Privy Council Appeal No. 15 of 1974

Edward Francis Nakhla – – – – – – *Appellant*

v.

Her Majesty The Queen – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JANUARY 1975

Present at the Hearing:

THE LORD CHANCELLOR
LORD MORRIS OF BORTH-Y-GEST
LORD WILBERFORCE
LORD KILBRANDON
LORD EDMUND-DAVIES

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal by leave from the judgment of the Court of Appeal of New Zealand, delivered on the 12th October 1973, dismissing the appeal of the appellant against his conviction in the Supreme Court of New Zealand. He was convicted on the 8th August 1973 after trial upon indictment before the Chief Justice and a jury.

The charge which was preferred against the appellant was laid under section 52 (1) (*j*) of the Police Offences Act 1927. The indictment set out that the appellant " on or about 2nd May 1973 at Wellington is deemed to have been a rogue and vagabond in that being a suspected person he did frequent a public place namely Oriental Terrace with a felonious intent ". He pleaded Not Guilty. The jury found him Guilty. He was sentenced to a term of nine months' imprisonment.

The main question raised in the appeal concerns the meaning, in its context in section 52 of the Act, of the word " frequents ". On behalf of the appellant it was contended that there should be a re-examination and a re-appraisal of the judgment of the Court of Appeal in New Zealand in 1935 in the case of *R. v. Child* ([1935] N.Z.L.R. 186). Furthermore it was contended that having regard to the particular facts of the present case the jury were not correctly directed as to the law and that the conviction ought not to stand. On behalf of the Crown it was contended that the direction given to the jury was in accordance with law and that *R. v. Child* was correctly decided and further that in any event as that decision has long stood undisturbed its authority ought not now to be in any way challenged.

Section 52 of the Police Offences Act 1927 is in Part II of the Act. That part deals with varieties of conduct and behaviour classed as Indecency and Vagrancy. Sections 49–51 deal with "Idle and Disorderly Persons". Section 52 deals with "Rogues and Vagabonds" and sets out ten categories of persons who are to be "deemed" to be rogues and vagabonds and to be liable to imprisonment. The last four of these thus prescribe a person who is so to be deemed:

"(*g*) Who is armed with any gun, pistol, sword, bludgeon, or other offensive weapon or instrument with a felonious intent; or

(*h*) Who is found by night having his face blackened, or wearing felt or other slippers, or is dressed or otherwise disguised with a felonious intent; or

(*i*) Who is found by night without lawful excuse (the proof of which excuse shall be on him) in or on any building or in any enclosed yard, garden, or area, or in or on board any ship, launch, dredge, yacht, boat, or other vessel; or

(*j*) Who, being a suspected person or reputed thief, frequents any port or harbour, river, canal, navigable stream, dock or basin, or any quay or wharf, or any other public place, or any house, building, or other place adjacent to any such port or harbour, river, canal, navigable stream, dock or basin, or quay or wharf, with a felonious intent."

A person "found offending" may be apprehended.

A precursor of section 52 may be seen in section 4 (12) of the Vagrancy Act 1866. That Act was in line (though with some differences) with the English Vagrancy Act of 1824. In New Zealand in between 1866 and 1927 there was the Act of 1884. Since 1927 there have been various amendments to the Act of 1927 but at no time has the word "loiterer" been in terms introduced. No change has been made comparable to that introduced in England by section 7 of the Penal Servitude Act 1891 which amended earlier provisions relating to "frequenting" so as to make them apply also to "loitering."

It will be seen that on a charge under section 52 (1) (*j*) proof is necessary that the person charged was a suspected person or reputed thief and that he frequented one of the specified places with a felonious intent. Their Lordships have not been concerned with any question as to whether the appellant was a suspected person nor as to whether he had a felonious intent nor with the direction given to the jury in regard to those questions. What has been in issue has been whether the appellant was properly found to have frequented Oriental Terrace and whether the direction given to the jury concerning frequenting was in law correct and adequate.

The facts and circumstances giving rise to the charge must be set out. During a period of two weeks in April 1973 there were four burglaries of jewellers' shops in Wellington. Many rings and watches and items of jewellery were stolen. A youth named Wolzak was arrested on the 1st May 1973. He acknowledged that he was guilty of the burglaries. When he was arrested he told the police that a man named Basil Spartalis had been with him on the occasion of the first three burglaries. He said that he (Wolzak) received a few dollars for the part that he played and that he had allowed Spartalis to take the stolen articles.

On the day following (*i.e.* on the 2nd May 1973) the police went to premises where Spartalis was living with a Miss McIntyre. Spartalis and Miss McIntyre were then taken to the Police Station. As a result of what Spartalis said to the police it was considered that the appellant was a

likely or potential receiver of stolen property. Thereupon with the co-operation of Spartalis and Miss McIntyre certain arrangements were made and certain events took place as part of what was described in the Summing Up and again in the judgment of the Court of Appeal as having been a " Police trap ".

The sequence of events was as follows. To a telephone in the Police Station there was affixed a suction type microphone which was plugged in to a tape recorder. Then, at about 1.15 p.m., Spartalis was encouraged and invited to telephone from the Police Station to the appellant. Spartalis did so. He told the appellant that he had watches and jewels and rings that he would like to dispose of to the appellant and which he would like the appellant to see and that he needed money. At the conclusion of the conversation it was arranged that Spartalis and the appellant would meet the following night.

The plan appeared to have met with some success. The tape of the recorder was then played back. When this was done there was dismay when it was found that there had been some faulty assembling of the apparatus. As a consequence though there was a recording of what Spartalis had said to the appellant there was no recording of what the appellant had said to Spartalis.

Those concerned with the plan were not deterred. It was found that the apparatus could be correctly assembled and it was arranged that Spartalis should try again. So Spartalis telephoned the appellant a second time. To account for the fact that the further call was being made not long after the first Spartalis invented the story that he had not been able previously to speak freely because his father had been with him " in the shop ". In the ensuing conversation Spartalis said that he had about 400 rings and 100 watches and that he would sell them very cheaply as he needed money. This time the conversation that took place was duly recorded. It need not be fully described. Though the appellant was scornful of the nature of some of the property and indicated that it would have no appeal for him Spartalis was sufficiently pressing as to succeed in arranging that the two men would meet that evening. It was arranged that the appellant would arrive in his car at about 7.00 p.m. outside the fish shop where Spartalis worked.

The plan proceeded. The appellant duly arrived in his car at the appointed place. Spartalis then joined him. They drove to Oriental Parade. Nearby was a Valiant car in which was Miss McIntyre. She had two plastic bags containing jewellery. She had collected these from the place where she was living. She also had with her a tape recorder which the Police had entrusted to her and in the use of which the Police had instructed her. The appellant and Spartalis left the former's car and got into the Valiant car. Miss McIntyre (who at the correct moment switched on the tape recorder) was introduced. There followed a conversation. It was duly recorded on the tape recorder.

The details of the conversation need not be recounted. It related to articles which clearly were stolen. The appellant indicated in forceful language and with a measure of remonstrance that the articles were of little interest to him. From his point of view an acceptance of them, even at some minimal price agreeable to Spartalis who desperately needed money, would have no attraction. Possession of them would present difficulties of disposal which would not exist if the stolen articles had alternatively consisted of or included precious stones such as diamonds. There was not however a complete and final rejection by the appellant of any possibility of concluding some arrangement. Matters were left that Spartalis would get in touch with the appellant by telephone the next day.

The length of time of the conversation was assessed by Counsel as having been either from ten to fifteen minutes or from fifteen to twenty minutes. While it proceeded but all unknown to the unsuspecting appellant the car was kept under observation by the Police. When the conversation ended the appellant got out of the Valiant car in order to get back into his own car. He was surrounded by Police and was arrested.

Later that evening he was charged with receiving stolen goods. Subsequently when depositions were taken the charge of frequenting was added. When subsequently an indictment was drawn no charge of receiving was made. The question which now arises is whether on the direction as to the law which was given the conviction of the appellant can stand. Accepting for present purposes that there was sufficient and satisfactory proof and correct direction in regard to the appellant having been a " suspected person " and having had a " felonious intent " did he on the 2nd May 1973 " frequent " Oriental Terrace?

In his careful Summing-Up to the jury which had to cover many matters the learned Chief Justice dealt with the question of frequenting in the following way. In one passage he said:

> " Then there is the word ' frequent '. It does not mean that he must be proved to be there frequently. Action amounts to frequenting a place if it is proved that a man was in that place with a felonious intent. That is, if he is there long enough to exhibit a felonious intent then that can amount to frequenting."

He referred fully to the facts and in reference to them while very fairly pointing out that the Police in the interests of the whole community had a duty to detect people who commit crime and to bring them to justice he said:

> " Now gentlemen there is no point in mixing words about it, it was a police trap. The prosecution has not attempted to deny that and the defence, understandably, and they are quite entitled to do it, have made as much as they can of the fact. Spartalis was used to get the accused into the car at Oriental Terrace where the tape recording was made, and that tape recording, as you may think, is the key to this case, the most important part of the prosecution evidence."

Later in reference to the three elements of the charge the learned Chief Justice said:

> " The second is frequenting a public place, Oriental Terrace. Well, you have the tape recording which was made from Miss McIntyre's handbag, and you have the evidence of Detective Burt who says he saw the accused go into Spartalis's fish shop and come out with him and drive to Oriental Terrace, and that Burt followed them there and kept an eye on the Valiant car and saw the accused there. And, of course, you have the evidence of Sgt. Stretton who approached him, that is Nakhla, at his car just after he came out of the other car. Well you may think on that, and there is no challenge to it, the fact that he was in Oriental Terrace at that time is established. It is for you to judge."

At the end of the Summing-Up learned Counsel appearing for the appellant invited the learned Chief Justice to deal further with certain points which included the direction on frequenting and respectfully submitted that being in Oriental Terrace would not amount to frequenting nor would being there long enough to exhibit a felonious intent. The further direction then given to the jury was as follows:

> " Gentlemen, on the first point raised by Mr. Gazley, as you have just heard him say there is no dispute that he was in Oriental

> Terrace on the night in question. You are entitled to find that he was frequenting a place if you consider it is proved that he was in that place with a felonious intent."

The directions given received the full approbation of the Court of Appeal.

From a reference to the above passages the point of law clearly emerges whether it is right to say that frequenting denotes no more than merely being at a place. Provided that a person is proved to have been a suspected person or reputed thief and to have been in one of the places referred to in the section (*e.g.* a public place) and to have been there just long enough to show that he was there "with" a felonious intent (*e.g.* an intent to receive stolen goods) is he "frequenting" that place?

Their Lordships think that in its context in the section under consideration the word "frequent" denotes something more than mere physical presence. That is strongly indicated by the fact that whereas in section 52 (1) (*h*) and (*i*) the reference is to a person "who is found," the reference in (*j*) is to a person who frequents. More is suggested than simply being found in a place. If the legislature had intended to provide that a suspected person or reputed thief who had a felonious intent was to be deemed to be a rogue or vagabond and liable to imprisonment whenever he was in a public place or in any of the places designated in the section it would have been easy to find words to express so draconian an intention.

That the word "frequents" denotes more than mere physical presence is further indicated by the words enacted in section 52 (1) (*j*). If someone who was a "suspected person or reputed thief" lived in a "house, building, or other place adjacent to" a port or harbour and if he was waiting at home till darkness fell before setting out on a burglarious expedition it would be surprising if it were held that he was "frequenting" within the meaning of the section.

Their Lordships are of the opinion that the mere physical presence in a place (as described in the section) of a suspected person or reputed thief who, while in the place, is proved to have had a felonious intent, is not by itself sufficient to constitute frequenting. As the jury were told that they could find that the appellant was "frequenting" Oriental Terrace if it was proved that he was "in" Oriental Terrace with a felonious intent their Lordships feel impelled to the conclusion that the conviction cannot stand.

The word "frequents" must clearly be considered in its context. In general parlance the expression "to frequent" is probably understood as meaning "to visit often" or "to resort to habitually". From this it was contended that there cannot be a frequenting of a place unless there is at least more than one separate visit to the place. Accordingly it was contended that there could not have been frequenting in the present case. It was said that no prosecution can be brought in respect of the first visit by a suspected person with a felonious intent and further that visits must be clearly separated by some appropriate time factor such as that which distinguishes one day from another.

For reasons which must be amplified their Lordships do not consider that the matter can be stated on such simple and clear cut lines.

In the absence of any statutory definition of "frequenting" it is helpful to examine reported decisions in order to see the conclusions reached by various courts in regard to various situations. But the decisions are of course decisions in regard to the application of the

relevant statutory words to the particular facts. The cases must be looked at to see whether some pattern of interpretation emerges and whether guide lines are helpfully illustrated.

R. v. Child [1935] N.Z.L.R. 186 was a case stated for the opinion of the Court of Appeal. The charge against Child was that on the 16th August 1934 being a suspected person he frequented a public place "to wit a telephone cabinet situated in Old Mill Road and Old Mill Road adjacent thereto with a felonious intent." Child was convicted. Three questions were reserved for the decision of the Court of Appeal. The first was whether the telephone-box in question was a public place within the meaning of section 52 (1) (*j*). Having regard to the extended interpretation of "public place" provided by section 40 of the Act it was held that it was. The third question was whether certain evidence had been properly admitted. The second question was: "Did the accused's movements as disclosed by the evidence constitute 'frequenting'?" To that question the answer of the Court of Appeal was: "The accused's movements as disclosed by the evidence warranted a finding by the jury of 'frequenting'."

It becomes essential therefore to know what the evidence was. The direction to the jury was simply that they were "entitled" to draw the inference from the evidence that the accused was frequenting a public place. The evidence that had been given was stated by Reed J. in giving the judgment of the Court to have been as follows:—

"(*a*) That at a quarter to one in the morning the accused was seen to walk from the immediate vicinity of a telephone-box (the witness could not swear that he actually came out of it), went to the edge of the footpath, and looked up and down the street.

(*b*) That at ten minutes past one—twenty-five minutes later—the same man, the accused, was seen by the same witness in the telephone-box. The witnesses concealed themselves, and the accused came to the door and looked up and down and withdrew inside. Three minutes later the two witnesses—a police constable and a telephone inquiry officer—went to the telephone-box and accosted the accused.

(*c*) The money receptacle in the telephone-box had been tampered with and injured. The accused declined to be searched, and it was proposed to take him to the police-station. Whilst the inquiry agent ran to get his motor-car, the accused succeeded in breaking away from the constable and was not recaptured till next day."

The contention was advanced in the Court of Appeal that the evidence did not justify a finding of frequenting and that in order so to find there must be evidence of more than one visit. That contention did not succeed.

The judgment of the Court of Appeal contained a helpful review of certain decided cases. The actual decision (the correctness of which their Lordships do not wish to question) was that on the facts of the case a jury was "entitled" to find or was "warranted" in finding that there had been frequenting. There was a recognition of the fact that what amounts to "frequenting" must depend upon the circumstances of each particular case. There was recognition of the fact that it cannot categorically be laid down that before there can be a finding of frequenting more than one "visit" to the place must be established. If a "visit" is referred to, the question is at once raised as to what this means. If someone calls at the house of a friend for a brief conversation it could be called a visit. If someone used a telephone kiosk for

the purpose of speaking on the telephone he would have visited the kiosk. But more complicated situations than these, where more in the way of presence, or activity, is involved, require further consideration.

In the judgment in *Child's* case there was a reference to *Airton v. Scott* (1909) 25 T.L.R. 250. That case is only briefly reported. There had been a conviction of the appellant, under a by-law, of frequenting a public place for the purpose of betting. The appellant had attended at an athletic ground. In the short report Lord Alverstone was quoted as saying:—

> "As to the word 'frequent', it was plain that being long enough on the premises to effect the particular object aimed at was 'frequenting'".

That sentence was quoted in the judgment in *Child's* case. Without having fuller knowledge of the facts or a fuller report of the judgment some caution in placing emphasis on that one sentence is necessary.

From the report of the case in 100 L.T. 393 it appears that the athletic ground was open to the public (upon payment for admission) on certain days and that on one of these Airton went to the ground: he plainly appeared to be using the ground for the purpose of betting: both before and after a police officer spoke to him he stood on a step or footboard: he was helped by a clerk or assistant: people came to him and money passed and tickets were given. The facts clearly show that there was very much more than merely being in a place. The charge was that Airton did "frequent and use" a public place. Lord Alverstone referred to an unreported case in which a man who had been in a street for some fifteen minutes during which he had walked up and down in a space of some 15–20 yards and had had betting transactions with eleven different men had been held to have frequented for the purpose of betting.

What Lord Alverstone is reported as having said in *Airton v. Scott* must be considered in the context of and in the setting of the facts of that case. As a result of its having been quoted in *Child's* case overmuch significance has perhaps been attached to it.

The passage seems also considerably to have influenced North J. in *Goundry v. Police* in [1954] N.Z.L.R. 692. He pointed out that Reed J. had cited the passage from *Airton v. Scott* with apparent approval. Had North J. not felt bound by authority there are indications in his judgment that he would have given effect to the view which he expressed when he said:—

> "There is no doubt, I think, that the primary meaning of the word 'frequent' in this connection is to pay repeated visits to the same locality, or, at very least, to loiter or linger in a locality for a period of time. This was the view originally taken by a Divisional Court in *Clark v. The Queen* [1884] 14 Q.B.D. 92".

In that part of their judgment in the present case which dealt with frequenting the Court of Appeal gave their approval to the direction

> "that action amounts to frequenting a place if it is proved that a man was in that place with a felonious intent, that is, if he is there long enough to exhibit a felonious intent, then that can amount to frequenting".

Having referred to *Clark v. The Queen* (*supra*), *Airton v. Scott* (*supra*), *Clark v. Taylor* [1948] W.N. 410, *R. v. Child* (*supra*) and *Goundry v. Police* (*supra*), the Court in their judgment said:—

> " We think that the direction of the Chief Justice in the present case conformed with these authorities, and plainly the appellant was in Oriental Parade sufficiently to achieve the felonious objective alleged if he was so minded ".

Though apparent authority for this approach may be found in *Airton v. Scott* their Lordships consider that some words from the report of that case are much too literally and extensively applied if it is said that merely being long enough in a place to exhibit or to achieve a felonious intent or object amounts to frequenting.

A number of other cases were cited in argument which, in the light of the previous discussion, it is not necessary to examine in detail. Some of them are betting cases which, in the nature of things, involve more than mere physical presence at a point of time, or cases where there was presence for some identifiable criminal purpose of a continuous nature (cf. *Clark v. Taylor* (*supra*)). Of three Scottish cases referred to (*Linton v. Clark* (1887) 25 Sc.L.R. 29, *Lang v. Walker* (1902) 40 Sc.L.R. 284, *Davis v. Jeans* (1904) 41 Sc.L.R. 426) two were betting cases, and the third, *Linton v. Clark*, really involved a question of degree. Two cases from Australia, *Toomey v. Williams* (1898) 8 Q.L.J. 148 and *Clark v. Kelly* (1964) 80 W.N. (N.S.W.) 759, did not raise any question of principle. More significant is the early English case of *Clark v. The Queen* [1884] 14 Q.B.D. 92, since it shows that merely being in a place does not amount to frequenting. Hawkins J. said (see p. 102) that the mere finding upon one occasion of a man in a public street under circumstances leading to the conclusion that he intended to commit a felony was not sufficient to amount to frequenting: but he pointed out that what amounts to frequenting must depend upon the circumstances of each particular case. He said that one visit to a street does not amount to it.

So far as the principle on which cases turn can be crystallised in a single expression, it seems difficult to improve on the words of Lord Hewart C.J. in *Rawlings v. Smith* [1938] 1 K.B. 675, 686, where he said that frequenting involved

> " the notion of something which to some degree, at any rate, is continuous or repeated."

Their Lordships' view of the matter is that, without seeking to define or to limit the circumstances in which " frequency " may arise, they may include or involve enquiry as to the reason why a person goes to or is at or remains at a place, the time during which he is at or near to the place, the nature of the place and its significance or relevance in regard to the purpose or object with which he goes to the place, the events taking place while he is there and in particular the extent of his movements and the nature of his behaviour and his continuing or recurrent activities.

For the reasons which they have set out their Lordships consider that the facts in this case did not warrant a finding that the appellant had " frequented ". Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the conviction quashed.

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In the Privy Council

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