Neutral Citation no. [2007] NICA 31 (1) | *Ref:* **KERF5925**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **6/9/07**

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

KERR LCJ

[1] This is an appeal by way of case stated from a decision of Bernadette Kelly RM sitting at Belfast Magistrates' Court, convicting the appellant, Mark McClure, of possession of offensive weapons in a public place, contrary to article 22 (1) of the Public Order (Northern Ireland) Order 1987 which provides: -

> "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] For the purposes of the statute, public place is defined (in article 2 (2) of the Order) 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 magistrate found that at 12.55am on 6 February 2005 the appellant had emerged from a house at 6, Dundela Court, Belfast brandishing two knives. Police officers called on him to put the knives down and warned that CS gas would be used if he did not. The appellant said, 'Come on ahead' and the police therefore discharged gas canisters in his direction. He retreated into the house and was eventually found in the sitting room where he was arrested and cautioned. The knives were recovered.

[4] The magistrate described the area on to which the appellant had stepped on leaving the front door of 6 Dundela Court and her conclusions on the nature of the area in paragraph 5 of the case stated: -

> "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 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 a 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] The question posed in the case stated was whether the magistrate was 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 1987 Order.

[6] One original photograph was produced for the inspection of this court by Mr O'Donoghue QC for the appellant. This photograph was one of a set that had been examined by the magistrate. A number of significant features can be readily seen. The paved area immediately outside 6, Dundela Court provides access to a number of houses in the immediate vicinity, two of which can be seen in the photograph. This area is contiguous to a public footpath.

Two public utility boxes are located on the gable end of a wall of the house other than No 6 and access to these is also via the paved area. There is nothing to prevent a pedestrian from moving unimpeded and directly from the public footpath on to the paved area. The single bollard visible in the photograph and several plant pots would impede – but not necessarily prevent – access to the paved area by some vehicles. A tree has been planted within the paved area and this is protected by an encircling railing such as are commonly erected by local authorities. The only means of gaining access to the front doors of the houses is across the paved area.

[7] Mr O'Donoghue submitted that there was no evidence available to the magistrate to support the conclusion that the paved area was a "street, road or highway". Nor had any evidence been given that the public or any section of it had access as of right or by virtue of express or implied permission. The magistrate had, he argued, impermissibly assumed that, because there was nothing to impede access, this was a public place. He suggested that the area was private and that, in the absence of evidence of user by the public, it was not open to the magistrate to infer that the public had permission to use it.

[8] For the prosecution Mr Valentine argued that, in the absence of evidence pointing to the area being in private ownership, the magistrate was entitled to conclude that it was a public street. It gave access to a number of houses; the public street adjacent to the area was Dundela Street, suggesting that Dundela Court was also a public thoroughfare; this was plainly an area that was freely accessible to any pedestrian and none of the customary appurtenances of private ownership such as a gate or wall or other means of restricting entry or demarcating any separation from the indisputably public street, Dundela Street, was present.

[9] Mr O'Donoghue referred the court to the judgment of Bridge LJ in *Llewellyn Edwards and Eric Roberts* (1978) 67 Cr.App.R. 228, 231, where he said:-

> "... it seems to this Court that it is quite impossible to hold that the expression 'public place' can be construed as extending to the front gardens of private premises simply on the footing on which the learned judge relied that members of the public have an implied licence to pass through those private gardens in order to obtain access to the front doors of private premises if they have some lawful occasion for so doing. It is not *qua* members of the public that they thus enjoy access, it is *qua* lawful visitors."

[10] Counsel suggested that the same process of reasoning should be applied to the circumstances of the present case. I do not agree. It appears to me that

the two situations are entirely different. In the *Edwards and Roberts* case the court was dealing with an area of defined curtilage which was self evidently in private ownership. It was not in the least surprising that the court concluded in that case that access to the area was on sufferance of the owners and that those who were not owners came on to the land as visitors. In the present case the area adjoins an undeniably public highway; access to it is not only unrestricted, it cannot be prevented by residents and all who wish to approach the houses or simply to pass them by may do so without hindrance.

[11] Mr O'Donoghue also relied on the decision of the High Court in England in *Harriot v DPP* [2005] EWHC 965 (Admin). In that case the appellant returned to the bail hostel where he had been living for some six months to discover that his room had been burgled. He put a bread knife and a kitchen knife in his pockets and proceeded to the reception area of the hostel where an altercation took place. In consequence, he was locked out of the hostel. The appellant was first observed by two police officers about halfway along a path between the hostel building and the wall marking the front boundary of the premises**.** Access to the hostel from the street was unimpeded, whether physically or by displayed notices. It was held that the open area between the bail hostel building and the road was, on the face of it, part of private premises. Accordingly, the area between the bail hostel and the street had to be regarded in law as a place to which, absent evidence to the contrary, the general public did not have access. Mr O'Donoghue drew our particular attention to the following passage from the judgment of Sedley LJ at paragraph [13]: -

> "There was no evidence before the District Judge that public access to it was either invited or tolerated. The District Judge placed weight upon the undoubted fact that access from the street was unimpeded, whether physically or by displayed notices. But this is, in my judgment, not enough to turn a private place into a place to which the public has access."

[12] It was suggested that there was likewise no evidence before the resident magistrate in the present case that access by the public was permitted or encouraged. But in the *Harriot* case the court had concluded that the area was private. That it did so was to be expected because, although access was not impeded, a wall marked the boundary of the premises and a path led to the front door. This was plainly a private area. In the present case, however, no such features are present. Another passage from Sedley LJ's judgment is, in my opinion, instructive in contrasting the different nature of public and private areas. At paragraph [10] he said "land may be either on the face of it public or on the face of it private land: a street would be an example of the former, the front garden or front area of a private dwelling an example of the latter". It seems to me that the area in question in this appeal partakes far

more obviously of the former than the latter. I am reinforced in that view by Mitting J's description of the area in his judgment in *Harriot* where he said, "[a] private garden, clearly delimited as such, is not a place to which the public have access merely because public access is not physically obstructed by a fence, wall or gate, or legally prohibited by a notice or by any combination of them".

[13] In any event, in making a judgment as to whether a particular area is to be regarded as public or private land, the tribunal of fact enjoys an area of discretion with which an appellate court should be slow to interfere. Sedley LJ put it thus in paragraph [12]: -

> "… it is plain that a public place is not a term of legal art and that the statutory definition with which we are concerned here is illustrative and not exhaustive. It follows that the tribunal of fact has a certain margin of judgment within which to reach a conclusion as to whether the offence charged occurred in a public place."

[14] The magistrate was required in the present case to address as a first issue the question whether this was a public place. Mr O'Donoghue has suggested that she reached the conclusion that it was a public place for the singular reason that there was no physical barrier preventing members of the public from walking in the area within the bollards but it does not appear to me that the magistrate is to be taken as having relied exclusively on that consideration. The fact that people could walk unrestricted in the area is unquestionably relevant to the issue whether it is a public area. It may not be determinative of the issue but it is undoubtedly a useful starting point. The magistrate was right, in my opinion, to have regard to that factor. But, merely because she referred expressly to that feature of the evidence, it is not to be presumed that she left out of account other obviously relevant factors, such as the fact that there was no means (for owners and others alike) to gain access to the houses other than across the paved area.

[15] The court's conclusion in the *Harriot* case (that evidence was required to show that the public used the area) was reached in an entirely different context from that in which the magistrate arrived at her decision in the present case. In *Harriot* the court had concluded that the area was private. It was then exercised by the absence of evidence of the circumstances in which the public were permitted access to the private area. By contrast, here the magistrate was concerned with whether the unrestricted access to an area that, apart from a difference in road surface, was not otherwise distinguishable from the public street, identified it as a public area.

[16] In my judgment the magistrate was plainly entitled to reach the conclusion on the available evidence that this was *ex facie* a public place. Indeed, I go further and say that, on the evidence placed before her, I would likewise have decided that it was a public place. The area abutted several houses; access to those houses, whether by residents or others, could only be gained by means of the paved area; that area was entirely open to pedestrians who chose to use it; there was no indication of private ownership beyond the presence of a number of plant pots; there was certainly no sign that it was owned by a particular individual; at least some of the street furniture appeared to have been erected by a public authority; and there was no direct evidence available to the magistrate that it was privately owned.

[17] On the last of these points, Mr O'Donoghue suggested that the magistrate ought not to have referred to the failure of the appellant to give evidence but, for my part, I think that there is nothing in that argument. The magistrate's allusion to the fact that neither the appellant nor anyone else had given evidence constituted no more than a statement that nothing had been adduced to dispel the clear indication that the area was a public place. In the context of that debate she was clearly entitled to have regard to the absence of any direct evidence that the area was privately owned.

[18] Mr O'Donoghue criticised the magistrate for her avowed failure to state whether her conclusion that the area came within the definition of article 2 (2) was based on the area being a street, road or highway or because she had reached the view that the public had access to a private area as a matter of right or by implied permission. It appears to me to be clear, however, that the magistrate's decision was firmly based on the first of these. She did not, I hazard, discuss the question of authorisation or consent on the part of the notional owners for the prosaic but obvious reason that this was not in issue before her.

[19] As matters stand, however, I would have concluded that, if this area could not be said to constitute a public place within the first limb of article 2 (2), it would certainly be inferable that the public had implied permission to enter the area either to gain access to the houses which it lay alongside or to pass by. The entire configuration of the area would admit no other conclusion, in my opinion. The public could come and go as they pleased, without let or hindrance. In so far as it could possibly be said that the householders could have restricted access to the paved area (and, in my judgment all the evidence points unmistakably to the opposite conclusion) the fact that there was no restriction on the public's access to or passage over the paved area points clearly to an implied permission for all members of the public to use the area.

[20] I would answer the question posed in the case stated 'No' and dismiss the appeal.