CO/6980/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 17 November 2011

B e f o r e:

MR JUSTICE BEAN

Between:
DENZEL CASSIUS HARVEY

Appellant

v

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

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Mr S Natas (instructed by Irvine Thanvi Natas) appeared on behalf of the **Appellant**

Mr B Leonard (instructed by DPP) appeared on behalf of the **Respondent**

J U D G M E N T

MR JUSTICE BEAN: On 10 March 2009, at Bradstock Road, London E9, PC Challis and PCSO Mr Mcllvaney were looking for people who, the police had been informed, might be in possession of cannabis. They found one young woman and three young men, including the appellant, Denzel Cassius Harvey, outside a block of flats. The officers decided to search the three men. Mr Harvey objected and said, "Fuck this man, I ain't been smoking nothing". PC Challis told him that if he continued to swear he would be arrested for an offence under section 5 of the Public Order Act 1986. PC Challis searched the appellant but found no drugs, whereupon the appellant said, "Told you, you won't find fuck all". The officer again warned him about swearing and proceeded to search the other two men. A group of young people had gathered around them. The officer next used his radio to carry out a name search to see if any of the group was wanted by the police. He asked the appellant if he had a middle name and the appellant replied, "No, I've already fucking told you so". The officer arrested Mr Harvey for the offence under section 5.

A struggle ensued during which PC Challis alleged that the appellant assaulted him. The appellant was in due course charged, firstly with assault on a police officer in the execution of his duty, and secondly with using threatening, abusive or insulting words or behaviour contrary to section 5 of the 1986 Act. He was convicted on the latter charge and fined £50. He was acquitted on the charge of assault. I mention it as part of the history because some people learning of this appeal by way of case stated from the conviction might wonder whether it was a wise use of scarce resources for him to have been prosecuted under section 5 in the first place, had that charge stood alone; but it came before the magistrates accompanying the much more serious one of assault on the constable.

The prosecution relied on the three incidents of swearing in the exchanges to which I have referred. Such language is familiar to most courts. A search on the legal database Lexis for cases in which either the word "fuck" or the word "fucking" appear produces 2,124 results. Even allowing for duplication in the way that cases are reported and transcribed, or for cases which appear in more than one report, the total is still very large. Fortunately Mr Natas for the appellant, and Mr Leonard for the respondent, in their concise and helpful submissions, only found it

necessary to cite six of the many cases which bear on this vexed topic. They show a clear line of authority.

It is important to note that before the magistrates neither officer gave evidence of having been harassed, alarmed or distressed. The nearest anyone came to this is that PC Challis was asked if the word "fuck" justified an arrest and replied that it depends on the circumstances, but here it was said loudly and clearly. Nor was there evidence of anyone else having been harassed, alarmed or distressed. In paragraph 5 of the case stated, the justices wrote:

> "We were of the opinion that the offence under Section 5 of the Public Order Act 1986 had been proved. We believed that this was a public area in the middle of a block of flats: there were people around who do not need to hear frightening and abusive words issuing from a young man. It was not only the words but the tone in which they were said which causes alarm."

As Mr Leonard observed in his submissions for the prosecution, the last two sentences are ungrammatical, and the mixture of the present tense and past tense makes it difficult to say whether these were findings of facts or general propositions.

The justices went on to state three questions for the opinion of this court:

> "(i) As part of the reason for the decision that Denzel Harvey had committed the offence alleged

> under Section 5 of the Public Order Act 1986, were the justices entitled to conclude that the use by the Appellant of the words "Fuck this man. I ain't been smoking nothing", and "Told you you wouldn't find fuck all", and "No. I've fucking told you no", amounted to threatening, abusive or insulting words and/or behaviour or disorderly conduct?
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> "(ii) As part of the reason for their said decision were the justices entitled to conclude that either Police Constable Challis or Police Community Support officer Mcllvaney were likely to have been caused harassment, alarm or distress as a result of the use by the Appellant of the said words referred to in (i) above, in the absence of any specific evidence that either officer felt threatened by the Appellant's conduct or felt harassed, alarmed or distressed.
>
> "(iii) As part of the reason for their said decision were the justices entitled to include that the bystanders who witnessed the incident or who may have been in the open area of the flats or resident in their homes were persons likely to have been caused harassment, alarm or distress, in the absence of any specific evidence that such result was likely." [emphasis added]

A number of cases establish that expletives such as "fuck" or "fucking" are potentially abusive words, whether the addressee is a police officer or a member of the public. But Parliament has not made it an offence to swear in public as such. The elements of the offence under section 5 (1)(a) of the Public Order Act 1986 (so far as it relates to words) are that the defendant used threatening, abusive or insulting words within the hearing of someone else who was caused or was likely to be caused harassment, alarm or distress by hearing them. In DPP v Orum [1989] 88 Cr App

Rep 261 Glidewell LJ said:

> "Very frequently words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom. It may well be that, in appropriate circumstances, justices will decide (indeed they might decide in the present case) as a question of fact that the words and behaviour were not likely in all the circumstances to cause harassment, alarm or distress to either of the police officers. That is a question of fact for the justices to be decided in all the circumstances, the time, the place, the nature of the words used, who the police officers are, and so on. "

To like effect is the judgment of Fulford J, sitting in the Divisional Court, in Southard v DPP [2006] EWHC 3449, when he said that whether the person addressed is a police officer or a member of the public, the words "fuck you" or "fuck off" are potentially abusive. Mr Leonard accepts that there is some distinction between saying "fuck you" or "fuck off" and the way in which the expletives were used in the present case, though he submits that the difference is not decisive, and I agree.

The observations in Southard should be seen in the context of the facts of that case. The defendant's brother Adam was stopped and searched by a police officer, PC Richards. While this search was going on the defendant, Andrew Southard, approached and swore at PC Richards on two occasions, interfering with the search. Andrew was

cautioned after the first swearing incident and arrested after the second. The officer, during cross-examination, described the situation as follows:

> "I felt threatened by [his] behaviour ... by his actions, by his manner. He was very agitated. He was verbal……It was his whole course of conduct, his whole manner. He was very verbal. He was very agitated. He had become very aggressive".

The Crown Court, from whom the appeal by case stated was brought, expressed their conclusions in the case thus:

> "The court was of the view that PC Richards was -- just -- caused harassment, alarm or distress thereby and dismissed the appeal."

When they were asked to give reasons, the presiding judge said this:

> "We then considered whether in the particular circumstances, those words were likely to cause harassment, alarm or distress. In respect to alarm or distress our conclusion is no. Harassment, well considering the fact that PC Richards was having to deal with the search of another particular defendant notwithstanding the fact that the closest you got was some three metres away, we do take the view that that was likely to amount to harassment. It follows therefore that we have taken the view that your behaviour, not by much, crosses the line and that the offence has been made out."

It is in that context that Fulford J said at paragraph 19 that the expletives which Mr Southard had used were potentially abusive, and went on:

> "Frequently though they may be used these days, we have not yet reached the stage where a court is required to conclude that those words are of such little significance that they no longer constitute abuse. Questions of context and circumstance may affect the court's ultimate conclusion as to whether, in an individual case, they are abusive, but on these facts, during an incident in which the appellant was strongly opposing the detention of his brother, they were delivered in a situation which sustainably led the court to conclude that they were abusive. I stress that the decision on an issue of this kind will always be fact dependent."

In R(R) v DPP [2006] EWHC Admin it was held that “distress” requires real emotional disturbance or upset, and that while the degree of such disturbance or upset need not be grave, it should not be trivialised.

The next element of the offence is that the threatening, abusive or insulting words must have been spoken within the hearing of someone who is likely to be alarmed or distressed or harassed thereby. It is not necessary to adduce evidence from bystanders to say that they were in fact alarmed or distressed, or even that they heard what was said; this can be inferred. In Holloway v DPP [2004] EWHC 2621 (Admin), at paragraph 32, Collins J said:

> "... I do not believe it to be necessary that the prosecution call a person or persons who can say

> that they did see what was happening. The evidence must be sufficient, so that the court can draw the inference, having regard to the criminal standard, that what he was doing was visible to or audible to people who were in the vicinity at the relevant time."

The final case to which I was referred was Taylor v DPP [2006] EWHC 1202 (Admin), another decision of a Divisional Court. The appellant was charged with the use of threatening, abusive and insulting words or behaviour, racially aggravated, contrary to section 51(a) of the 1986 Act, but in the aggravated form, contrary to section 31(1)(c) of the Crime and Disorder Act 1988. The district judge found that the appellant had shouted at police officers words such as "fucking nigger" and "fucking coon bitch", along with a good deal of other bad language. He was of the opinion that not only two policemen, but an ambulance crew, a fellow occupant of the premises at which the appellant was found, and several neighbours were all near enough to hear this racially abusive language. The judge also found that anybody hearing that sort of language, black or white, would be likely to be caused distress. I have no difficulty in agreeing with that case -- apart from the fact that it is binding on me. The conclusion is obvious from the facts. The racially abusive words used were ones which the district judge was entitled to hold would be distressing to anyone

who heard them.

It is now time to answer the questions posed for the opinion of the court by the justices. In answer to the first question: as part of the reasons for their decision, they were entitled to conclude that the use by the appellant of the expletives I have outlined, a total of three times, amounted to abusive or insulting words or behaviour. But I find that there was no evidence in this case on which they could have concluded that either of the police officers had been caused or was likely to have been caused harassment, alarm or distress as a result of the use of those words.

Where witnesses have given oral evidence of an incident which forms the basis of a charge under section 5 of the Public Order Act 1986, but have said nothing and been asked nothing about experiencing harassment, alarm or distress, there is no sound basis for the court to reach that conclusion for itself. This is particularly so in the case of police officers because, as Glidewell LJ observed in Orum, they hear such words all too frequently as part of their job. This is not to say that such words are incapable of causing police officers to experience alarm, distress or harassment. It depends, as the court said in Orum and Southard, on the facts; but where a witness has been silent on the point it is wrong to draw inferences.

The only possible candidates for being the victims of harassment, alarm or distress, other than PC Challis and PCSO Mcllvaney, were the group of youngsters who gathered round during the exchanges, according to the case statement, or other neighbours. As to the group of young people, it may be inferred that they were interested in what was going on and perhaps even that they were sympathetic to the appellant and his companions rather than the police. There was, after all, a scuffle which was the subject of the charge on which Mr Harvey was acquitted. But it is wrong to infer in the absence of evidence from any of them that a group of young people who were in the vicinity would obviously have experienced alarm or distress at hearing these rather commonplace swear words used (in contrast to the far more offensive terms used in the case of Taylor v DPP).

As for neighbours and people in the flats, it is not enough simply to say that this incident took place outside a block of flats and that "there were people around who do not need to hear frightening and abusive words issuing from a young man". There was no evidence that anybody other than the group of young people was within earshot. If there had been evidence, for example, of apparently frightened neighbours leaning out of windows or of similar passers-by within

earshot, that might have formed the basis of a finding that such persons were caused alarm or distress. But there was no such specific evidence in this case.

My answer to both the justices' second and third questions is therefore “no”. It follows that the appeal succeeds and Mr Harvey's conviction must be quashed.