FREEDOM OF EXPRESSION

Free Speech – Conduct Likely To Cause A Breach Of The Peace – Obstruction

Redmond-Bate v DPP 23rd July 1999, The Times

28th July 1999 QBD

The Facts

Three women were preaching from the steps of Wakefield Cathedral. Alison Redmond-Bate was one of them. They were members of a small organisation of Christian fundamentalists called *Faith Ministries*, and were preaching about morality, God and the Bible. A couple made a complaint to a Police Officer, who attended the scene. He found no crowd and no cause for complaint. About twenty minutes later the Officer returned to find a crowd of over 100 people. The mother of Alison Redmond-Bate was marching up and down proclaiming the speakers' message. A gang of three youths were chanting and swearing. Others were shouting 'bloody lock them up' and 'shut up'.

The Police Officer asked the gang of youths to move on and they did so. He then asked the three speakers to stop preaching, so to prevent a breach of the peace occurring. When they refused, he arrested them. Subsequently they were convicted of obstructing a police officer in the course of his duty.

Alison Redmond-Bate appealed unsuccessfully to the Crown Court. She appealed by case stated to the Queen's Bench Divisional Court.

The Decision

The Court allowed her appeal. Sedley LJ gave the judgement, with Collins J agreeing. The question for the Court, the parties agreed, was the reasonableness of the Constable's perception that Alison Redmond-Bate was about to cause a breach of the peace. During his speech, Sedley LJ made several pronouncements on the law of breach of the peace and free speech.

Breach of the Peace

Sedley LJ approved the modern definition given by the Court of Appeal in *R v Howell:*[1] '...we cannot accept that there has been a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done.'[2] Sedley LJ emphasised that there must be at least a threat of *violence*, 'noise and disorder are not enough'.[3]

The judge then distinguished two situations: first, where the threat to the peace was coming from the defendant, and second, where the threat was coming from somebody else. For this Sedley LJ relied upon the contrast between *Beatty v Gilbanks*[4] and *Wise v Dunning.*[5] In *Beatty* a Salvation Army march provoked violent reactions from townsfolk in Western-Super-Mare. The Divisional Court overturned a bind-over order preventing the Salvationists from making further marches. This was on the basis that any violence was not the 'natural consequence' of the Salvationists' march; rather, it was caused by the unlawful conduct of the objectors. However, in *Wise v Dunning* a Protestant preacher who insulted Roman Catholics was bound over to keep the peace. 'The distinction between the two was clear enough:' said Sedley LJ, 'the reactions of the opponents would in either case be unlawful, but while in the first case they were the voluntary acts of people who could not be properly regarded as objects of provocation, in the second the conduct was calculated to provoke violent and disorderly reaction.'[6] (In response to a question by counsel, Sedley LJ said that where both parties threatened violence a constable may properly take steps against either party.)

The judge went on to refine this dichotomy: '...if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or liberties of others, provoke violence which, though unlawful, would not be entirely unreasonable...a constable is empowered to take steps to prevent it'. This explained the 'protest' cases, where provocation to violence was a mere consequence of the protests, and not

1 [1982] 1 QB 416 CA.
2 Per Watkins LJ, [1982] 1 QB 416, at 426.
3 Transcript para 9.
4 (1882) 9 QBD 308.
5 [1902] 1 KB 167.
6 Transcript para 2.

calculated. In *R v Morpeth Justices, ex parte Ward*[7] protesters disrupted a pheasant shoot and in *R v Nicol*[8] protesters obstructed an angling competition. In each case the protesters were non-violent. But as each protest was likely to provoke a violent response it was the *protesters* who were bound over to keep the peace. That was because any violent response would *not* have been 'entirely unreasonable'.

And so, for the instant case, the Court had to decide where the threat was coming from. Here, Sedley LJ discussed the law regarding free speech.

Free Speech

Sedley LJ referred to Article 10 of the European Convention of Human Rights (ECHR) and the forthcoming Human Rights Act 1998 (which, with certain exceptions,[9] give a right to 'freedom of expression').[10] He stated that 'it is now accepted that the common law should seek compatibility with the values of the Convention'. And that there 'has been for a long time, good reason for policing and law in this field to respect the Convention'. This was because breaches of the Convention by the executive can lead to the United Kingdom being brought before the European Court of Human Rights. Thus, Sedley LJ held, there was a right of free speech.

His Lordship noted that the European Court of Human Rights had held the law of breach of the peace to be compatible with the Convention (*Steel v UK*)[11] and therefore, in this area, the common law conformed to the Convention.

Sedley LJ then offered a definition of free speech: '[it]...includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of state control of unofficial ideas'.[12]

7 (1992) 96 Crim App Rep 215 DC.
8 [1996] CRIMLR 318, [1995] Times LR 607. Also see (1996) 1 J CIV LIB 75.
9 As necessary in the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals and the rights and freedoms of others.
10 The HRA is due to come into force 2nd October 2000.
11 Case No 67/1997 185111058.
12 Transcript para 20.

He then held: 'To proceed, as the Crown Court did, from the fact that the three women were preaching about morality, God and the Bible (the topic not only of sermons preached on every Sunday of the year but of at least one regular daily slot on national radio) to a reasonable apprehension that violence is going to erupt is both illiberal and illogical.'[13] Thus it was held that the constable's perception that Alison Redmond-Bate was about to cause a breach of the peace was not a reasonable one; he was not acting in the course of his duty when warning the women to stop preaching.

Analysis

This decision was actually based on the simple ground that the facts revealed no threat of a breach of the peace. In a speech more complicated and broader than necessary to decide the case, Sedley LJ made some points on free speech and breach of the peace which are worthy of comment.

A 'Right' Of Free Speech

Headlines reporting this case will proclaim a right of free speech. By asserting such a right the common law is anticipating the arrival into domestic law of the European Convention on Human Rights (as the Human Rights Act 1998[14]). Sedley, LJ recognised the 'constitutional shift which is now in progress' and said 'A liberty, as A P Herbert repeatedly pointed out, is only as real as the laws and bylaws which negate or limit it. A right, by contrast, can be asserted in the face of such restrictions and must be respected, subject to lawful and proper reservations, by the courts.'[15] This is in contrast to the traditional common law approach to human rights, perhaps at its nadir in *Malone v Metropolitan Police Commissioner.*[16] There, Megarry VC stated: 'England is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.'[17] It followed that there was no *right* to privacy, but there was a *liberty* for the police to tap our telephones.

13 Ibid Para 21.
14 Due to come into force October 2000.
15 Ibid Para 13.
16 [1979] Ch 344.
17 Ibid at 356.

The pronouncement that there is a common law *right* of free speech is a major breakthrough in English law. It is a pity that the Court only delivered this right under the shadow of the soon-to-be-in-force Human Rights Act. Presumably though, the common law will from now on recognise all the rights provided by the Act, such as privacy, a fair trial and freedom from degrading treatment.

Violence An Element Of Breach Of The Peace

It was noted above that this speech was broader than necessary to decide the case. It was only necessary to hold that violence was an ingredient of breach of the peace. Without a threat of violence no question of arrest (let alone *who* to arrest) should arise.

On the simple issue of 'violence as an element' the preference for the *Howell* definition over other wider ones is welcome. Sedley, LJ emphasised that the *Howell* definition was confined to violence or threats of violence.[18] This contrasts with Lord Denning's statement in *R v Chief Constable of Devon & Cornwall ex parte CEGB*[19] that violence was not a necessary element. He stated that if peaceful protesters obstruct those trying to do lawful work then the protesters are guilty of a breach of the peace, even if no violence is likely.[20]

Which party should be arrested or bound over

Sedley LJ then explained the law as to *who* should be arrested (or bound over) when there is a threat to the peace. It should be those who threaten violence, *or* those who provoke others to violence (unless those others act entirely unreasonably). To support this, the judge classified a number of cases into two groups. The first group – those who 'provoke' 'unreasonable' violence in others – contained *Beatty v Gilbanks* and *Percy v DPP*.[21] (Of course the 'provokers' in this group should *not* be arrested or bound over.) The second group – those who provoke '*reasonable*' violence in others – contained *Wise v Dunning, Duncan v Jones, R v Nicol* and *ex parte Ward*. However, this classification is too broad to support an accurate and workable definition of the law.

18 Transcript para 9. Cf Fenwick, Civil Liberties (2nd ed p 302) who states that the Howell definition is not confined to violence or threats of violence.
19 [1982] QB 458 CA.
20 Ibid at 471. In *Percy v DPP* [1995] 3 All ER 124 the Divisional Court preferred *Howell* to *ex parte CEGB*.
21 [1995] 3 All ER 124.

In *Duncan v Jones* the police arrested Mrs Duncan for refusing to abandon a speech outside an unemployed training centre. The Divisional Court upheld her conviction for obstructing a police officer in the course of his duty. The constable present apprehended a breach of the peace because in the previous year a 'disturbance' followed a similar event, which Mrs Duncan had also addressed. That was the only evidence that Mrs Duncan's speech would provoke a breach of the peace. The Divisional Court in *Duncan's* case did not know whether there would be violence, or whether any possible violence was 'not entirely unreasonable.' Sedley's LJ definition of breach of the peace is at odds with *Duncan v Jones*. Yet Sedley LJ found *Duncan v Jones* to be 'sharper example'[22] than *Wise v Dunning* of this category of cases.

What is more, it is at odds with comments made in the Court of Appeal in *Howell*. It will be recalled that Sedley LJ approved of the definition of breach of the peace provided in *Howell*. That definition was given by Watkins LJ, who continued: 'Furthermore, we think, the word "disturbance" when used isolation cannot constitute a breach of the peace'.[23] In *Duncan v Jones* the word 'disturbance' *was* used in isolation. It was, therefore, contradictory to follow *Howell* and approve *Duncan v Jones*.

Duncan v Jones has been a long-standing blight on free speech in England. Sedley's LJ approval of it was at odds with the spirit of his proclamation of 'a right of free speech'. Furthermore, a consideration of *Duncan v Jones* was not even necessary to decide this case. Its affirmation – in 1999 – has breathed life into a moribund case from what we may have kindly thought was a different era with courts of different values.

In *ex parte Ward*, it will be recalled, protesters who obstructed a pheasant shoot were bound over to keep the peace. In that case Brooke J held that the behaviour of the protesters was likely to have the 'natural consequence' of causing violence.[24] (The 'natural consequence' test was, of course, used in *Beatty v Gilbanks*.) However, three years later, in *R v Nicol*, Simon-Brown LJ linked the 'natural consequence' test with reasonableness: was it the defendant or the other party who had acted unreasonably? Of course, the Court in *Redmond-Bate* took this a step further in providing only a test of reasonableness. Thus Sedley LJ put *Wise v Dunning, Duncan*

22 Transcript para 7.
23 In his speech, Sedley LJ stated that (Transcript para 9) 'noise and disorder' were not enough to constitute a breach of the peace.
24 (1992) 95 Crim App Rep 215, at 221.

v Jones, ex parte Ward and *Nicol* into a single category: in each case any likely response of violence would have been 'reasonable'.

However, *Wise v Dunning* is distinguishable from the others: there the provocation to violence was calculated, rather than a mere consequence. Placing *Duncan v Jones*, *Ward* and *Nicol* within the principle of *Wise v Dunning* was unhealthy and illiberal. It associated a bigot who deliberately incited sectarian violence with lawful protest and free speech.

Wise v Dunning is correct. But what should the police or magistrates do in these other situations? The alternative was best articulated by O'Brien J in *R v Londonderry Justices*:[25] 'If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent the result, not the legal condemnation of those who exercise those rights.'[26]

As well as one of justice, there is another problem with laying down a law as to *which* party should be arrested. Take for instance, a situation where a crowd of one hundred is reacting (unreasonably) to a single speaker with threats of violence. According to the Court and the reasonableness test that single constable should warn, and if necessary, arrest the whole crowd. That is not a workable option. Proponents of the 'reasonableness test' might respond with a suggestion that the constable should call for reinforcements before acting. Which is, of course, similar to the action suggested by O'Brien J: where there appears to be a threat to the peace, the police should gather so to prevent it.

Finally, Sedley LJ curiously placed *Percy v DPP* into his first group (cases where defendants 'provoke' 'unreasonable' violence in others). In *Percy* a woman who persistently climbed a perimeter fence of a military base had a bind-over order quashed because there was no likelihood that trained security personnel would respond with violence. *Percy* was a case like the instant one: there was no threat of violence and so no breach of the peace to apprehend. Nobody in *Percy* was provoked to threaten a breach of the peace.

25 (1891) 28 LR Ir 440 QBD. A case similar to *Beatty v Gilbanks*.
26 This approach was preferred to *Duncan v Jones* by Conner ACJ in the Supreme Court of the Australian Capital Territory, in *Forbutt v Blake, Reid v Eggins, Vickers v Pearson* (1980) 51 FLR 465.

Conclusion

The pronouncements that there is a common law *right* of free speech and that a breach of the peace is limited to violence (or threats of violence) are welcome. However, the other pronouncements on breach of the peace severely restrict this right to free speech. According to Sedley LJ, the police should arrest those who protest lawfully if it appears that others will respond with violence. If they resist, they will receive a criminal record (for obstruction). There was no suggestion that the police should protect these lawful protesters. For example, as O'Brien J suggested over one hundred years ago,[27] by the police gathering to prevent any likely violence.

It is fortunate that only the positive rulings in this case – that is the right to free speech and the restriction of breach of the peace to violence (or threats to violence) – were necessary for the decision. Thus it is only these rulings that constitute the *ratio decidendi*. The comment that, in certain cases, those who threaten violence should *not* be arrested or bound over is illiberal; it is in inconsistent with a right to free speech. The comments that (1) approved *Duncan v Jones*, and (2) assimilated the 'protest' cases with *Wise v Dunning*, are illiberal *and* incorrect. All three comments were unnecessary for the decision and so *obiter dicta*. They *need* not be followed and, for the sake of free speech, *should* not be followed.

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27 In *R v Londonderry Justices* (1891) 28 LR Ir 440 QBD, see above.