

Neutral Citation [2007] NICA 31 (3)

Ref: **COGC5885**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **10/09/2007**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

POLICE SERVICE OF NORTHERN IRELAND

Complainant/Respondent;

and

MARK McCLURE

Defendant/Appellant.

Before: KERR LCJ, HIGGINS LJ and COGHLIN J

COGHLIN J

[1] This is an appeal by way of case stated from a decision of Mrs. Kelly RM sitting at Belfast Magistrates' Court on 9 March 2006 as a result of which the appellant, Mark McClure, was convicted of the offence of possession of offensive weapons in a public place contrary to Article 22(1) of the Public Order (Northern Ireland) Order 1987 ("the Order"). Article 22(1) provides as follows:

"A person who, without lawful authority or reasonable excuse (proof of which lies on him), has with him in any public place any offensive weapon shall be guilty of an offence."

[2] Article 2(2) of the Order defines public place as "any street, road or highway and any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission."

[3] The facts are clearly set out in the helpful case stated and the question posed by the Magistrate for the opinion of the Court of Appeal was:

“Was I wrong in law to determine that the area outside 6 Dundela Court, Belfast was a public place for the purposes of Article 22(1) of the Public Order (Northern Ireland) Order 1987?”

[4] The Magistrate described the area onto which the appellant had stepped when it was alleged that he had committed the relevant offence in the following terms:

“Defence counsel produced a set of agreed photographs showing the area to the front of 6 Dundela Court. They depicted a front door in a block of houses with a paved area immediately outside the said door. Every so often a permanent bollard had been erected between this paved area and the pavement bounding the main road. These bollards appeared to continue across the front of the other properties in the block. Aside from this there was nothing by way of notice or otherwise to suggest that members of the public could not walk on the inside of the line of the bollards. There was nothing between the bollards to prevent access. Defence argued that the area outside the front door was a private area and not an area to which the public had access and, accordingly, the prosecution had failed to prove the necessary ingredient of the offence. On the face of the photographs I was satisfied that there was nothing to prevent a member of the public walking along the inside of the line of bollards and in the absence of evidence from the appellant or anyone else on his behalf I was satisfied that the area in question was a public area and so convicted.”

[5] One original photograph was produced for the inspection of the Court of Appeal by Mr O’Donohue QC for the appellant. The photograph depicts Dundela Court as an area lying between the edge of the public footpath in Dundela Street and the front doors of houses in Dundela Court. The area is surfaced with a type of ornamental tile or block that clearly distinguishes it from the pavement. In addition a bollard is shown, presumably one of the bollards to which the R.M. referred as present across the block of properties. No evidence seems to have been given about the purpose or function of these bollards but it is possible that they may have been located to prevent unauthorised parking. The photograph, which depicts the area outside the appellant’s home, also shows the presence of a long box for the display of

plants lying along the border between the paved area and the pavement together with a number of large ornamental flower barrels and a sapling protected by a metal cage. On the gable wall to the left of the plaintiff's dwelling two public utility boxes are located. Apart from these objects there is nothing to prevent a pedestrian walking directly from the footpath onto the surface of the area immediately outside the houses in Dundela Court.

[6] In reaching her decision the Resident Magistrate clearly placed weight upon the fact that there was nothing to prevent a member of the public walking along the inside of the bollards. While this may be a relevant factor in determining whether or not an area falls within Article 22(1), I do not think that it can be determinative. She did not make any specific finding as to whether she considered the relevant area to fall within the first or second limb of Article 2(2) nor was any evidence tendered by the prosecution on this point other than the agreed photographs.

[7] A number of authorities were opened by the appellant including *Harriot v DPP* [2005] EWHC 965 (admin). In that case Sedley LJ had to deal with a somewhat different definition of the term 'public place' which is contained in section 139(7) of the Criminal Justice Act 1988, the equivalent legislation in England and Wales, and applies to:

".....any place to which at the material time the public have or are permitted access, whether on payment or otherwise."

Unlike the Northern Ireland legislation this definition provides that the simple fact of access is sufficient. It is rather difficult to be sure about the precise nature of the area in question in that case since Sedley LJ referred to it as a "forecourt" whereas Mitting J described it as a "garden." It seems clear that the area in question was divided from the public highway by a low wall about one metre high but, in my opinion, I do not think that the presence or absence of a dividing structure can be determinative – see *Thomas v Dando* [1951] 2 K.B. 620 – although it may well be relevant, depending upon the circumstances.

[8] In *Harriot v DPP* Sedley LJ stated that the principle which ran through all the relevant authorities was that land might be either on the face of it public or on the face of it private land but that the ostensibly private character of a piece of land might be negated by evidence that the general public did have access to it. He made it clear that, in this context the term 'general public' was a reference to any one who wanted to have access as opposed to lawful visitors including not only residents and staff at the hostel but anyone with lawful business who had implied permission to go to the door.

[9] On the basis of the photograph produced to this court I was of the view that the character of Dundela Court was on the face of it private. The surface

of the area was quite clearly structurally differentiated from the public pavement and the positioning of the bollards and decorative plantars prima facie incompatible with one of the fundamental characteristics of most streets, roads or highways which is the right of the public to enjoy generally unimpeded passage. In fact it seemed to me that the photograph provided strong prima facie evidence that Dundela Court was constructed and decorated for the benefit of the residents rather than the general public. It is rather difficult to understand the function and positioning of the various plantars if Dundela Court was intended to form part of the public pavement or footway. The photographs were the only evidence available to the RM in relation to this issue. In such circumstances, even after allowing for a degree of discretion, I am unable to accept that she could have legitimately reached the conclusion that Dundela Court was a " street, road or highway."

[10] To be fair, I think that it is most unlikely that the RM did so conclude and she did not make any such specific finding. In my view, her reference to the absence of any notice or obstruction preventing access to the area within the bollards is a clear indication that she relied upon the second part of article 2(2), namely that it constituted a place to which the public had access as of right or by virtue of express or implied permission. However, once the possibility that it formed part of the street road or highway had been excluded, it seems to me that there was no evidence of the public enjoying a right to have access to this area, whether as a consequence of payment or otherwise nor was there any evidence to support a right enjoyed by express permission. An inference of implied permission might be drawn, in appropriate circumstances, from regular use without objection but no such evidence seems to have been called on behalf of the prosecution and, in my opinion the simple absence of signs or notices or a barrier of sufficient dimensions to effectively keep the public out was not enough to establish this essential element in a criminal case beyond a reasonable doubt. The case might well have been presented differently by the prosecution and it is not difficult to have considerable sympathy for the R.M. who does not seem to have received the benefit of the detailed and carefully researched submissions advanced before this court.

(11) Accordingly I would answer the question in the case stated "Yes" and allow the appeal.