FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE LR 7/79

No. 1,881 of 22nd MAY, 1980.

LAW REPORTS

Note: These Reports are cited thus —
(1979) Gib. L.R.

BORASTERO v. FOUNTAIN

Supreme Court
Spry, C.J.
15 October 1979

Practice and procedure (Criminal) — defective information — whether duty of magistrate to require amendment
Crime — meaning of "breach of the peace" — Criminal Offences Ordinance, s.245.
Crime — meaning of "in a public place" — Criminal Offences Ordinance, s.245.

The respondent was charged in the magistrates' court with using threatening words in a public place contrary to s.245 of the Criminal Offences Ordinance (Cap. 37, 1974 Reprint). The agreed facts were that the respondent, being annoyed by the lights in the patio of the Jewish Club which, he said, prevented him from sleeping, shouted threatening words from the window of his flat and fired an imitation pistol. The magistrate held that there was no case to answer, partly because the words were not uttered in a public place and partly because he did not consider that there was any intention to provoke a breach of the peace or any likelihood that one would be provoked.

On appeal, it was argued for the appellant that the reference to a public place in the information was a mistake and that the magistrate ought to have required the prosecutor to amend.

HELD: (i) While it is the practice for a magistrate to require the prosecution to amend an information if he sees a mistake, it is the duty of the prosecution to seek leave to amend if the evidence does not accord with the information.

(ii) The defendant's own conduct cannot constitute the breach of the peace referred to in s.245 of the Criminal Offences Ordinance, which must be retaliatory conduct.

(iii) An offence against s.245 may be committed by a person in or

on private property if he utters threatening words or makes gestures or adopts a pose intending his conduct to have an impact on persons in a public place.

Per curiam. *Russon v. Dutton* is not authority for saying that a public house is not a public place.

Cases referred to in the judgment
Wright v. Nicholson [1970] 1 All E.R. 12
Garfield v. Maddocks [1973] 3 All E.R. 303
R. v. Newcastle-upon-Tyne Justices, ex p. John Bryce (Contractors) Ltd [1976] 2 All E.R. 611
McNaught v. Alman Cr.App.1 of 1953 (unreported)
Russon v. Dutton (1911) 104 L.T. 601
Wilson v. Skeock (1949) 65 T.L.R. 418
Ward v. Holman [1964] 2 All E.R. 729
Edwards, Llewellyn v. R. (1978) 67 Cr. App. R. 228
Smith v. Hughes [1960] 2 All E.R. 859
Behrendt v. Burridge [1976] 3 All E.R. 285

Appeal

This was an appeal from a decision of the stipendiary magistrate holding that there was no case to answer and dismissing the information.

C. Finch for the appellant
A. J. Haynes for the respondent

24 October 1979: The following judgment was read—

This is an appeal by way of case stated from a decision of the learned stipendiary magistrate. The respondent had been charged with an offence against s.245 of the Criminal Offences Ordinance, in that, in a public place namely the patio at No. 10 Bomb House Lane, he had uttered threatening words whereby a breach of the peace might have been occasioned. The magistrate dismissed the information holding that there was no case to answer. He gave as his reasons

"(a) the words complained of were not uttered in a public place;
(b) there was no evidence adduced that the patio of the Jewish Club is a public place within the meaning of s.245 of the Criminal Offences Ordinance; and
(c) whereas I was satisfied that the words complained of were uttered to the annoyance of persons in the patio I was not satisfied that they were uttered with either the intention

to provoke a breach of the peace or whereby a breach of the peace could have been occasioned."

Mr Finch, who appeared for the appellant, explained that the reference to a public place in the summons was an error. He said that the case was prosecuted on the basis that the incident occured in the patio, but not that the patio was a public place. Section 245 relates not only to offences committed in public places but also to those committed, inter alia, in patios which are means of access to occupied premises.

Mr Finch claimed that the mistake was no more than a misdescription of the patio. He submitted, relying on *Wright v. Nicholson* (1) and *Garfield v. Maddocks* (2), that the magistrate had the choice either of ignoring the defect, if he thought that it was technical and that the defendant had not been prejudiced, or of requiring amendment. In other words, he put the onus on the magistrate. So far as I can see, this submission rests on one phrase in *Garfield's* case, when Lord Widgery, C. J. observed that

"the practice is for the court to require the prosecution to amend in order to bring their information into line."

I accept that statement as correct, but it applies only, in my opinion, to cases where the mistake is obvious to the magistrate, as, for example, if an information alleged that an incident occurred at Rosia Bay and all the evidence indicated that it had occurred at Camp Bay. But it is always for the prosecution to be alert to see that the evidence justifies the information and to seek leave to amend when necessary. This is illustrated by *R. v. Newcastle-upon-Tyne Justices, ex p. John Bryce (Contractors) Ltd.* (3), a case which Mr Finch cited for another purpose. That was a case where the prosecution decided that they might not be able to satisfy the justices as to one element of the offence charged and sought, and were granted, leave to amend to allege a different offence.

To revert to the present case, Mr Finch said that no evidence was led to show that the patio was a public place. I cannot see that the mere failure to call evidence as to one of the constituents of an offence can put the magistrate on enquiry whether amendment is necessary, particularly since it would seem that no evidence was called to show that the patio was a means of access. Had this been done, the mistake might have become obvious.

(1) [1970] 1 All E.R. 12
(2) [1973] 2 All E.R. 303
(3) [1976] 2 All E.R. 611

The information alleged the use of threatening words "in a public place namely in the Patio situated at No 10 Bomb House Lane." I cannot accept that the insertion of the words "in a public place" is no more than a misdescription of the patio: on the contrary, I think that on any ordinary reading of the information, the reference to the patio can only be regarded as the description of a public place.

Mr Finch submitted that the mistake did not prejudice the defence, because the defence case was that as the respondent had, at the material time, been in a private place, he could not have been guilty of the offence charged. I accept that, in the event, there was no prejudice to the defence, but I think the magistrate was misled. I am not satisfied that he either realized or ought to have realized that there was any error in the information. In this connection, I would remark that the words "in a public place namely" were not merely surplusage: if that was not the allegation, some such words as "a means of access to occupied premises" should have followed the decription of the patio. I think the fault was with the prosecution and that the magistrate was justified in the second ground he gave for dismissing the information.

The appeal is dismissed.

I heard some argument on the question whether or not the respondent's behaviour could be considered likely to cause a breach of the peace, in relation to the third reason given by the magistrate for his decision. On this, I will only say that there does not appear to have been any evidence to show the likelihood that a breach of the peace would be provoked. The persons against whom the threatening words were uttered were four elderly gentlemen playing bridge and a fifth who was watching. There is no suggestion that they were noisy or unruly: all that annoyed the respondent was that the lights they had on prevented him from sleeping. There appears to have been no direct access from the patio to the place where the respondent uttered the threatening words. On the slight information available to me, it appears that the likelihood was that the bridge players would retire, as in fact they did. I reject completely a suggestion made by Mr Finch that the respondent's own conduct constituted a sufficient breach of the peace: the breach of the peace contemplated by s.245 is one which is a reaction to the threatening words. This ground of appeal also must fail.

Mr Finch stated from the bar that when the magistrate gave his decision in court, he said that he felt bound by the decision of Bacon, C.J., in *McNaught v. Alman* (1). Mr Haynes, who appeared for the respondent, concurred. The magistrate's statement was, of course, correct but Mr Finch contended that, so far as it was relevant, *McNaught*'s case was wrongly decided. He stressed the importance of the interpretation of s.245 in the circumstances of Gibraltar.

In view of the decision which I have reached, it is not strictly necessary for me to deal with this, but as it was argued at length, and as my decision might conceivably go to appeal, I think I should do so.

McNaught's case was an appeal against conviction, inter alia, of an offence against s.22 of the Summary Conviction Ordinance (2), which is substantially similar to s.245. Bacon, C.J., made two observations which Mr Finch attacked. In the first place, he said

> "The criterion prescribed by the section is the place where the words were used...The section says nothing about the words being audible in one place though spoken in another. And it goes out of its way meticulously to define the places in one of which the alleged offender must be when he uses the words if an offence is to be established."

Secondly, he said, in passing, and this is clearly obiter dictum

> "even a public house — to which, of course, members of the public have access — is not a public place: see *Russon v. Dutton*. (3)"

As regards the first passage, it is clear that the attention of the learned judge was not drawn to the case of *Wilson v. Skeock* (4) in which Lord Goddard said, obiter, in dealing with an alleged offence against the Public Order Act, 1936,

> "Nothing that I say now would apply to a case where a man stood in his back yard or garden, or even in his room, and

(1) Cr. App. 1 of 1953 (unreported).
(2) Cap 120 (1950 Ed), repealed and replaced by the Criminal Offences Ordinance (Ord. 17 of 1960, Cap 37, 1974 Reprint)
(3) (1911) 104 L.T. 601. (4) [1964] 2 All E.R. 729.
(4) (1949) 65 T.L.R. 418: the report is not presently available but the passage quoted is taken from *Llewellyn Edwards*.

proceeded to use language likely to cause a breach of the peace directed at passers-by. In such circumstances, his voice being carried into a public place and his intention being to insult people passing by in the street, he might well be convicted of an offence under s.5."

This passage was quoted with approval in *Ward v. Holman* (1) and in *Llewellyn Edwards* (2), although in each case the approval is obiter, since the references were not essential to the decision of those cases. It seems, surprisingly, that there is no authoritative decision on the subject.

Mr Finch also cited, by way of analogy, what may be called the soliciting cases, *Smith v. Hughes* (3) and *Behrendt v. Burridge* (4). I do not propose to consider those cases in detail but will only say that women were held guilty of soliciting "in a street" on proof of inviting behaviour within private premises visible to and intended to attract men passing by in the street. Mr Haynes submitted that these cases could be distinguished, which is, of course, true, but I think they are of value for their reasoning.

The underlying reasoning in all these cases is, I think, that if a person in or on private property, utters words, or makes gestures, or even adopts a pose, intending his conduct to have an impact on a person or persons in a public place and if such conduct in a public place would have constituted an offence, he is just as guilty as if he had been in that public place. The impact of the words, gestures or pose is treated as a projection of the personality.

I have come to the conclusion, after some hesitation, that the English approach is to be preferred to the literal approach of Bacon, C.J. Certainly it accords with commonsense.

As regards the second passage, Mr Finch submitted that *Russon's* case is not authority for the statement that a public house is not a public place. I agree. It concerned a by-law forbidding the use of indecent language to the annoyance of passengers using streets and public places. Lord Alverstone, C.J., said

(1) [1964] 2 All E.R. 729.
(2) (1978) 67 Cr. App. R. 228, at p.233.
(3) [1960] 2 All E.R. 859
(4) [1976] 3 All E.R. 285

"It would be difficult also to say fairly that the words 'street or public place' in connection with the word 'passengers' could include a public-house."

Avory, J., said

"It may be that a public house is a public place for some purposes and under some statutes, but it is impossible to say that it is a public place within this by-law, having regard to the words 'to the annoyance of passengers.'"

I do not propose to pursue the matter further, as it is not relevant to this appeal.