[2001–02 Gib LR 13]

PARODY v. R.

SUPREME COURT (Schofield, C.J.): March 8th, 2001

Criminal Law—threatening behaviour—elements of offence—threatening behaviour under Criminal Offences Ordinance, s.34 to be with intent, or likely to cause breach of peace—not ingredient of offence that behaviour be to annoyance of person

Courts—magistrates' court—reasons for decision—reasons to be given as part of requirement of fair trial in Constitution, s.8(1) to enable Supreme Court on appeal to understand lower court's reasoning

The appellant was charged in the magistrates' court with offences of using threatening behaviour.

When the appellant was informed that he was being evicted from his flat, he visited the offices of the Minister for Housing and allegedly used threatening behaviour towards the Minister and his personal assistant. The charges alleged that he used threatening behaviour "to the annoyance of" these people. After being convicted, the appellant requested that reasons be given for his conviction, which was refused, save that the magistrates repeated that they had found that threatening behaviour had been used and that a breach of the peace may have been occasioned.

He submitted that, in refusing to give a reasoned judgment, the court had (a) erred in law; and (b) denied him the right to a fair trial under s.8(1) of the Constitution.

Held, allowing the appeal:

(1) Although the European Convention on Human Rights did not form part of the law of Gibraltar, art. 6(1) of the European Convention was not dissimilar to s.8(1) of the Constitution, and decisions of the European courts on art. 6(1) were of persuasive value in Gibraltar. The European Court of Human Rights had held that the right to a fair trial under art. 6(1) involved an obligation on a court to give reasons for its decision (paras. 19–20).

(2) Reasons for a conviction needed to be given by the magistrates in Gibraltar, for the trial to be fair. As there would be no verbatim transcript of the lower court proceedings submitted on appeal, reasons must be given to enable the Supreme Court to know what led the lower court to reach its decision (paras. 21–22).

(3) The reasons provided here, that beyond reasonable doubt threatening behaviour had been used and a breach of the peace may have been occasioned, were not sufficient. Whilst the case rested mainly on credibility, there were also issues which were not addressed, such as what exactly the appellant had done which amounted to threatening behaviour and why it was considered likely to cause a breach of the peace. Moreover, the charges were defective. It was not an ingredient of s.34 of the Criminal Offences Ordinance that the threatening behaviour be to the annoyance of a particular person: rather it must be with intent, or likely to cause a breach of the peace. The appeal would therefore be allowed, the convictions quashed and the sentences set aside (paras. 23–28).

Cases cited:
(1) *Hiro Balani* v. *Spain* (1995), 19 E.H.R.R. 566, followed.
(2) *R.* v. *Civil Serv. Appeal Bd., ex p. Cunningham*, [1991] 4 All E.R. 310; [1991] I.R.L.R. 297; [1992] I.C.R. 816, considered.
(3) *R.* v. *Harrow Crown Ct., ex p. Dave*, [1994] 1 W.L.R. 98; [1994] 1 All E.R. 315; (1994), 99 Cr. App. R. 114, considered.
(4) *R* .v. *Immigration Appeal Tribunal, ex p. Khan*, [1983] Q.B. 790; [1983] 2 All E.R. 420, followed.
(5) *Van de Hurk* v. *Netherlands* (1994), 18 E.H.R.R. 481, followed.

Legislation construed:
Criminal Offences Ordinance (1984 Edition, Supplement No. 5, L.N. 68/1999), s.34: The relevant terms of this section are set out at para. 24.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), Annex 1, s.8(1):
> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmnd. 8969), art. 6(1):
> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

D. Hughes for the appellant;
C. Pitto, Crown Counsel, and *Ms. K.K. Khubchand* for the Crown.

1 **SCHOFIELD, C.J.:** On December 20th, 2000, Albert Parody ("the appellant") was convicted of two charges of using threatening behaviour, contrary to s.34 of the Criminal Offences Ordinance, and was sentenced

on each charge to two months' imprisonment suspended for two years. He appeals against those convictions and sentences.

2 On October 18th, 2000, the appellant was in Marbella visiting his mother, who was undergoing a surgical operation, when he received a telephone call from his wife to the effect that officers from the Housing Department were evicting them from a flat they were occupying in Flat Bastion Road. The appellant rushed back to Gibraltar and tried, unsuccessfully, to contact those who could put a stop to the eviction, and then went to the office of the Minister for Housing, James Joseph Netto, at City Hall. The appellant made his way, without appointment, into Mr. Netto's offices, by-passing the security personnel on the way.

3 At the time the appellant made his way to Mr. Netto's offices, Mr. Netto was in the Personal Assistant's office with the Housing Manager, Jyoti Neish. When Mrs. Neish alerted Mr. Netto to the appellant's presence, the appellant was only a few inches away from him. Mr. Netto's evidence was that the appellant had his fist clenched, he was very jumpy and used threatening behaviour towards him. Mr. Netto said he felt threatened and uppermost in his mind was to control the situation and not say or do anything to provoke an incident. The appellant was saying, in Spanish, such things as "What do you want to do?" "Do you want to send me to prison?" "We'll see."

4 Mrs. Neish, meanwhile, had gone to call security officers and had returned when the appellant turned round and walked out of the door to the office. Mrs. Neish said that the appellant came up to within 2 in. of her and said, again in Spanish; "You do everything over the phone, don't you? You want to take my flat away from me. You want to send me to prison."

5 Mrs. Neish said she felt intimidated and Mr. Netto said that he thought the appellant might assault her and he (presumably Mr. Netto) would try to jump at him to avoid physical aggression. A young man, who it seems is the appellant's nephew, then came and persuaded the appellant to leave.

6 In an interview given to P.C. Bonavia two days later, the appellant admitted entering Mr. Netto's office. He said he was nervous, but denied threatening Mr. Netto. He said Mrs. Neish was there but she did not speak.

7 The appellant testified that he told the security guard at City Hall that he wanted to see Mr. Netto. When he saw a couple come out of the office he waited to be invited in, but someone (it is unclear from the record whom) told him that Mr. Netto did not want to see him. It is also unclear from the record whether the appellant was saying that Mr. Netto had promised him an appointment on that day or another day. The appellant

said he did not intend to hit Mr. Netto. He agreed that he was nervous and a little annoyed and his voice was raised a little. He denied moving up close to either Mr. Netto or Mrs. Neish.

8 When the justices announced their finding of guilt on both charges, Mr. Hughes, who represented the appellant in the lower court as well as before this court, asked for the reasons for the decision. The justices declined beyond saying that beyond reasonable doubt they found that threatening behaviour was used and a breach of the peace may have been occasioned. The chairman of the justices pointed out to Mr. Hughes that it is not the normal practice of the justices to give reasons.

9 The appellant claims that he has a right to know the reasons for the justices' decision and he appeals to this court on that basis. The notice of appeal reads:

> "The appellant appeals on the grounds that, in refusing to give a reasoned judgment, the court—
>
> (a) erred in law, in deciding that it was not required to give a reasoned judgment, and/or
>
> (b) denied the appellant a fair trial, and that in consequence the court's verdict is unsafe and/or unsatisfactory."

10 It is right to say that it has not been the practice of the justices to give reasons for their decisions and this is the first time that this question has been raised on appeal.

11 Before the implementation of the Human Rights Act in England, which gives effect to the European Convention on Human Rights, justices of the peace in that jurisdiction did not give reasons for their decisions. The reason for that was explained in the case of *R.* v. *Civil Serv. Appeal Bd., ex p. Cunningham* (2), in which a prison officer sought judicial review on the basis that the board had failed to give reasons for rejecting his appeal. Lord Donaldson of Lymington, M.R. had this to say ([1991] 4 All E.R. at 318):

> "I accept at once that some judicial decisions do not call for reasons, the commonest and most outstanding being those of magistrates. However, they are distinguishable from decisions by the board for two reasons. First, there is a right of appeal to the Crown Court, which hears the matter de novo and customarily does give reasons for its decisions. Second, there is a right to require the magistrates to state a case for the opinion of the High Court on any question of law. This right would enable an aggrieved party to know whether he had grounds for raising any issue which would found an application for judicial review, although his remedy would procedurally be different."

12 The first of these reasons, that the appeal proceedings before the Crown Court are by way of a re-hearing of the evidence, does not apply in Gibraltar, where by s.301 of the Criminal Procedure Ordinance, appeals are "on the papers." The second of those reasons, that there is a right to require the justices to state a case, did not find favour in the subsequent case before the Queen's Bench Division of *R.* v. *Harrow Crown Ct., ex p. Dave* (3), which was an application for judicial review of a decision of the Crown Court on appeal from the justices, in which the court had to consider whether the Crown Court was obliged to give reasons for its decision. Pill, J., in delivering the judgment of the court, considered whether the fact that there was a right of appeal by way of case stated was sufficient excuse for the Crown Court not giving reasons for its decision. He had this to say ([1994] 1 W.L.R. at 105):

> "We have regard to that right to question a conviction 'on the ground that it is wrong in law or is in excess of jurisdiction' by requesting the court to state a case for the opinion of the High Court: Supreme Court Act 1981, s.28(1). We do not regard the existence of that right however as a complete answer to the claim that reasons should be given for decisions of the Crown Court on appeal from the magistrates' court.
>
> As Mr. Nicol pointed out, rule 26(2) of the Crown Court Rules 1982 (S.I. 1982 No. 1109 (L. 22)) provides that the application to state a case 'shall state the ground on which the decision of the Crown Court is questioned.' Unless reasons are given, the potential appellant has no means of knowing whether the court has misdirected itself. Further, by rule 26(11) the Crown Court is empowered, before stating a case, to order the applicant to enter into a recognisance, with or without sureties, conditioned to prosecute the appeal without delay. In our judgment a potential appellant should not have to go through those procedures or subject himself to that obligation in order to discover the reasons for a Crown Court decision against him."

13 Whilst it may be that there is no requirement in Gibraltar for an appellant to state the ground upon which the decision of the justices is questioned, he is required by s.63 of the Magistrates' Court Ordinance to enter into a recognizance to prosecute an appeal by way of case stated. I agree with the Divisional Court that a potential appellant should not have to subject himself to that obligation to discover the reasons for a decision against him.

14 In my judgment, the justification put forward for justices in England not being obliged hitherto to give reasons for their decisions, does not apply in this jurisdiction.

15 In *R.* v. *Harrow Crown Ct.* (3), the Divisional Court was dealing with a case where a charge of assault causing actual bodily harm,

involving a decision which basically rested on the credibility of witnesses, was found proved before the justices, and after an appeal by way of re-hearing in the Crown Court before a judge sitting with two justices, the appeal was dismissed. The reasons given were:

> "Over the course of three days we have had ample opportunity to hear and to assess the witnesses. It is our unanimous conclusion that this appeal must be dismissed."

16 The Divisional Court adopted the following reasoning of Lord Lane, C.J. in *R.* v. *Immigration Appeal Tribunal, ex p. Khan* (4), in which His Lordship was considering a comment by Donaldson, M.R. in an earlier case that failure to give reasons amounts to a denial of justice and is itself an error of law. Lord Lane said ([1983] Q.B. at 794–795):

> "Speaking for myself, I would not go so far as to endorse the proposition set forth by Sir John Donaldson that any failure to give reasons means a denial of justice and is itself an error of law. The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence upon which they have come to their conclusions.
>
> Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis upon which they have reached their determination upon that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Secondly, the appellant is entitled to know the basis of fact upon which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not."

17 In remitting the case to the Crown Court for a re-hearing, the Divisional Court had this to say ([1994] 1 W.L.R. at 107):

> "In the present case the issues were of fact and not of law. Elaborate reasoning was not required. Miss O'Neill submits that what the judge said was enough. Implicit in his statement was a finding that the evidence of the prosecution witnesses had been accepted. Incantations by the judge upon such matters as the burden

of proof are unnecessary, she submits, as, in this case, was further reasoning.

The reasoning required will depend upon the circumstances. In some cases the bald statement that the evidence of a particular witness is accepted may be sufficient. In the present case however apparently compelling evidence was called by the defence. It was independent evidence which inevitably cast doubt upon the truthfulness of the evidence of the complainant and her supporting witness. Events at the hospital were relevant and, on the face of it, adverse to her credibility. The prosecution case was in certain respects different from that in the magistrates' court.

The appellant was entitled to know the basis upon which the prosecution case had been accepted by the court. In the present case, that involved knowing the process by which the apparently powerful points in favour of the defence had been rejected."

18 That, then, was the position in England until recently. Justices did not have to give reasons for their decision, for reasons which do not apply in this jurisdiction. The Crown Court was obliged to give reasons for a decision on appeal from the justices.

19 With the coming into force of the Human Rights Act 1998, justices in England are now obliged to give reasons for their decisions. This is because it has been held in the European Court of Human Rights that the right to a fair trial embraced in art. 6(1) of the European Convention on Human Rights involves an obligation on a court to give reasons for its decision (see *Van de Hurk* v. *Netherlands* (5) and *Hiro Balani* v. *Spain* (1)).

20 Of course the Human Rights Act has not been enacted in Gibraltar and the European Convention on Human Rights does not form part of our law. However, art. 6(1) of the European Convention is in terms not dissimilar to s.8 of the Gibraltar Constitution, and decisions of the European courts upon art. 6(1) are of persuasive value in Gibraltar. The European courts are building a body of jurisprudence which in many instances is of assistance in this jurisdiction. For the purposes of this case it is sufficient to say that the view of the European Court of Human Rights is that the right to a fair hearing, which is contained in art. 6(1) of the European Convention, and which finds its parallel in s.8 of the Gibraltar Constitution, has been interpreted as obliging a court (and this would include the justices' court in England) to give reasons for its decisions.

21 A fair trial process also involves an appellate court having all relevant material before it on which to base its decision. It is difficult for an appellate court to make a fair determination on the record of the trial

of the lower court if the reasons which led the lower court to reach its decision are unavailable. This is particularly so in the case of appeal from the justices, where the Supreme Court does not have the benefit of a verbatim transcript of the proceedings before the justices.

22 My conclusion is that the requirements of a fair hearing and a fair trial process oblige the justices to give reasons for their decisions. These need not be elaborate, and indeed will in most cases involve a note of but a few lines, and I would commend for the justices' consideration the passages I have cited from *R.* v. *Immigration Appeal Tribunal, ex p. Khan* (4) and *R.* v. *Harrow Crown Ct., ex p. Dave* (3).

23 Were the brief reasons given by the justices in this case sufficient? I think not. Although the case rested mainly on credibility, there were issues of what exactly the appellant did which the justices found amounted to threatening behaviour and why they considered his behaviour was likely to cause a breach of the peace. The chairman announced a finding, but when pressed by Mr. Hughes, did not give reasons for that finding.

24 There was also the issue of the charges, which from the appeal record were defective. The particulars of the offences allege that the appellant used threatening behaviour, in the one charge "to the annoyance of the Hon. James Joseph Netto" and in the second charge "the annoyance of Jyoti Neish." Section 34 of the Criminal Offences Ordinance reads:

> "A person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, is guilty of an offence and is liable on summary conviction to imprisonment for three months or to a fine at level 4 on the standard scale."

25 It is not an ingredient of the offence that the threatening behaviour should be to the annoyance of a particular person: rather it must be such as to be with intent, or be likely, to cause a breach of the peace. No point was taken on the charges by Mr. Hughes and it seems that although he commenced his submissions before the justices on the basis of the charges as framed, he pursued his submissions on the basis of s.34 and the charges as they should have been framed. It also seems from the record that it was on the latter basis that the justices reached their decision, although, from the record of appeal, no formal amendment of the charges was made. It would have been helpful for the record to show whether the justices addressed their minds to the charges. Furthermore, the framing of the charges affects the disposition of the appeal.

26 Having determined that the justices should have given reasons for their decision, I could take one of three courses. I could ask the clerk to

the justices to remit the reasons of the justices before I finally determine the appeal. I am persuaded that this course would be unfair to the justices. It would be in the nature of requesting them, several weeks after the event, to justify their decision from the record.

27 Following *R.* v. *Harrow Crown Ct.* (3) I could order a re-trial as I am empowered to do by s.302 of the Criminal Procedure Ordinance. Given that the charges are defective, I decline to do so.

28 In the unusual circumstances of this case I allow the appeal, quash the convictions and set aside the sentences imposed upon them.

Appeal allowed.