed thereafter according to law.