THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 69

Record No: 2018/325

President
McCarthy J.
Donnelly J.

BETWEEN/

TEZAUR BITA

APPLICANT/APPELLANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS,
THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on the 13th day of March, 2020

1. This is an appeal of the High Court's refusal to grant the applicant/appellant ("the appellant") relief arising from his prosecution under s.5 of the Summary Jurisdiction (Ireland) Amendment Act, 1871 (hereinafter, "the 1871 Act"). Among the reliefs he claimed was an order preventing his further prosecution on that charge and a declaration of unconstitutionality of the said s. 5 of the 1871 Act. The High Court (Ní Raifeartaigh J.) refused all relief sought in a judgment reported at *Bita v. DPP* [2018] IEHC 385.

2. At the Old Nangor Road, Dublin at approximately 3:45am on the 27th August, 2015 the appellant exited his vehicle and urinated. After an exchange with a member of An Garda Síochána, the appellant was arrested under s.107 of the Road Traffic Act, 1961. Following a search in custody, he was found to be in possession of a small amount of cocaine.

3. The appellant was subsequently charged with an offence contrary to s. 3 of the Misuse of Drugs Act, 1977 which is not relevant to these proceedings, and an offence contrary to s.5 of the 1871 Act. The particulars of the s. 5 charge were that he "committed an act contrary to public decency to wit: urinating in public". The appellant highlights the discrepancy between the *précis* of evidence compiled by a member of An Garda Síochána, in which it is stated that he began to "urinate in bushes" and that same member's affidavit in which he stated that the appellant urinated on the footpath.

4. Section 5 of the 1871 Act provides:-

> "Any person who within the limits of the police district of Dublin Metropolis, in any thoroughfare or public place, shall wilfully and indecently expose his person or commit any act contrary to public decency, shall be liable, on conviction before any justice or justices sitting in any court within the police district of Dublin Metropolis,

a fine not exceeding five pounds, or, at the discretion of such justice or justices, to be imprisoned for any period not exceeding two calendar months."

5. The appellant sought leave to apply for judicial review, seeking a prohibition of his trial on the grounds that s.5 of the 1871 Act was unconstitutional. Leave was refused by order dated the 1st February, 2016 by Humphreys J., primarily on *locus standi* grounds and prematurity.

6. The appellant appealed that refusal to the Court of Appeal. The appeal was adjourned to allow for the lodging of a note authenticated by Humphreys J. who provided a written judgment outlining his reasons for refusing leave cited as *Bita v. DPP* [2016] IEHC 288.

7. On the 25th October, 2016, the Court of Appeal, delivering an *ex tempore* judgment allowed the appeal and granted leave. The matter then came on for substantive hearing in the High Court before Ní Raifeartaigh J.

The Judgment of the High Court

8. The first issue was a procedural one as to whether the appellant had locus standi to bring the proceedings by way of judicial review. The trial judge in holding that the appellant had *locus standi* to bring the proceedings, stated that the appellant's case was not based on hypothetical scenarios but rather, on the basis of the facts before the court, his argument was that the offence was so vague that the appellant could not have known in advance that his actions fell within the remit of the s.5 offence. She did remark that there was a disproportionality in bringing judicial review proceedings to achieve a result which might be achieved more speedily and at much less expense in the District Court.

9. The substantive issue before the High Court was whether s.5 of the 1871 Act is inconsistent with the Constitution by reason of being excessively vague. In considering that question, the trial judge found that the core issue before her was whether there is an essential difference between the term "indecent" as it appears in indictable offences of this nature and the phrase "contrary to public decency" as it appears in the s.5 offence. The trial judge held that in effect these were the same concepts of decency or indecency in other criminal offences, the constitutionality of which, has been upheld in *Douglas v. DPP (No.2)* [2017] IEHC 248 and *PP v. Judges of the Circuit Court* [2017] IECA 82. The trial judge held that she could not see a difference of substance between "indecent" and "contrary to decency". Moreover, the inclusion of the word "public" within the phrase "contrary to public decency" did not make any difference. The trial judge stated, that the word "indecent" in offences such as indecent assault is interpreted to mean indecent by the standards of an ordinary or reasonable member of the public. She emphasised that this is intended to import an objective standard into the offence. Accordingly, the High Court refused the reliefs sought by the appellant and held that s.5 of the 1871 Act was not repugnant to the Constitution.

Grounds of Appeal

10. The appellant lodged five grounds of appeal, however it was clear from the oral submissions, that the issue before this Court is whether "contrary to public decency" is unconstitutional by reason of being too vague and within that framework, whether

decency in and of itself is merely the converse to indecency, a well-defined term within the legal field. Although the finding that the appellant had *locus standi* was not cross-appealed, the respondent maintained in submissions that the appellant must advance his appeal on the basis of his own factual circumstances and may not seek to impugn the provision by reference to the alleged effect on other third parties. The respondent submitted that by virtue of the *jus tertii* rule, a plaintiff cannot seek a general review of the legislation under attack but may only rely upon such arguments as bear on his own personal circumstances.

The Appeal

11. In putting forward the argument that s.5 of the 1871 Act is unconstitutional for being too vague, the appellant referred to general principles that criminal law must be certain and specific; the difference between indecency and contrary to public decency; and that the offence is one in which updated judicial interpretation could not prevent its arbitrary application. I will briefly summarise each of the appellant's arguments in turn while also synopsising the respondent's position in relation to same.

Criminal Law must be Certain and Specific

12. The appellant opened well known caselaw which reiterated the fundamental doctrine that the criminal law must be certain and specific. In the case of *King v. Attorney General* [1981] I.R. 233, the Supreme Court held that s.4 of the Vagrancy Act, 1824 was struck down as being inconsistent with the Constitution. The appellant relied on the quote of Kenny J. in which he stated:-

> *"[C]itizens may be convicted only of offences which have been specified with precision by judges who made the common law, or of offences which created by statute, are expressed without ambiguity."*

13. This principle was also expressed by Hardiman J. in The *People v. Cagney* [2008] 2 I.R. 111 where he stated that "*a citizen should know or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful*". The appellant submitted to the Court that any act contrary to public decency cannot be precisely defined as it is inherently subjective.

14. The respondent, while agreeing with the general principle that criminal offences must be specified with precision, referred to *Douglas v. DPP (No.2)* and *PP v. Judges of the Circuit Court* to support the view that that there are a range of offences that do not lend themselves to absolute precision but which are still sufficiency precise to be constitutional. The respondent relied on Hogan J. in *Douglas v. DPP* in which he stated at para. 26 of his judgment:-

> *"absolute precision is not possible. One may therefore have perfectly general laws which can be adapted to new sets of facts within certain defined parameters provided that the laws themselves articulate clear and objective standards."*

15. The respondent relied on ECHR jurisprudence to show that while an offence must be clearly defined, absolute certainty is unattainable. The respondent opened *Aydin v. Germany* (2013) 57 E.H.R.R. 35 in which the Court stated:-

> *"Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which to a greater or lesser extent are vague and whose interpretation and application are a question of practice."*

16. The respondent submitted that this principle was also invoked by McDermott J. in *Douglas v. DPP (No.2)* in which he stated:-

> *"There are however, as is clear from numerous authorities, including most recently, PP […], many offences which may be committed in widely differing ways. These do not lend themselves to very precise definition which might, if insisted upon, preclude the criminalisation of obnoxious public behaviour to an extent that would bring the criminal law into disrepute with the community for whom its protection exists."*
>
> *[…]*
>
> *"one of those instances when it becomes necessary because of the wide-ranging nature of human behaviour to define an offence which a lesser degree of certainty than might be appropriate in other types of behaviour but that does not necessarily give rise to constitutional infirmity*
>
> *[….]*
>
> *"[M]athematical certainty is not either required or possible in respect of framing the offence. As is clear from much of the case law, the core concept of indecency is one which is well understood but it is not possible to define every conceivable act or omission that is prohibited by the offence."*

17. The respondent also relied on the English case of *Knuller (Publishing, Printing and Promotions) Ltd. v. DPP* [1973] A.C. 435 to show that there is a recognition within the law that sufficient warning as to future conduct is not equivalent to the manner of committing an offence being expressly proscribed.

Contrary to Public Decency, a sufficiently flexible law or too vague to be constitutional?

18. After outlining the current jurisprudence surrounding the dichotomy between vague offences and offences which are sufficiently flexible to encompass changing social mores, counsel on both sides entered into discussion as to the category into which s.5 of the 1871 Act fell.

19. The appellant submitted that "any act contrary to public decency" refers to any conduct that might be considered as immoral, improper or unacceptable in some way. Counsel argued that it is incorrect to equate "contrary to public decency", with indecent acts. In our present law, decency is not sufficiently defined. When one reviews offences related to indecency, it is used in the form of an adjective: "indecent assault" and "indecent exposure". However, if it was indecency *simpliciter*, that would be too vague to constitute a valid offence. The s.5 offence merely states that the "act" must be contrary to public decency. It is open to the prosecution to allege that any act is contrary to public decency. The appellant took spitting as an example, while they are not connoted with assault, they are actions which can be *subjective* as to whether they are antisocial.

20. Counsel referred to recent legislation which they submit, is more specific as to what is constituted as unacceptable conduct. Section 45(3) of the Criminal Law (Sexual Offences) Act, 2017 which "[a] person who intentionally engages in offensive conduct of a sexual nature is guilty of an offence". "Conduct of a sexual nature" is defined within the act and there is also a definition for a "public place". Counsel stated that this is the level of specificity that modern legislation has in contrast to the 1871 Act and that even with the qualification that the act must be "public", this still does not cure it from being too vague.

21. The appellant relied on *Douglas v. DPP* [2014] 1 I.R. 510 and *McInerney v. DPP* [2014] 1 I.R. 536 which held the offences outlined in s.18 of the Criminal Law Amendment Act, 1935, namely an act which is "deemed to cause scandal or injure the morals of the community" and "to offend modesty" were unconstitutional for being impermissibly vague. The appellant submitted that these s.18 offences and the offence at issue in the present case include conduct which is part of the same stable if not in fact interchangeable. They are both statutory embodiments of the common law offences by which generally objectionable conduct was a misdemeanour at common law. The two sections criminalise the same *conduct*. The conduct in question is *immoral conduct*. If one were to go back to the date of enactments, the words quoted above were interchangeable with "contrary to public decency" as it was in 1871. These were all general phrases which were to capture immorality, such as indecent exhibitions and indecent exposure.

22. The respondent submitted that *Douglas v. DPP and McInerney v. DPP* can be distinguished in so far as the present case should not be grouped with offences which relate to "offending modesty", "injuring the morals of the community" or indeed "causing scandal". Rather, it is submitted that committing an act contrary to public decency is in substance the same or similar to indecency offences considered in *PP v. Judges of the Circuit Court and Douglas v. DPP (No.2)*. *PP v. Judges of the Circuit Court* centred around the offence of "gross indecency", the respondent submitted that despite the desire for certainty in criminal statutes, absolute precision is not necessary in so far as it is permissible to have general laws that can be adapted to meet changing circumstances:-

> *"the inherent problems of formulating a precise and comprehensive definition of gross indecency, taking into account changes in social attitudes and the multiplicity*

of situations of potential relevance that could arise are such that it was not incumbent upon the legislature to devise such a definition."

The respondent submitted that this was endorsed by the trial judge who stated that it was important to maintain appropriate flexibility to encompass the variety of factual situations that may arise.

Interpreting "*decency*"

23. The appellant submitted, that the fundamental principle of statutory interpretation is that words should be given their ordinary meaning and in the proper context. In doing this, the appellant relied on the approach taken in *Commissioners of Public Works v. Howard* [1994] 1 I.R. 101 in which the intention of the Oireachtas, or in this case, the UK parliament in 1871, should also be discerned through the words used in the Act itself. However, the appellant submitted that the words used in any given provision are indeed the first consideration and if its ordinary meaning is unambiguous, then that is the meaning that should be given to the provision.

24. The appellant relied on the MacMillan online dictionary definition of "decency" which is "behaviour that is moral good or reasonable" and Collins dictionary definition of decency accords it with "the quality of following accepted moral standards". Indecency, the appellant submitted, has a similar meaning but it is behaviour which is more aligned with a sexual nature.

25. The appellant submitted that the literal grammatical interpretation of "contrary to public decency" is one in which a general offence against morality, is consistent with the historic context in which it was enacted. The appellant, in making this submission, refers to caselaw from the late 1800's to early 1900's to show that "public decency" as understood in 1871 was a vague and general concept which empowered police constables of the day to control a variety of generally disapproved behaviour. The appellant states that s.5 of the 1871 Act is similar to s.18 of the Criminal Law Amendment Act, 1935 in so far as O'Malley, *Sexual Offences; 2nd Edn.*, (2013, Round Hall) refers to the s.18 offence as one in which:-

"The clear intention behind the section was to create an omnibus indecency offence, triable summarily and applicable throughout the State, while some more antiquated statutory provisions to the same effect often applied to certain localities only."

26. The respondent utilised a different method of evaluating "indecency" and "contrary to public decency". It was submitted that the offence of committing an act contrary to public decency does not give rise to difficulties of interpretation any more than the concept of indecent assault. Counsel for the respondent drew attention to the migration of indecent assault to "sexual assault" but that the requirement on the prosecution to prove an element of indecency still remains. It is submitted by the respondent that this element of indecency has never been put on a statutory footing; rather, it is the jury that enters into an assessment of whether the assault was "indecent" by *contemporary* standards.

27. The respondent relayed the more recent offences which include "indecency" thereby seeking to submit that the purpose of the legislature not seeking to specify with precision the exact behaviour which may result in criminal liability is to allow for changing social conditions and allowing legislation to adapt. The respondent used s.13 of the Post Office (Amendment) Act, 1951 (as substituted by the Communications Regulation (Amendment) Act, 2007) and s.55 of the Communications Regulation (Postal Services) Act, 2011. The respondent argued that these offences nevertheless give warning to any reasonable person that certain conduct will be prohibited.

28. The respondent relied on s.6 of the Interpretation Act, 2005 which states that:-

> "in construing a provision of any Act[…]a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act […] and other relevant matters which have occurred since the date of the passing of that Act […] but only in so far as its text, purpose and context permit."

The respondent submitted that this applies to the present case. Certain expression, namely "indecent", "just" and "reasonable" are examples which refer to standards that evolve with time.

Discussion of PP v. Judges of the Circuit Court and Douglas v. DPP (No.2)

29. The appellant submitted that there is an element of "hard cases make bad law" upon review of these decisions. Both of these cases involved complainants who were minors. In *PP v. Judges of the Circuit Court*, the accused was charged with seven counts of "gross indecency" contrary to s.11 of the Criminal Law Amendment Act, 1885. The accused was charged with engaging in sexual activity with one of his pupils and was seeking to invoke the rights of consensual adult male homosexuals which he could never have invoked on his own behalf. *Douglas v. DPP (No.2)* concerned an applicant who was charged with committing an act to wit "masturbated in such a way as to offend modesty or cause scandal or injure the morals of the community" under s.18 of the Criminal Law Amendment Act, 1935 as amended by s.18 of the Criminal Law (Rape) Amendment Act, 1990. The accused was subsequently charged under a different provision for the same offence, which was quashed; that being the commission of an act "outraging public decency". McDermott J. stated that the offence of outraging public decency did not exist in Irish Law.

30. The appellant submitted that it was necessary to refer to *Douglas v. DPP* (No.2) and *PP v. Judges of the Circuit Court* as the former case suggested s.5 of the 1871 Act should be revisited, but more importantly, the appellant opened these cases to distinguish them to the present case. In both of these cases, the acts complained of were obviously criminal in nature. The conduct was so wrong, so even if the law was vague, the accused was doing something offensive, and indeed he did not have *locus standi* as the complainant was not a consenting adult.

31. Secondly, the appellant argued that while the constitutionality of the offences which involved indecency or indecent acts were upheld in the above cases, the findings of the

court were *obiter dicta*. The trial judge in *Douglas (No.2)* was aware that he was not dealing with a marginal case. The case was on the facts largely criminal in nature. Thirdly, the appellant submitted that the offence of "gross indecency", the offence of which the appellant in *PP v. Judges of the Circuit Court* was charged with, has a different root in the common law to indecency, in that the former is concerned with sodomy and other acts deemed unnatural at the time of the enactment of the Criminal Law Amendment Act, 1885. The appellant argued that the ordinary meaning of grossly indecent conduct is of little relevance to the matter before this Court.

32. The appellant submitted that the judgment in *Douglas (No.2)* did not tackle the issue of whether indecency was a synonym for immorality or displays of immoral acts or exhibits, as the facts of the case did not call for such a discussion.

33. In relation to the appellant's argument that the finding of the court in relation to the offences in *Douglas* and *PP v. Judges of the Circuit Court* were obiter, the respondent stated that in *PP v. Judges of the Circuit Court*, the High Court expressly decided the matter on the merits of the claim concerning vagueness and while the court on appeal first addressed the standing of the accused, the Court went on to endorse the view of the trial judge on the substantive issue.

Section 5 and its Purported Conferral of an Arbitrary Power of Arrest on Gardaí

34. The appellant referred to Hogan J. in *Douglas v. DPP* who reiterated O'Donnell J. in *McGowan v. Labour Court* [2013] IESC 23 in relation to the importance of the principles and policies doctrine:-

> *"A vague law 'impermissibly delegates basic policy matters to policemen, judge and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application".*

35. The appellant argued that the second limb of the 1871 Act does in fact confer an arbitrary power of arrest on gardaí.

36. The respondent submitted that the appellant cannot advance this issue on appeal as the appellant lacks the necessary *locus standi* to put forward his argument. The respondent referred to the *jus tertii* rule which states that a plaintiff cannot seek a general review of the legislation which is under attack, but can only rely on arguments which bear on his own personal circumstances as per *T.D. v. Minister for Education* [2001] 4 I.R. 259 at 282; *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88.

37. The respondent stated that the appellant was not in fact arrested in relation to the s.5 offence but was arrested under s.107 of the Road Traffic Act, 1961. He therefore cannot make the argument that the impugned section confers an "arbitrary power of arrest" as averred. Indeed, the respondent went further and submitted that s.5 does not confer a power of arrest at all.

Survival of s.5 of the 1871 Act Through Updated Judicial Interpretation?

38. The appellant relied on *Keane v. An Bord Pleanála & Ors* [1997] 1 I.R. 184 to show that the courts can apply old legislation to modern developments where the wording used in the statute is wide enough to encompass it. However, the courts may not alter the meaning of the words used in legislation. The appellant used this case to argue that one cannot simply state how the words "contrary to public decency" might reasonably be understood to mean as this is not statutory interpretation. What the court is bound to do is interpret what the *legislature* intended them to mean.

39. The appellant submitted that judges are slow to change the meaning of common law offences, let alone statutory offences, which owe their existence and meaning entirely from statute. Therefore, the appellant submitted, vagueness cannot be cured by interpretation of the Court. This would substitute the prevailing standard of morality. It was posed by counsel that this was a standard which was not envisaged at the time the 1871 Act was enacted and therefore, what the courts would be engaged in would not be an exercise of judicial interpretation, but rather, re-interpretation.

40. The respondent submitted however, that it is a common practice of statutory interpretation and it is within the remit of the court to interpret the s.5 provision and the interpreter is not locked into interpreting it in the manner in which it would have been construed in 1871.

Discussion

41. I acknowledge at the outset of this discussion the considerable help and assistance that the court received from the written and oral submissions of both parties to this appeal. They were of the highest standard and have been fully considered in the context of writing this judgment.

Locus Standi

42. The issue of *locus standi* was conceded in the appeal by the respondent. However, the respondent maintained the position with respect to the *jus tertii* rule; that the appellant could not seek a general review of s. 5 but may only rely on such arguments as bear on his own personal circumstances. The trial judge had referred in her decision to his factual situation i.e. that "*he has been charged with the offence and says, on the basis of the facts (urination on a public footpath, whatever the precise location), that the offence was so vague that he could not have known in advance that what he did fell within this offence.*" The trial judge referred to the fact that part of the argument and submission involved hypothetical scenarios but said that the core of the submission, as she understood it was based on his own factual circumstances. Against that determination neither the appellant nor the respondent expressly appealed.

43. The Supreme Court, by a majority of 3 to 2 decided in *PP v. The Judges of Dublin Circuit Court* [2019] IESC 26 that the plaintiff, who challenged the constitutionality of s.11 of the Criminal Law Amendment Act, 1885, was not entitled by virtue of the law of *jus tertii*, to argue the invalidity of the section by reference to the fact that this section was capable of applying to consensual adult male activity in private. Thus, the Supreme Court held that while he had locus standi to challenge the compatibility of the section with the

Constitution, he only had such *locus standi* as related to his own personal circumstances. In the view of the majority of the Supreme Court (see the judgment of O'Donnell J.), that was a consequence of the application of the rule in the case of *Cahill v. Sutton* [1980] I.R. 269.

44. In light of the decision of the Supreme Court in *PP v The Judges of Dublin Circuit Court*, this Court must approach this appeal from the perspective of the applicant's personal circumstances. It is noteworthy that the plaintiff in *PP v. The Judges of Dublin Circuit Court* had also pursued his claim in part of the grounds of vagueness. Indeed, O'Donnell J. notes in his judgment that the specific issues before the Supreme Court had been structured so as to invite the court, *inter alia*, to find that "*the appellant has locus standi not just generally, but specifically to challenge the section on the basis that it criminalises (private) consensual activity and represents the enforcement of morals alone*". That claim to *locus standi* was rejected.

45. In those circumstances, the arguments that the appellant made in the present appeal concerning issues such as whether breastfeeding in public, spitting, removing one's shirt, amorously embracing and displaying risqué tattoos would be covered by the section are not relevant to this Court's consideration as to whether s.5 is so vague or so uncertain that he could not have known, even with the benefit of legal advice, that urinating in the manner in which it is alleged that he did was an offence contrary to the section. We must decide this case on the basis of his circumstances. It is also necessary to refer to the appellant's claim that the section is arbitrary as it confers too great a power on a Member of An Garda Síochána in circumstances where there is no standard by which they can be called to account in choosing to arrest and charge for these purposes. The appellant was not arrested for this offence but for failing to respond to the request for identification. In any event, the appellant has not identified any power of arrest for an offence under this section and I am satisfied that it is not appropriate to consider this as an aspect of his claim that the offence is inconsistent with the Constitution.

The Requirement of Certainty in Criminal Law

46. There is no disagreement that *King v. The Attorney General* establishes the principle that a trial in respect of an offence of which the ingredients are vague and certain is not a trial in accordance with Article 38.1 of the Constitution. No issue has been taken with, nor could an issue be taken with, the dictum of Kenny J. set out above. Criminal law must be certain and specific. The dictum of Hardiman J. in the *People (DPP) v. Cagney* neatly encapsulates the law: "*from a legal and constitutional point of view it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful.*"

47. To the above, there must be added greater elaboration. Such elaboration was neatly captured by Hogan J. in Douglas v. DPP when he said "*it must be here acknowledged, however, that in a common law system such as ours, absolute precision is not possible. One may therefore have perfectly general laws which can be adapted to new sets of facts within certain defined parameters, provided that the laws themselves articulate clear and objective standards.*"

48. The trial judge, in that paragraph of her judgment where she quotes more fully from the above passage by Hogan J., captured the position succinctly when she stated:-

> *"it is clear from the authorities in the area, many of which were cited to me and which include the above, and indeed certain American and European Court of Human Rights authorities which sometimes features in the Irish judgments referred to, that there is a distinction between (1) an offence the ingredients of which are expressed in excessively vague language (which is constitutionally impermissible) and (2) an offence the ingredients of which are expressed in general terms in order to maintain appropriate flexibility to encompass the variety of factual situations which may arise but are nonetheless considered sufficiently clear notwithstanding the general language used (which is constitutionally permissible)."*

49. The appellant, correctly in my view, did not take issue with that statement of the law by the trial judge. The issue in the present case is whether, when looked at from the factual circumstances of the appellant's case, this is an offence which falls into the category (1) or (2) above. As the trial judge acknowledged, *"many criminal offences are expressed in such precise terms as to leave no room for argument, so are closer to the dividing line between the permissible and the impermissible and the line can sometimes be a fine one."*

The meaning of "contrary to public decency"

50. The central theme running through the appellant's submissions in this appeal was that the legal and historical meaning of "contrary to public decency" was inextricably linked to the concept of immorality. From that point of view, the appellant submitted that this offence was impermissibly vague for the same reasons as Hogan J. had found that the offences of causing scandal, injuring the morals of the community or offending modesty to be "*hopelessly and irredeemably vague*" and lacking "*any clear principles and policies in relation to the scope of what conduct is prohibited and they intrinsically lend themselves to arbitrary and inconsistent application.*" (see *Douglas v. DPP* above and *SS*).

51. Subsequent to the *Douglas* and *McInerney* decisions, there were three unsuccessful constitutional challenges based on the vagueness doctrine. In *Cox v. DPP* [2015] I.R. 601, at issue was a charge of "wilfully, openly and lewdly exposing his person with intent to insult a female" contrary to section 4 of the Vagrancy Act 1824. McDermott J. was satisfied that the use of the word "person" carried sufficient clarity and precision to convey that the exposure by the applicant of his penis in a public place in the circumstances and with the intention set out in this section rendered him liable to criminal sanction. With reference to the words "lewdly and obscenely" he said they aptly and clearly qualified circumstances which attract criminal liability.

52. I have referred to the decision in *PP* above. Although the Court of Appeal and the Supreme Court decided the case on the issue of *locus standi*, the Court of Appeal (Birmingham J.) made the following comments on the substance of the arguments:

"42. The nature of the conduct alleged does not provide scope for significant disagreement as to what is indecent. Right-thinking people generally are unlikely to have any real doubt but that the alleged conduct, if it occurred, was grossly indecent. If the trial proceeds, the jury is unlikely to be troubled greatly by whether the acts alleged amounted to gross indecency, rather the issue is likely to be whether the prosecution has proved beyond reasonable doubt that the facts alleged actually occurred.

43. While it may be possible to conceive of borderline or marginal cases, and such cases can safely be left to the good sense of juries if prosecuted, in the great majority of cases jurors have no difficulty in determining what is grossly indecent.

44. Thus, I find myself in agreement with the trial judge that the offence of gross indecency does not fall foul of the requirement for legal certainty contemplated by the Constitution and by the Convention."

53. The final case in this trio is that of *Douglas (No. 2) v. DPP* in which McDermott J. held that the offence of outraging public decency was not an offence at common law in Ireland. Instead he held that an offence of committing an indecent act in public was an offence. He went on to hold that the ingredients of that offence were not impermissibly vague. McDermott J. stated that the alleged acts of facing a nine year old girl in a public place while placing his hand into his trousers and masturbating his penis, fell within the concept of lewd, disgusting and obscene conduct that was the indecent act or *actus reus* of the offence. The respondents rely heavily upon this case, following the decision of the trial judge. The appellant distinguishes the case on the basis that it did not tackle the nature of indecency as known to the common law and whether the scope of the offence was vague and uncertain and in particular that even if the common law offence could have evolved to change the meaning of indecent through judicial decision, the statutory offence had not and could not.

54. The appellant's contention that s. 5 of the 1871 Act is the statutory embodiment of common law nuisance offences by which generally objectionable in the sense of being immoral conduct was criminalised is the starting point for his submissions. In effect, the appellant submits, offences contrary to public decency are from the same stable of offences as causing scandal, injuring the morals of the community or offending modesty. As referred to above and more fully set out in his written submissions, the appellant relied upon the legal commentary of the various authors of textbooks to that effect.

55. The appellant places significant reliance on the claim that unless a narrow meaning of "decency" was intended by the UK Parliament in 1871 and that such meaning can be found from reading the Act as a whole, it must be given its ordinary meaning, to wit, that which is moral, good or reasonable, accords with accepted moral standards or is otherwise good, moral and acceptable in society. It is in those circumstances that he contends that the section is impermissibly vague for the reasons set out by Hogan J. in the *Douglas and McInerney* cases.

56. It is important to make some preliminary observations. Insofar as it might be considered that there is a difficulty with legislating in respect of issues of morality *per se*, it must be acknowledged that there is a relationship between law and morality. The criminal law, in particular, is often based upon the moral principles of a society. Naturally, not all acts that a large portion or even a majority of the community may view as immoral, will be designated criminal offences. Those acts that are designated criminal offences generally reflect the opprobrium of society at large in relation to those acts. Acts are usually not criminalised simply because of a desire to regulate the conduct of individuals; instead they are criminalised to protect individuals (including the perpetrator) and the community from harm. Legislation for immoral acts may create constitutional difficulties when viewed in the balance with other constitutional rights of an individual but that is not the concern in this case. The appellant makes no claim that he has a constitutional right to urinate in public. His claim is that legislating for this type of immorality in this fashion, is constitutionally unacceptable because the terms of the criminal offence are so vague as to make it intrinsically uncertain as to what acts are in fact prohibited.

57. Regardless, therefore, of whether s.18 of the Criminal Law Amendment Act, 1935 and s.5 of the 1871 Act came from the same stable of offences which sought to criminalise certain acts which were viewed as immoral, the question is whether the terms of the latter statutory offence crosses the dividing line of what is permissible and what is not. In *Douglas v. DPP* and *McInerney v. DPP*, when dealing with the offences under s.18, Hogan J. held that the offences were impermissibly vague. A comparison of the language in s.18, namely offending modesty, causing scandal or injuring the morals of the community, with that of s.5 of the 1871 Act, namely an act contrary to public decency can be made. The s.18 offences are worded in an inherently broad fashion, expressly referencing morality, scandal and modesty. On the other hand, the offence of committing an act contrary to public decency appears to permit more easily an interpretation that is restrictive; by reference to the well-established legal concept of indecency. It is noteworthy, but perhaps not legally significant, that the legislature in 1935 chose not to extend the 1871 Act to the country as a whole. Instead, it chose to legislate nationwide, by creating offences which were worded very differently from each other.

58. The appellant places significant reliance upon the claim that s.5 may not be subject to judicial interpretations so as to alter the meaning of the words used in the legislation. In this sense, he submits that "contrary to public decency" meaning conduct broadly described as immoral, cannot be amended to a more contemporary legal understanding of the words "indecent act".

59. I do not accept the accuracy of the submission that a court in interpreting s.5 is locked into an interpretation that is fixed in 1871. The provisions of the Interpretation Act, 2005 recognise that circumstances change over time and the laws need to be construed in light of evolving circumstances. Even without the 2005 provisions, concepts or standards referred to in legislative provisions *e.g.* "just" or "reasonable", have frequently been refined by courts in light of evolving standards. Whether at common law or by statute law, a concept such as indecency may evolve to incorporate contemporary

understandings. That does not make the offence uncertain but it is a recognition that "*the law must be able to keep pace with changing circumstances*" as set out by the European Court of Human Rights in *Aydin v Germany*.

60. In his submissions, the appellant asserts that "a man, even with the benefit of the finest legal advice, would no more know that urinating at the side of the road is captured by the section than a woman contemplating breastfeeding in public. For many, neither act would be considered to be an act contrary to public decency (assuming they and their legal advisers had managed to break down the words of the second limb and decide their probable meaning) whereas for others, perhaps fewer in 2017 in the case of breastfeeding, it may well remain contrary to public decency." To equate urinating in public view with breastfeeding in public appears an extraordinary comparison. I will not say any more in relation to this, because it is not an act upon which the appellant can rely to advance his case. In accordance with the decision in *PP*, it is his own act of urinating in a public place and in public view that is at issue.

61. I observe also that when the appellant refers to urinating in public, he insists that the respondent's position is that all public urination is caught by the section. That is incorrect, it was not put in that fashion by the respondents in their High Court (and Court of Appeal) submissions. It was also a position rejected by both Humpheys J. or Ní Raifeartaigh J. in their respective judgments in the High Court, the latter judge making reference to the respondent's submissions. At issue is public urination carried out in a manner which is objectively indecent by an ordinary or reasonable member of the public.

62. The appellant submits that such an act of public urination would have been viewed differently in 1871. He submits that there is no evidence of Victorian prosecutions of persons for dismounting from carriages and relieving themselves on the side of the highway. He submits that this is evidence as to the uncertainty of its scope: "the uncertainty of the boundaries of the offence render it unconstitutional; it fails the test of vagueness."

63. In the summary to his written submissions, the appellant concludes "The mere fact that the respondents persist in arguing that the section covers the conduct in question in this case, urinating in a public place without any additional element, is evidence in and of itself of the ambiguity that exists in this very old and it is submitted outdated offence. But fundamentally, the offence as properly understood, is one that captures any conduct that might be considered immoral or unacceptable behaviour: it is the same offence in substance as was struck down in *Douglas (No.1) and McInerney* and for like reasons should also be found inconsistent with the Constitution in this case." As I have pointed out this was a misunderstanding of the respondents' position. More fundamentally, this illustrates what I view as the main problem with the case advanced by the appellant. His case is premised on a consideration of the margins: how can one know the extent of the conduct covered by this offence? That is not the test we are faced with, we are faced with a consideration of whether the offence captures with certainty and precision the type of conduct alleged against him.

64. As I understand his submissions, the appellant is not arguing that the concept of "indecency" is so vague as to fall on the wrong side of the line of what is acceptable to satisfy the constitutional test of certainty within the criminal law. Even if he was so arguing, I am entirely satisfied that "indecency" is a concept that is well recognised by Irish criminal law and has already been recognised as falling on the right side of the generality/vagueness divide as the trial judge held. As stated by the Court of Appeal in *PP* "*…the concept of indecency is one that is long familiar to the criminal law. The standard charge delivered by judges to juries every day of the week tells them that the offence of sexual assault was previously known as indecent assault, and defined as an assault accompanied by circumstances of indecency, the determination of indecency being a matter for them as jurors.*" The standard of indecency is that of an ordinary or reasonable member of the public *i.e.* an objective standard.

65. This is an important consideration because, even if the word decency is, as the appellant argues, considerably wider than the word indecent, this does not avail him. His main argument is that the phrase contrary to public decency is not confined to indecent acts but extends to whatever conduct of whatever nature might be considered to be immoral or improper or simply unacceptable. Yet, if his own conduct comes within the concept of "indecent" or at least is sufficiently arguable so that the trier of fact may be permitted to adjudicate upon it, that is the end of his challenge to the constitutionality of the section. He simply cannot argue that because there is uncertainty as to where the boundary lies so that other acts may be caught the offence is inconsistent with the Constitution.

66. The appellant appears to view the word "indecent" as inherently involving a sexual or at least "sexualised" component. In my view the concept, although incorporating those aspects, is a wider one. I agree with the views expressed by McDermott J. in *Douglas (No. 2)* after his extensive review of relevant case law as follows:

> *"Indecency as the constituent element of a criminal offence is a concept well-known in the faming of criminal offences. Indecent assault, indecent exposure, offences of gross indecency and others have produced an extensive body of case law. The word "indecent" defined the nature of the act committed. A number of synonyms have been employed to define its meaning in the criminal law and in sample indictments produced in various textbooks as already seen. The charge of outraging public decency, in this case reproduces some of those terms in that the applicant was charged with committing an 'act of a lewd, obscene and disgusting nature and outraging public decency' by behaving in the manner described. According to the Shorter Oxford English dictionary (2002) (2nd Ed.) 'Indecent' means 'obscene, lewd, licentious, immodest, vulgar, offensive to acceptable standards of decency, suggesting tending towards obscenity'; 'lewd' means 'lascivious, unchaste, indecent, obscene'; 'obscene' means 'highly offensive, morally repugnant, repulsive, foul, lonesome': 'outrage' means 'aroused fierce anger or indignation or deeply offend'. There is very little discernible difference in the nature of the conduct described these words; their meaning is plain."*

67. McDermott J., who had considered in the course of his judgment the cases of *Douglas v. DPP* and *McInerney v. DPP* and the textbooks equating those offences with the offences of outraging public decency, public exposure etc., went on to hold that he was "*satisfied that the offence of committing an act of public indecency does not fail the test of legal certainty because of difficulties surrounding its definition. Its parameters are sufficiently precise: the concept of indecency is well known and it will be for a jury to determine whether the acts alleged were indecent*".

68. Hogan J. had suggested that a relevant consideration in the analysis of vagueness was whether the offence would be tried by a jury. The trial judge, queried, correctly in my view, whether that can be right in the situation of an assessment of indecency as for example an indecent assault may be tried summarily in certain circumstances. In those circumstances a Judge of the District Court will have to determine if the assault was committed in circumstances of indecency.

69. The appellant has sought to argue that the criminal law only applied the term "indecent" to an otherwise criminal offence. I do not consider that to be correct. While clearly an indecent assault is linked to the concept of the criminal offence of assault that is not so in the context of other offences. The offence of "gross indecency" is a prime example. The act itself was criminalised because it was found to be "grossly indecent". Other legislative offences such as s. 13 of the Post Office (Amendment) Act, 1951 (as substituted by the Communications Regulation (Amendment) Act, 2007 criminalise telephone communications which are, indecent. In that situation, the main focus is on whether the communication is indecent and thereby a criminal offence. There is nothing unclear or uncertain about such a consideration, it is the same consideration that has been given as to whether the criminal assault reaches the further requirement of being indecent so as to amount to an indecent assault (now named sexual assault).

70. The appellant is not being tried simply because he urinated in public. He is being tried because of the circumstances in which that public urination occurred and in circumstances where the respondents have expressly contended that it is indecent. Importantly, the DPP, who is prosecuting the offence, accepts that the core of the offence is in substance the same as that which underpins the indecency offences covered in *Douglas (No.2)* and *PP*. The appellant points to the discrepancy in the description by the Garda of his alleged conduct. The resolution of that is a matter for the trial. The mere fact of public urination is not an act being put forward as inherently indecent. The examples given by Humphreys J. and recited in the judgment of the trial judge are particularly apt. Thus, in circumstances where the prosecution accepts that indecency must be proven against the appellant, where indecency as a concept is not impermissibly vague and where the appellant does not appear to contextualise that an act contrary to public decency could incorporate an act of public indecency, the appellant's claim of vagueness must fail.

71. It must be recognised however, that the appellant's claim has focussed on what he submits is the incorrect equation of public decency with public indecency. As it is possible that, even with the DPP's concession that it is only in circumstances of indecency that his

case could be successfully prosecuted, there may be some doubt that if those circumstances were not proven, the trier of fact might nonetheless form a view that the act was otherwise contrary to public decency. It is therefore necessary to resolve that aspect.

72. The appellant's contention that "contrary to public decency" did not equate to "contrary to public indecency" is not in my view sustainable. It has long been held that concepts of decency and indecency have been interchangeable. In the English decision of *R v. Mayling* [1963] 2 QB 717 it was held by the Court of Criminal Appeal in upholding a conviction for outraging public decency that "*in addition to publicity as explained above, it is of course necessary for the prosecution to establish that the act complained of was an act of indecency, or, to use the words in the indictment, an act outraging public decency. On the assumption that the evidence of the police officers about the behaviour of the defendant was accepted by the jury, this requirement also was plainly satisfied.*" Although McDermott J. held that such a common law offence did not exist in Ireland, he traced the history in Ireland of the criminalisation of indecent acts.

73. The dictionary definitions provided by the appellant do not in my view preclude a finding that what is being criminalised is an indecent act. Even if those meanings were to be viewed as precluding it, they do not oust the legal understanding of the term being used in the statute. That term has to be seen in the context of the section as a whole which refers to any person who shall "wilfully and indecently expose his person or commit any act contrary to public decency". I am satisfied that as a matter of law, the interpretation of "contrary to public decency" was in fact to apply to acts of public indecency. I agree with the reasoning of McDermott J. which leads one to this conclusion.

74. In any event, as stated above, I am satisfied that even if it were not the case that in 1871 the meaning of public decency equated with public indecency, s.5 of the Interpretation Act, 2005 requires the Court to give this an interpretation which is adjusted to, *inter alia*, social conditions. Therefore, in construing the provisions, it is possible to make allowances for changing social conditions and therefore it is the prevailing standard of morality that applies today. In that way, only those acts which are deemed objectively indecent according to contemporary standards that are criminalised by this section.

75. I am satisfied that there were no error in the finding of the trial judge as follows "*in my view, the respondent is correct and the concept of the core of this offence is essentially the same concept of decency or indecency which is at the core of other criminal offences the constitutionality of which has been upheld in PP and in Douglas v. DPP (No.2.). It seems to me to be rather a hair-splitting exercise to contend that 'contrary to public decency' does not correspond with 'indecent'. I see no difference of substance between 'indecent' and 'contrary to… decency'.*"

Conclusion

76. The appellant stands accused of committing an offence contrary to s. 5 of the 1871 Act. He has *locus standi* to challenge the constitutionality of that offence in claiming that it terms are impermissibly vague and uncertain. His standing to challenge the

constitutionality is limited however to raising his own personal circumstances and does not extend to asserting rights of others. This is in accordance with the principle of *jus tertii* as expounded by the Supreme Court most recently in *PP*.

77. His claim that the parameters of the offence may not be certain in so far as it could apply to cases of breastfeeding in public, spitting, risqué tattoos *etc*. is not relevant to the consideration in this case of whether the offence is impermissibly vague. His claim that the offence gives too much power to members of An Garda Síochána in terms of arrest must be rejected on the grounds that he was not arrested on suspicion of having committed this offence but more fundamentally on the ground that there is no power of arrest under this section.

78. The requirement of certainty in the criminal law is a well-established constitutional principle. It is also an established principle found in other legal systems and it is reflected in the European Convention on Human Rights. It is also acknowledged in judicial decisions in this jurisdiction, and by the European Court of Human Rights, that there is no requirement for absolute certainty. Hogan J. in *DPP v. Douglas* stated that "*absolute precision is not possible*" when defining an offence in a system such as a common law system. As the trial judge noted in this case, the issue is whether s. 5 of the 1871 Act is an offence which is excessively vague and is therefore impermissible or is an offence which has the appropriate level of flexibility to encompass the variety of factual situations and therefore permissible.

79. The appellant is not being tried because he urinated in public, he is being tried due to the circumstances in which the public urination occurred, namely, in a manner which was objectively indecent by an ordinary and reasonable member of the public.

80. The core of the appellant's submissions was that "contrary to public decency" was a term inextricably linked to the concept of immorality and that "immorality" as a concept is impermissibly vague. The appellant relied upon the decisions of Hogan J. in *DPP v Douglas* and *DPP v. McInerney*, as authorities for the proposition that legislating for immorality is "hopelessly and irredeemably vague." It must be noted however, that there is a relationship between law and morality. While not all acts that a majority of the community may view as immoral will be classed as criminal offences, it is not correct that legislating for immorality *per se*, is unconstitutional. The issue in the case is whether the manner in which the legislature has chosen to legislate for this particularly type of impugned immorality, *i.e*, criminalising acts contrary to public decency, is too wide to permit a clear understanding by the public of what acts are in fact prohibited under this section.

81. There is not direct analogy with the offences in *DPP v. Douglas* and in *DPP v. McInerney*. The impugned provisions in those cases explicitly referred to the standard of immorality such as scandal and "injuring the morals of the community". The present section, however, is not so legally uninvolved and vague. It refers to "decency", a term I accept to be interchangeable with "indecency".

82. Indecency is a term which is very familiar to the legal profession and indeed, a trier of fact has on many occasions to decide whether a particular act, usually indecent (now sexual) assault, has the element of indecency so as to categorise it into *that* class of offence. Further, the Court of Appeal in *PP v. Judges of the Circuit Court*, the High Court in *DPP v Douglas (No. 2)* and the High Court proceedings, accepted that the term of "indecency" is a concept well recognised in Irish Criminal Law. Like the trial judge, I see no difference in effect with the word "decency".

83. I do not accept that the criminal law only applied the term "indecent" to an otherwise criminal offence. The offence of "gross indecency" is an example whereby neither of the terms, "gross" or "indecent", are a crime in and of themselves. Another example is that of the offence of sending indecent telephone communications.

84. The appellant's contention that the standard of decency is that of the 1871 standard of decency is an incorrect understanding of the principle of statutory interpretation. Section 6 of the Interpretation Act, 2005, explicitly permits the judiciary to interpret legislation in a way that is in line with contemporary standards. A concept such as indecency may evolve to incorporate contemporary understanding. Indeed, even without s.6, judges have refined the meaning of certain words in statutes as society's understanding of the concepts change.

85. For the reasons set out in this judgment, I would dismiss this appeal.