Hilary Term

[2014] UKSC 8

On appeal from: [2012] EWHC 1238 Admin

JUDGMENT

Richardson and another (Appellants) vDirector of Public Prosecutions (Respondent)

before

Lady Hale, Deputy President

Lord Kerr

Lord Hughes

Lord Toulson

Lord Hodge

JUDGMENT GIVEN ON

5 February 2014

Heard on 12 November 2013

Appellant	Respondent
Hugh Southey QC	Duncan Penny
Jude Bunting	William Hays
(Instructed by Irvine Thanvi Natas)	(Instructed by CPS Appeals Unit)

LORD HUGHES, (with whom Lady Hale, Lord Kerr, Lord Toulson and Lord Hodge agree)

1.
This appeal concerns the proper ambit of the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"). That section provides, so far as material:

"(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect—

(a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,

(b) of obstructing that activity, or

(c) of disrupting that activity…

(2)
Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land…"

2.
The present case concerns trespassers who wished to make a protest, as do some other reported cases upon this section. But the offence is not limited to such people. Those who trespass and obstruct the activity of others might include many in different situations, such as for example business rivals or those engaged in a personal dispute, as maybe between neighbours.

3.
By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences.

4.
Under the section there are four elements to this offence:

i)
the defendant must be a trespasser on the land;

ii)
there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity;

iii)
the defendant must do an act on the land;

iv)
which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it.

The present case concerns the second element and in particular the meaning of "any lawful activity". Given that by subsection (2) an activity is lawful if those on the land may engage in it without committing a criminal offence, what connection if any is required between any offence which may be committed and the activity which the defendant is said to have intentionally disrupted (etc)? Is any

offence committed on the land, however remote from or incidental to the occupant's activity, or however technical, a bar to the conviction of the invading trespasser?

5.
The defendants mounted a non-violent but determined protest in a London shop. They objected to the shop because its wares were connected with an Israeli-owned business in the West Bank. The shop specialised in selling beauty products derived from Dead Sea mineral material. Not all the products sold in the shop originated from the Dead Sea but the vast majority did. The defendants' objection was grounded in the facts that (i) those products were produced by an Israeli company, in an Israeli settlement adjacent to the Dead Sea in the West Bank, that is to say in the Occupied Palestinian Territory ("OPT") and (ii) the factory was said to be staffed by Israeli people who had been encouraged by the Government of Israel to settle there.

6.
The defendants arrived at the shop on a trading day, equipped with a heavy concrete tube. With the help of colleagues they connected their arms through the tube anchored by a chain secured by a padlock to which they said they had no key. The district judge found that they had no intention of buying anything; rather, their intention was to disrupt the shop's trading. When asked to leave they failed to do so. They succeeded in their aim because the manager concluded that trading was impossible and closed the shop. She called the police. The police found the defendants polite and co-operative except in refusing to free themselves. It was necessary for tools to be used to break through the concrete. When the defendants had thus been released, they were arrested and in due course charged with the offence contrary to section 68. The Crown case was that the lawful activity which they had intentionally disrupted was retail selling.

7.
The defendants had no defence to elements (i), (iii) and (iv) of the offence. They contested the charge on the basis that the activity being carried on in the shop was not lawful. They asserted that it involved the commission of criminal offences for one or more of four reasons.

i)
The company running the shop was guilty of aiding and abetting the transfer by the Israeli authorities of Israeli citizens to a territory (the OPT) under belligerent occupation; the transfer was said to be contrary to article 49 of the Fourth Geneva Convention of August 1949, and aiding and abetting it to be an act ancillary to a war crime, made a criminal offence in England and Wales by sections 51 and 52 of the International Criminal Court Act 2001.

ii)
The products sold in the shop were criminal property, as the product of this offence of aiding and abetting a war crime; accordingly the company running the shop, which at least suspected this, was guilty of the offence of using or possessing criminal property, contrary to section 329 of the Proceeds of Crime Act 2002.

iii)
The products had been imported into the UK as if covered by an EC-Israeli Association Agreement, which conferred certain tax or excise advantages. But the European Court of Justice has ruled that products originating in the OPT do not qualify for this treatment. Accordingly, it was said, the company running the shop was guilty of the offence of cheating the Revenue.

iv)

The products sold in the shop were labelled “Made by Dead Sea Laboratories Ltd, Dead Sea, Israel.” This was said to be false or misleading labelling because the OPT is not recognised internationally or in the UK as part of Israel. Accordingly the company running the shop was guilty of one or both of two labelling offences, contrary to the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) or the Cosmetic Products (Safety) Regulations 2008 (SI 2008/1284).

8.
The district judge convicted the defendants in the magistrates’ court. Their appeal by case stated was dismissed by the Divisional Court of Queen’s Bench. One part of the district judge’s reasoning was not upheld by the Divisional Court, for he had held that only the activity of a natural person fell within section 68, and that neither the shop manageress nor the sales assistants were even arguably guilty of any offence. The Divisional Court rightly held that section 68 plainly included a company within the expression “person… engaging in” (lawful activity). Its conclusions on that issue are not challenged and no more need be said about it. The live issue relates to the meaning of the expression “lawful activity” and in particular to when the commission of a criminal offence by the occupant whose activity is targeted by the trespasser has the effect of making unlawful the occupant’s activity. The question certified by the Divisional Court was:

“Should the words ‘lawful activity’ in section 68 Criminal Justice and Public Order Act 1994 be limited to acts or events that are ‘integral’ to the activities at the premises in question?”

“Lawful activity”

9.
The meaning of the expression “lawful activity” in section 68(2) has received some previous attention from the courts. Three propositions were not in dispute in argument in the present case.

i)
Section 68 is concerned only with a criminal offence against the law of England and Wales. The House of Lords so held in R v Jones (Margaret)[2006] UKHL 16, [2007] 1 AC 136. Thus a defendant trespassing at a military base was not entitled to assert that the ordinary activities of the base were unlawful because the UK Government was, or might be, committing an act of international aggression in preparing to despatch military hardware to Iraq.

ii)
In a prosecution under section 68 the Crown is not required to disprove the commission of every criminal offence which could conceivably be committed by the occupant(s) of the land. A specific offence or offences must be identified by the defendant and properly raised on the evidence. The Divisional Court so held in Ayliffe v Director of Public Prosecutions[2005] EWHC 684 (Admin), [2006] QB 227, see particularly para 50. Thus a bare assertion by trespassers at military bases that the Government may have aided and abetted a war crime did not raise the issue.

iii)
Where, however, the issue of a relevant specific criminal offence by the occupant(s) of the land is fairly raised by evidence, the onus lies upon the Crown to disprove it to the criminal standard of proof, in order for it to prove, to that standard, that the defendant trespasser has committed the offence contrary to section 68. This follows from Ayliffe and from the language of the statute.

10.

Two other cases give some assistance on the question of whether any criminal offence committed by the occupants has the effect of making the activity unlawful. In Hibberd v Director of Public Prosecutions (unreported) 27 November 1996 the Divisional Court was concerned with a trespasser who set out to stop the clearance of land for the construction of a new by-pass. He gave evidence that one or more of the tree-fellers was using a chainsaw but not wearing gloves and suggested that that raised the real possibility that he was committing an offence contrary to the Management of Health and Safety at Work Regulations 1992 (SI 1992/2051) in not using equipment provided for him by his employers. Without investigating whether any such offence was or was not made out, the Divisional Court held that even if it had been it could not affect the lawful nature of the activity which the defendant had disrupted, namely the clearance of the site. That was lawful in the sense that it was properly authorised. The "activity" of the occupants could not be defined simply to extend to the actions of the particular chainsaw operator(s) spotted. Two years later in Nelder v Director of Public Prosecutions The Times, 11 June 1998 a different Divisional Court considered the case of hunt saboteurs who set out to disrupt a hunt. They adduced evidence that at the outset of the hunt, two whippers-in had strayed from the land over which the hunt had permission to ride and had taken the hounds onto adjacent land where they had no such permission. The trespassing defendants had actively disrupted the actions of all the hunt, not confined to the strayers, and had continued to do so after the latter had rejoined the main body of hunters. In this case the relevant part of section 68 was the concluding words of section 68(2), trespassing occupants rather than occupants committing a criminal offence, but the two limitations upon the concept of lawful activity are clearly in similar case. The court held that the fact that some few members of the hunt had acted unlawfully by trespassing on adjoining land did not affect the lawfulness of the activity which the defendants had disrupted. Simon Brown LJ offered the suggestion that it might have been otherwise if either the hunt's "central objective" had been to hunt over land where it had no authority to be, or the defendants had confined their disruption to activity by the strayers.

11.
Each of those cases illustrates the problem posed by the wording of section 68(2). Part of the difficulty arises from the use of the word "may" in the definition of lawful activity:

"Activity…is 'lawful'…if he or they may engage in the activity…without committing an offence or trespassing on the land."

For the Crown, Mr Penny revived, although not at the heart of his submissions, the argument previously ventilated in Ayliffe, that this means that an activity remains lawful even if an offence is committed, providing that the activity could have been accomplished without the offence. It may be noted that if that were the correct construction it would have provided a complete answer to the appeals in both Hibberd and Nelder. Although this might on the face of the statutory language be a possible construction, it would deprive the defence of most of its force; it would mean that even if the occupants were engaged in a thorough-going criminal act which represented their central purpose in being on the land, the defence would not operate if they could have altered the way they did things so as to do them lawfully. It would have the effect of treating as lawful something which was anything but lawful, and of examining not the activity which was actually carried out, but an activity which was not. That construction was rejected by the Divisional Court in Ayliffe at para 52, and also by the Divisional Court in the present case, at para 29. The true meaning of section 68 must be found despite the use of the word "may", which was perhaps employed because the section has to apply to activity by the occupant which has not yet commenced. The true meaning lies in examining the activity which was (or was to be) carried out on the land.

12.
In argument in the present case, neither side contended that every criminal offence committed on the land provides the defendant with an escape from the section. For the appellants, Mr Southey QC accepted that if, for example, it had turned out that in the present case there was an employee in the shop who was paid something less than the national minimum wage, that would not render the activity of the shop unlawful for the purposes of section 68. Such a merely collateral offence would not provide the defendants with a fortuitous defence. His proposed solution to the problem was that the section defines "activity" by reference to the particular feature of the occupant's acts against which the defendant was protesting or objecting. So, he contended, if the defendant made his objection to low wages, the fact that the whole of the rest of the shop's activity was entirely lawful would matter not, but unless this was the defendant's focus, the collateral offence against wage regulation would be irrelevant. That, however, is to turn section 68 upside down. True it is that section 68(1) requires the defendant's act to be done with the intention of disrupting (etc) the lawful activity of the occupant, but it calls first for a finding as to the lawful activity, and only then asks whether that is what the defendant intended to disrupt (etc). The section cannot be read in the way suggested. Mr Southey's contention suggests an enquiry not into what the defendant intends, for he clearly intends to disrupt the whole activity, but rather into his motive or ulterior purpose for intending it. Moreover, this suggested construction is open to an objection similar to that lying against the one rejected in Ayliffe (para 11 above); it would direct the court away from the activity actually carried out by the occupants, in this case into the mind of the defendant. Just as the argument rejected in Ayliffe would enable the Crown or the occupant to choose which activity to rely upon, however remote from what he was actually doing, so this construction would bestow a similar bounty upon the defendant.

13.
The intention of the section is plainly to add the sanction of the criminal law to a trespass where, in addition to the defendant invading the property of someone else where he is not entitled to be, he there disrupts an activity which the occupant is entitled to pursue. Section 68(2) therefore must mean that the additional criminal sanction is removed when the activity which is disrupted is, in itself, unlawful, which may be either because the occupant is himself trespassing, or because his activity is criminal. Mr Southey's realistic concession is correct, for not every incidental or collateral criminal offence can properly be said to affect the lawfulness of the activity, nor to render it criminal. It will do so only when the criminal offence is integral to the core activity carried on. It will not do so when there is some incidental or collateral offence, which is remote from the activity. The decisions in Hibberd and Nelder are both consistent with this approach. The certified question ought thus to be answered "Yes".

14.
This was the general approach of the Divisional Court in this case, as the terms of the certified question show. However, as may occur in an extempore judgment, some of its language ranged more widely than required. To the extent that it spoke in para 29 of the defence being confined to the case where the activity is "patently unlawful", that latter expression needs to be understood to mean that the criminal offence must be integral to the core activity of the occupant and not collateral to or remote from it. It does not mean that the illegality must be so obvious as not to call for more than the barest enquiry. The Divisional Court was also concerned at the potential breadth of enquiry which might be required of the court of trial, usually the magistrates' court, especially where, as here, the defence raises potentially far-reaching questions concerning international political events. That found expression in para 27 as follows:

“As Waller LJ said in Ayliffe…it is enough for the prosecution to show that the activity in question is apparently lawful. If then the defendant seeks to raise an issue to the contrary within the section 68 proceedings he must…do so by reference to facts or events inherent in the activity itself. He cannot rely on the assertion of extraneous facts whose effective investigation would travel into contexts and controversies which are markedly remote from what is actually being done by way of the activities in question.”

15.
It is correct that section 68(2) does not arise in the case of an apparently lawful activity unless and until it is raised on the evidence (Ayliffe). It is also correct that a criminal offence, if raised on the evidence, will be relevant to section 68(2) only if it is integral to the core activity in question. But if it is, it may yet involve investigation of extraneous events. The Divisional Court expressly, and correctly, accepted at para 30 that guilt of a war crime might in theory at least qualify. Other less grave alleged offending may also involve investigation of the assertion that it has occurred. It does sometimes fall to magistrates to examine matters of complexity and occasionally of international import; so long as the issue is not a non-justiciable one such as the nation’s foreign policy as in Jones, there is no inhibition on their doing so and they will no doubt constitute themselves appropriately if necessary. Nor should the court of trial be inhibited from doing so, if the case requires it, by consideration of the fact that a finding may be made against the occupant of the land, such as the shopkeeper here, who is not a party to the trial. The only finding that might be made is that the Crown has not made out its case because there appears to have been an activity on the land which is not proved to have been lawful. That is not a conviction of the absent shopkeeper, nor in any sense a finding binding upon him. Decisions may sometimes have to be made in all manner of criminal proceedings which involve consideration of the actions of non-parties – an obvious case is where the defendant blames a third party for the offence.

16.
The application of these principles to the present case demonstrates that the conclusions of both the district judge and the Divisional Court were correct and that the defendants were rightly convicted.

The war crime argument

17.
Section 51 of the International Criminal Court Act 2001 renders genocide, a war crime and a crime against humanity domestic offences against the criminal law of England and Wales. It applies wherever the offence was committed if the offender was resident in the UK. Section 52 of the same Act does the same for “conduct ancillary” to such a crime, and such conduct includes, via section 55, aiding, abetting, counselling or procuring the commission of the principal offence. A “war crime” is defined in article 8(2)(b) of Schedule 8 to the Act to include:

“(viii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies…”

That offence derives, as the defendants said, from the Fourth Geneva Convention of August 1949 relating to the protection of civilians in time of war. If therefore a person, including the shopkeeper company, had aided and abetted the transfer of Israeli civilians into the OPT, it might have committed an offence against these provisions. There was, however, no evidence beyond that a different company, namely the manufacturing company, had employed Israeli citizens at a factory in the West Bank and that the local community, which held a minority shareholding in that manufacturing company, had advertised its locality to prospective Israeli settlers. It is very doubtful that to employ

such people could amount to counselling or procuring or aiding or abetting the Government of Israel in any unlawful transfer of population. Such an employer might be taking advantage of such a transfer, but that is not the same as encouraging or assisting it. Even if that company could have been aiding and abetting such transfer, that cannot amount to an offence by the separate retailing company, whatever the corporate links between the two companies. And even if the companies had been the same, such a crime of assistance was not an integral part of the activity carried on at the shop, which was retail selling. On the contrary, it was antecedent to, and remote from, the selling. The selling was perfectly lawful. The defendants, for their own reasons, elected to trespass and to stage a sit-in which was intended to (and did) stop that lawful activity in its tracks. They thereby committed the offence under section 68.

18.
The supplemental contention that the shopkeeper company was committing a money laundering offence fails for the same reasons. The suggested money laundering is the possession and use (by selling) of the products of the West Bank factory. Those products were said to be criminal property because they were the benefit of the criminal conduct of the factory owning company and thus within section 326(4) of the Proceeds of Crime Act 2002. If, however, there was no aiding and abetting of the unlawful movement of population, the products of the factory could not be property obtained "by or in return for" criminal conduct (section 242 of the Proceeds of Crime Act 2002). Even if there had been aiding and abetting, and assuming that it could properly be said that the shopkeeping company suspected this to be the case, the criminal property offence could not be said to be integral to the activity of selling; it was on any view a collateral matter which did not render selling unlawful.

The cheating the Revenue argument

19.
For similar reasons it is clear that even if the shop's stock had been imported into the UK under favourable terms reserved for goods properly deriving from Israel as distinct from those produced in the OPT (as to which there is no evidence), this could not render their subsequent sale in the shop unlawful. At most, it means that the importer is liable to repay the Revenue any duty which ought to have been paid but was not. This is a classic example of a collateral, and in this case an antecedent and remote, offence which does not affect the lawfulness of the core activity of the shop, namely retail selling. On the assumption that it was committed by the shop company, it would provide the defendants with no defence to the offence under section 68.

The argument from labelling offences

20.
The principal offence relied upon was one contrary to the Consumer Protection from Unfair Trading Regulations 2008. These were made to transpose the EU Unfair Commercial Practices Directive 2005/29/EC. The relevant offence is under regulation 9, and consists of engaging "in a commercial practice which is a misleading action" as defined by regulation 5. In its turn, regulation 5 provides that a commercial practice is a misleading action if (inter alia):

"(2)(a) …it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."

The paragraph 4 relevant matters include the "geographical or commercial origin of the product." Thus the argument before the district judge was that the products sold in the shop were mislabelled as to geographical origin in that they were labelled as "Made by Dead Sea Laboratories Ltd, Dead Sea, Israel." That amounted, it was said, to representing that they came from Israel when they did not, because they came from the OPT.

21.
This regulation does not, it should be observed, make the selling of mislabelled goods an offence. If the offence is committed, the seller is guilty, but the sale is not itself an offence; rather it is the application of the misleading description. That suggests that the offence is collateral to the activity of selling, rather than integral to it. However, of the offences postulated by the defendants, this one comes closest to the core activity of selling undertaken by the shop on the occasion of the defendants' trespass.

22.
In the event, it is not necessary to resolve the question whether this offence is integral to the activity of selling or not. The district judge found that even if the other elements of the offence were made out the additional condition required by regulation 5(2)(b) could not be established. There was no basis for saying that the average consumer would be misled into making a transactional decision (ie into buying the product) when otherwise she would not have done, simply because the source was described as being constitutionally or politically Israel when actually it was the OPT: the source was after all correctly labelled as the Dead Sea. The district judge found that:

"Whether or not the information given is false…I consider that the number of people whose decision whether or not to buy a supposedly Israeli product would be influenced by knowledge of its true provenance would fall far below the number required for them to be considered as the 'average consumer'. If a potential purchaser is someone who is willing to buy Israeli goods at all, he or she would be in a very small category if that decision were different because the goods came from illegally occupied territory."

That finding was clearly open to the district judge on the evidence and is fatal to the contention that the offence was committed.

23.
The Cosmetic Products (Safety) Regulations 2008 were made to transpose a different EU Directive (76/768/EEC as amended). Regulation 12(1)(a) provides that no person shall supply a cosmetic product unless the following information is displayed in indelible and legible lettering:

"the name or style and the address or registered office of the manufacturer or the person responsible for marketing the cosmetic product who is established within the EEA. ….Where the cosmetic product is manufactured outside the EEA, the country of origin must also be specified."

As the district judge found, the objective of these Regulations is clearly safety of the consumer. They require the provision of information about the manufacturer, so that the consumer knows whom to pursue in the event of complaint. Within the EEA the name of the manufacturer is enough. If the manufacturer is outside the EEA, then the country must also be identified. These products were accurately labelled as coming from the Dead Sea and it is not suggested that the manufacturer was

not identified. The alleged inaccuracy relates to the political status of the Dead Sea area from which they are identified as coming. As the district judge rightly said, the Regulations are not directed at disputed issues of territoriality, however important those may be in other contexts. It is doubtful that any offence under these Regulations was shown, but if it was, there can be no doubt that it was not integral to the activity of the shop in selling the products, but at most collateral to it.

Conclusion

24.
It follows that of the postulated offences all were either not demonstrated to have been committed by the occupants of the shop at the time of the defendants' trespass or were at most collateral to the core activity of selling rather than integral to that activity. The occupants of the shop were, accordingly, engaged in the lawful activity of retail selling at the time and section 68(2) provided no defence to the defendants. The certified question was as follows:

"Should the words 'lawful activity' in section 68 Criminal Justice and Public Order Act 1994 be limited to acts or events that are 'integral' to the activities at the premises in question?"

It should be answered "yes". The appeal must in consequence be dismissed.