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Judgment: approved by the Court for handing down
*(subject to editorial corrections)** | *Delivered:* **02/12/19**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY CASE STATED FROM THE MAGISTRATES' COURT FOR THE DIVISION OF FERMANAGH AND TYRONE

THE QUEEN

–v-

SEAN MICHAEL PEARSON

Before: Morgan LCJ and McCloskey LJ

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] The Defendant (hereinafter "*the Respondent*") was acquitted of the offence of disorderly behaviour by a district judge for the Division of Fermanagh and Tyrone, acceding to an application that he had no case to answer. Arising therefrom, the judge concerned has stated a case for determination by this court. The second offence for which the Respondent was prosecuted, namely resisting a police officer in the execution of duty, also embraced by the judge's direction of no case to answer, while formally included in the case stated has not featured in this appeal.

The Case Stated

[2] The case stated is in the following terms:

> *"1. On the 20th day of September 2018 a Complaint was preferred by the appellant against the respondent claiming that he*
>
> *(a) That you on 01/09/2018, used disorderly behaviour in a public place, Asda car park, Dromore Road,*

Omagh, contrary to Article 18(1)(a) of the Public Order (Northern Ireland) Order 1987.

(b) *That you on the 01/09/2018 resisted Constable Monteith a constable in the due execution of his duty contrary to Section 66(1) of the Police (Northern Ireland) Act 1998.*

2. *I heard the said complaint on the 13th day of November 2018 and found the following facts:-*

(a) *On Saturday the 1st September 2018 Constables Mark Monteith and Carson Hill were on duty and in uniform on mobile patrol travelling on the Dromore Road, Omagh, towards the town.*

(b) *At approximately 09:45 hours on the above date the officers observed a white Volkswagen Golf, bearing vehicle registration number GU12 WDX. Constable Monteith signalled this vehicle to stop by employing the police vehicle blue lights and sirens, as he wished to speak to the occupants under Section 26 of The Justice and Security Act 2007.*

(c) *The white Volkswagen Golf turned into the Asda Car Park on the Dromore Road and the police car followed. The respondent alighted from the front passenger seat of the Volkswagen Golf and walked away from the vehicle. Constable Monteith followed the respondent.*

(d) *Constable Monteith informed the respondent that he was being detained for the purpose of a search under Article 24 Schedule 3 of the Justice and Security Act 2007. The respondent began to shout at Constable Monteith and told him to "Fuck off". Constable Monteith warned the respondent about his language to which the respondent responded in an aggressive manner stating "What are you going to do about it?"*

(e) *There were a number of people in the area, to include children.*

(f) *The respondent then walked back towards his vehicle and said "Fat useless cunt". Constable Monteith then arrested the respondent at 09.55 hours for disorderly behaviour and cautioned him.*

The respondent's reply after caution was "What are you doing?"

(g) No search of either the defendant or the vehicle was carried out.

(h) The car park at Asda, Dromore Road, Omagh has signs erected at the entrance to the car park and throughout the car park itself which state that the car park is private property for use by customers only.

3. It was contended by the respondent at the close of the prosecution case that the charges should be dismissed because there was no case to answer, pursuant to the first limb of the case of R v Galbraith [1981] 2 All ER 1060 . The respondent continued that the signs clearly stated that the area in question was private property for use of customers only and, as such, was not a public place per se. The case of Police service of Northern Ireland v Mark McClure [2007] NICA 31 concerned a portion of a pavement fronting Dundela Street in Belfast. The Court of Appeal in that case held that once the possibility that the area formed part of the street, road or highway had been excluded, the prosecution have to adduce evidence that the general public had access as of right or by virtue of express or implied permission. The respondent concluded their submissions by pointing out that this was not part of a street, road or highway. It was, therefore, up to the prosecution to adduce evidence to show that the area in question was a public place to which the general public had access, as of right or by virtue of express or implied permission. They had not done so and as disorderly behaviour could only be committed in a public place the prosecution had failed to prove an essential element of the charge.

4. The appellant did not make any submissions in response to the respondent's submissions at all; effectively conceding the point.

5. 1 was referred to the following cases:-
R v Galbraith [1981] 2 All ER 1060;
Police Service of Northern Ireland v Mark McClure [2007] NICA 31.

6. I was of opinion that the locus was not a street, road or highway. The signage precluded a finding that the area

was a public place, per se. It was classified by the owners/occupiers as private property for the use of customers only. I was bound by the decision of Police Service of Northern Ireland v Mark McClure. The appellant required to adduce evidence that the general public had access to the locus as of right or by virtue of express or implied permission and had not done so, despite being aware, in advance of the hearing date that this was the issue upon which the charges were being contested and accordingly I acceded to the respondent's application and dismissed both charges.

QUESTION

7. The question for the opinion of the Court of Appeal is:

Was I wrong in law to dismiss the charge of disorderly behaviour because no evidence had been adduced that the locus in which the offending behaviour occurred was a public place?"

Relevant Statutory Provisions

[3] Article 18(1)(a) of the Public Order (NI) Order 1987 provides:

*"**18.** – (1) A person who in any public place uses –*

(a) . . . disorderly behaviour; or

(b) behaviour whereby a breach of the peace is likely to be occasioned,

shall be guilty of an offence……."

There is a definition of "*public place*", per Article 2:

"'Public place' means 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."

It is to be noted that this definition has two limbs, separated by the word "and".

The Hearing

[4] The Public Prosecution Service ("*PPS*"), in the usual way, served documentary evidence on the defence in advance of the hearing. This consisted largely of the witness statements of the two police officers involved in the events. These statements, and others, were read to the court with the agreement of the defence.

[5] The statement of the first police constable describes the locus as the "*Asda car park*". The Respondent parked his vehicle there and alighted. He refused to be searched under the relevant statutory provision and swore at the officer. With regard to topography, the officer's statement includes the following:

> "*There were a large number of people in the area along with children present who were using a nearby supermarket.*"

Both police statements confirm that the Respondent had driven into this area from the adjoining public thoroughfare, the Dromore Road. The incident occurred at around 09.45 hours on a Saturday morning.

[6] The statement of the second police constable contains the following passage:

> "*At this time I observed a lot of people in the public car park. There were approximately ten that were in earshot of* [the Respondent] *shouting and swearing. They were approximately 10 – 15 metres away*".

The prosecution evidence was completed by two short formal statements proving a CCTV recording of the incident. This evidence does not feature in the case stated and was not ventilated before this court.

[7] Neither the Respondent nor any witness on his behalf testified at the hearing. Two photographs prepared on behalf of the Respondent were presented in evidence with the agreement of the PPS. These depict two signs erected in the area of the subject car park. The first is in the following terms:

> "*PARKING RESTRICTIONS APPLY. For use by customers only. This car park is private property, see Blue Badge and Parent and Child signage in car park for terms and conditions*".

The second of the photographs depicts a familiar disabled driver's symbol and includes the following:

> "*DISABLED PARKING …*
>
> *This is an attendant and/or camera controlled car park which may include taking photographs of vehicles. Parking conditions apply 24/7. Please be aware that vehicles failing to display a valid blue badge will be subject to a parking charge notice*".

(The remainder of the text is indecipherable)

The Decision in PSNI v McClure

[8] In *PSNI v McClure* [2007] NICA 31, the offence of disorderly behaviour was alleged to have been committed by the defendant at a location described as "*the area outside 6 Dundela Court, Belfast*". The defendant was convicted. An appeal by case stated to this court ensued. The judgment of this court, at [5], describes the location of 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 … surfaced with a type of ornamental tile or block that clearly distinguishes it from the pavement. In addition a bollard is shown … [and] … a long box for the display of plants 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*".

This is followed by the observation:

> "*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.*"

[9] The Court of Appeal allowed the defendant's appeal. The reasoning of the court is contained in [10]. Having referred to the Resident Magistrate's finding that the location was a place to which the public had access as of right or by virtue of express or implied permission, Coghlin J continued:

> "*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.*"

We shall explain the significance and status of this decision *infra*.

Other Decided Cases

[10] The attention of the court was drawn to certain cases from the jurisdiction of England and Wales: ***Harriot v DPP*** [2005] EWHC 965 (Admin), ***May v DPP*** [2005] WHC 1280 (Admin), ***DPP v Vivier*** [1991] 4 All ER 18 and ***Richardson v DPP*** [2018] EWHC 428. As observed by this court in ***McClure***, these decisions are of limited assistance at most as they concern a statutory provision, section 139(7) of the Criminal Justice Act 1988, couched in terms which differ from Article 22(1) of the 1987 Order. The essence of the English statutory definition is that a public place is one to which "*…. the public have or are permitted access …*" The contrast with the Northern Ireland statutory definition is that the latter requires such access to be "*as of right or by virtue of express or implied permission*". In short, the definition in our legislation is more precise and exacting.

The Arguments Summarised

[11] The kernel of the argument of Mr Philip Henry (of counsel) on behalf of the PPS emerges in the following passage in his skeleton argument:

> "*The* [District Judge] *erred in law by interpreting* ***McClure*** *to mean that once the signs were erected stating it was private property the locus could no longer be a public place ….*"

The elaboration of Mr Henry's central submission in oral argument was, in substance, that the District Judge had failed to consider and apply the several ingredients of the statutory definition of "*public place*". The main riposte of Mr Craig Patton (of counsel) on behalf of the Defendant was formulated on the agreed basis that the prosecution case was founded on the second limb of the definition of "*public place*". The argument advanced was that the evidence adduced by the prosecution was insufficient to establish beyond reasonable doubt that the public or a section of the public had access to the relevant locus as of right or by virtue of express or implied permission.

Our Conclusions

[12] We consider that the submission of Mr Patton accurately formulates the central question which had to be determined by the District Judge, namely: had the prosecution proved beyond reasonable doubt that the locus of the alleged offence of disorderly behaviour was, in the statutory language, "[a] *place to which at the material time the public or any section of the public* [had on the relevant date] *access, on payment or otherwise, as of right or by virtue of express or implied permission*". It is appropriate to observe that in every case this will be an intensely fact sensitive question. It will be determined by reference to the onus and standard of proof applicable in every criminal case. This exercise will require consideration of all material evidence, namely the evidence bearing on this issue. The issue for the District Judge in every case will be the sufficiency and quality of the evidence adduced.

[13] Whatever the district judge's conclusion on the issue of "*public place"* in prosecutions for disorderly behaviour every appeal by case stated to this court will normally entail consideration of whether there is any demonstrable error of law in the judge's interpretation and application of the relevant statutory provisions. This court will frequently search for indications of any erroneous self-direction, whether express or to be inferred. This court typically will also consider whether the judge's decision is based upon a correct appreciation and application of the burden and standard of proof. These are the touchstones which habitually (though not exhaustively) arise in appeals by case stated to this court in criminal cases.

[14] On the one hand, in isolation the District Judge's evaluation of the photographic evidence of the signs displayed in the supermarket car park is superficially sustainable. It involves no erroneous self-direction or misunderstanding or misinterpretation of the statutory provisions. In the passage in question the judge rehearsed impeccably the statutory definition and the onus of proof. The evaluation of the photographic evidence was a matter for the judge and not this court. This was a fact sensitive issue.

[15] On the other hand, however, it was incumbent on the judge to engage with the statutory definition of "public place" in its entirety. We consider that the judge failed to do so. First, the judge failed to examine the "express permission" element of the statutory definition. This element was especially apposite given the evidence relating to the activities and presence of the Respondent, the two police officers and the other members of the public and the relevant vehicle movements, juxtaposed with the first item of photographic evidence (*supra*). Second, the judge gave no consideration to the alternative statutory criterion of "*implied permission*. " Third, the judge failed to consider the "*section of the public"* element of the statutory definition. Each of these constitutes an issue which the judge was obliged to examine and to

follow by appropriate findings of fact, which could include reasonable inferences from the evidence adduced.

[16] It was further incumbent on the judge to engage with all aspects of the evidence bearing on the various elements of the statutory definition. The terms of the case stated, with their heavy emphasis on the photographic evidence, to the exclusion of other material evidence – see [15] - indicate a separate failure in this regard.

[17] The wise words of Lord MacDermott LCJ in *Montgomery v Loney* [1959] NI 171 at 186 resonate in the present appeal and could usefully be considered in other prosecutions of this *genre*:

> "*Generally, the decision* (on whether the locus is a public place) *will be a matter of fact and degree, but whether the material for consideration suffices to support one view or the other is a matter of law*".

And see further, on this discrete issue of law, *DPP v Vivier* [1991] 4 ALL ER 18 at 21.

[18] We further consider that the judge erred in law in expressing herself to be "*bound*" by the decision of this court in *McClure.* Neither the decision in ***McClure*** nor, for that matter, this decision promulgates any new legal principle or clarification of existing principle or the construction of any relevant statutory provision. Both decisions, at heart, turn on burden and standard of proof and sufficiency of the prosecution evidence. Both are fact sensitive decisions. Neither ranks as a precedent decision. It follows that if there are any superficial similarities between the factual framework of future prosecutions involving the issue of "*public place*" (which extends beyond disorderly behaviour prosecutions), such cases will not be resolved by resort to either ***McClure*** or this decision. They will, rather, be decided by the court of trial's evaluation of the sufficiency and cogency of the evidence adduced applying the criminal onus and standard of proof.

[19] Finally, the impugned decision of the District Judge was one acceding to an application for a direction that the Respondent had no case to answer on the disorderly behaviour charge. As explained in Valentine, Criminal Procedure in Northern Ireland (2nd ed) at 12.84, the District Judge had to be satisfied that there were no circumstances in which a conviction could properly be made. The judge did not advert to this test, a self – evidently elevated one. For the reasons elaborated above, we conclude that the no case to answer direction/decision in the present case is unsustainable in law.

[20] One word of guidance is appropriate. The statutory definition of "public place" in the Public Order (NI) Order 1987 embraces multiple

possibilities. These should be to the forefront of the rationale of every decision to prosecute. Ideally, that element of the statutory definition upon which the prosecution rests in a given case should be clearly specified in the summons or charge sheet and should be specified at the opening of the substantive hearing. It appears to this court that this should not be unduly onerous and will positively promote the defendant's right to a fair trial. It is undesirable that the defence and the court should be left in the dark as regards this obviously important issue. Uncertainty, imprecision and conjecture are antithetical to a fair trial.

Disposal

[21] We consider that the question posed in the case stated should be rephrased in the following fuller terms:

> "*Was I wrong in law to dismiss the charge of disorderly behaviour on the ground that the prosecution had failed to adduce sufficient evidence to prove beyond reasonable doubt that the location of the alleged offence was a place to which at the material time the public or any section of the public had access, on payment or otherwise, as of right or by virtue of express or implied permission?*"

For the reasons given, the answer is "*Yes*". The appeal is, therefore, allowed. Remittal of the case to a differently constituted District Judge's Court for a fresh hearing is the appropriate disposal.