Criminal Appeals Nos. 20 and 27 of 1981

Crisp Adeang v Director of Public Prosecutions
and
Director of Public Prosecutions v Crisp Adeang

26th January, 1982.

Wilfully and unlawfully damaging property - intention to damage - proof of intention.

Joinder of counts - offence charged in one count essentially the same as some elements of offence charged in another count - offences should be regarded as charged in the alternative.

Appeal against conviction for assaulting a police officer in the execution of his duty, for wilfully and unlawfully damaging property and for offensive behaviour; cross-appeal against acquittal on count alleging offence of disturbing the public peace. A police officer, called by neighbours complaining of excessive noise on the appellant's premises, told two young men who were causing the noise the desist from making it. The appellant incited the young men to continue. The police officer told him that, if he did not cease to incite them, he would arrest him. The appellant continued to incite them: the police officer tried to arrest him but he struck the police officer. A struggle ensured, in which the appellant's brother joined. In the course of the struggle the police officer's uniform was torn by the appellant or his brother, but it was not established by which of them.

Held: (1) On the facts the police officer was entitled to arrest the appellant without a warrant for wilfully obstructing him when he was acting to prevent the commission of an offence of disturbing the public peace, contrary to section 5(b) of the Police Offences Ordinance 1968, by the two young men.

(2) As it was not established which of the appellant and his brother tore the police officer's uniform, for the appellant to be convicted of wilfully and unlawfully damaging it, it had to be proved that he and his brother had a common

intention not only to fight with the officer but also to tear his uniform. If express intention was not established, the intention might possibly be imputed if risk of tearing the uniform was recklessly disregarded. However, the prosecution would have had to prove that the appellant and his brother knew of the risk and chose to ignore it: it was not sufficient to prove that reasonable persons would have known of it.

(3) The offence of disturbing the public peace contrary to section 5(1) of the Police Offences Ordinance 1968 is committed if noise is made which is not kept within the confines of a private building, which is not reasonable in the circumstances and which causes or is likely to cause annoyance or nuisance to other persons. However, the two young men had ceased to make the noise before the appellant incited them and did not make it after he did so. So he did not aid, abet, counsel or procure the commission of an offence by them. As he did not make any noise himself, he was not guilty of disturbing the public peace.

Appeal allowed in respect of two of the three counts: cross-appeal dismissed.

B. Dowiyogo for Crisp Adeang
Director of Public Prosecutions (D.C. Land) in person

Thompson C.J.:

Crisp Adeang has a house in Uabee District. Early on the evening of 3rd February, 1981, while he was at the Uberide Club, two young friends set up loudspeakers outside his house, facing across the road towards where other persons had set up other loudspeakers. Each group then operated equipment which caused a high volume of sound to be emitted by the loudspeakers. It disturbed the quiet of the night. A neighbour phoned the police and complained; in response police officers went to the scene and told both groups to reduce the volume of the sound emitted by their loudspeakers. They did so. Some hours later the same lady phoned the police again: it was then 1 a.m. Police officers again went to the scene; they found that the volume of the sound coming from the loudspeakers outside Crisp's house had

been increased again. They told the two young men who were operating the equipment to switch it off, and they did so.

By that time Crisp was at his house; he had been drinking. He took offence that the complaint had been made to the police and not to himself. So, when the two young men switched off the equipment, he called out to them to switch it on again. One of the police officers, P.C. Nelson Tamakin, went to remonstrate with him. Crisp continued to incite the two young men to switch the equipment on again in defiance of the constable's instructions. P.C. Tamakin then told Crisp that, if he did not desist, he was going to arrest him for offensive behaviour. Crisp did not desist; the constable tried to arrest him. Crisp objected to being arrested; he resisted P.C. Tamakin's effort to take him into custody. A struggle ensued, blows were exchanged and Crisp's brother, after initially attempting to restrain Crisp, joined in on his side. Meanwhile the only other police officer at the scene had left it to phone for assistance. In the course of the fight P.C. Tamakin receive several minor injuries and his shirt was torn.

Crisp and his brother were subsequently charged with assaulting a police officer in the execution of his duty, an offence against section 340 (2) of the Criminal Code of Queensla in its application to Nauru, with wilfully and unlawfully damaging P.C. Tamakin's shirt (an offence against section 469 of the Criminal Code), with offensive behaviour (an offence against section 5 (a) of the Police Offences Ordinance 1967) and with disturbing the public peace (an offence against section 5 (b) of that Ordinance). Crisp was convicted in the District Court of the first three of those offences but acquitted of the fourth. For each of the first two offences he was sentenced to three months' imprisonment with hard labour. For the third offence he was fined $10 (which is the maximum fine which can be imposed for such an offence). He has appealed against his conviction of each of the three offences and against the sentences of imprisonment. The Director of Public Prosecutions has appealed against his acquittal on the fourth count.

There can be no doubt that, if P.C. Tamakin's attempt to arrest Crisp was lawful, Crisp is guilty of the first offence,

assaulting a police officer in the execution of his duty. However, Mr. Dowiyogo has submitted that the arrest which P.C. Tamakin was attempting was not lawful. His argument has two alternative bases. First, he says that Crisp was not told the reason for his arrest; that is a question of fact. P.C. Tamakin gave evidence that he did tell Crisp that, if he did not desist from telling the two young men to continue operating the equipment, he would arrest him for offensive behaviour. Crisp gave evidence that he asked P.C. Tamakin why he was being arrested but was not told the reason. The learned resident magistrate believed P.C. Tamakin and disbelieved Crisp. There was no reason why he should not have done so; nor is there any reason for this Court to disturb that finding. Mr. Dowiyogo's argument, on its first basis, must accordingly fail.

The second basis for his argument is that Crisp had not been guilty of offensive behaviour, so that P.C. Tamakin had no right to arrest him for such an offence. In finding Crisp guilty of offensive behaviour and of the offence of serious assault the learned resident magistrate did not expressly deal with the issue of whether the attempted arrest was lawful. Although Crisp was charged with assaulting P.C. Tamakin in the execution of his duty the learned resident magistrate made his finding in terms that he "assaulted, resisted and wilfully obstructed" him. Crisp might have been charged with resisting and with wilfully obstructing P.C. Tamakin: but those were offences separate from the alleged offence of assaulting him. If they had had been charged all in one count, that count would have been bad for duplicity. If Crisp had been charged with wilfully obstructing P.C. Tamakin, his incitement of those operating the noise-making equipment to defy the constable would have justified his conviction: but he was charged not with wilful obstruction but with assault. The danger of the approach taken by the learned resident magistrate of considering Crisp's guilt in respect of offences not charged is that, having found that Crisp was guilty of wilful obstruction, he may have not have addressed his mind to the question whether the force which Crisp subsequently used against P.C. Tamakin was unlawful and constituted an assault.

In dealing with the third count, offensive behaviour, he found simply that "both the accused indulged in offensive behaviour that night in a public place". He did not indicate whether he found that offensive behaviour to have preceded the use of force by Crisp against P.C. Tamakin or to have been constituted by what took place during the fight. As the finding related to Crisp's brother also, and he had done nothing which could have been categorised as offensive behaviour until after the fight had started, it seems likely that the findings related to the latter time rather than the former.

It is necessary, therefore, to ascertain whether, before P.C. Tamakin tried to arrest Crisp, Crisp had been guilty of an arrestable offence and whether either that offence was the offence of offensive behaviour in a public place or the constable, although calling it offensive behaviour, made clear to Crisp what the offence actually was. To ascertain those matters the facts must be examined. The learned resident magistrate believed P.C. Tamakin and disbelieved Crisp, where their evidence conflicted. P.C. Tamakin gave evidence that, at the time when he was speaking to those operating the loud-speakers, Crisp approached him, was intoxicated and insisted that the police ought not to interfere with their operation as it was his place. He was upset that the neighbours had complained to the police instead of to himself. He refused to "pack up the music" as requested by the constable and insisted that it be continued. The constable then told him that, if he did not comply, he would arrest him for offensive behaviour.

It is, I consider, quite clear that P.C. Tamakin was telling Crisp that he was obstructing him in the execution of his duty and that he would arrest him for doing so unless he desisted. If, therefore, Crisp was, in fact, obstructing him in the execution of his duty, the attempted arrest was lawful. There is no doubt that Crisp was obstructing P.C. Tamakin in the execution of what he thought were his duties. The only question remaining is whether he was in fact in the execution of his duties. Crisp clearly thought that he was not, because the loudspeakers were on his land. He thought that he could do what he liked on his own land regardless of the inconvenience

and annoyance which it might cause to neighbours, and that, if the neighbours wished to complain, they should do so to him. It was no part of the duties of the police, he apparently considered, to interfere in what he regarded as a private matter. However, he was wrong. Section 5(b) of the Police Offences Ordinance 1967 makes disturbing the public peace a criminal offence, one for which the offender can be arrested without a warrant. I shall deal in more detail with the meaning of "disturbing the public peace" when considering the appeal by the Director of Public Prosecutions in respect of the fourth count. It is sufficient at this point to state that the emission of the loud sounds from the loudspeakers at 4 a.m. was undoubtedly a disturbance of the public peace. Whether Crisp had caused that emission or not, he was obstructing P.C. Tamakin when the constable was taking steps to prevent the continuation of the offence of disturbing the public peace. P.C. Tamakin's attempt to arrest him was, therefore, lawful and the force Crisp used to resist arrest was unlawful. He was guilty of assaulting P.C. Tamakin in the execution of his duty. His appeal against his conviction on the first ground is, therefore, dismissed.

In respect of the second count, Mr. Dowiyogo has submitted that there was no evidence which established either that Crisp tore P.C. Tamakin's shirt or that he and whoever did so had a common intention to do so. There was certainly no evidence as to who tore the shirt. It was torn during the fight but there is no record of how. Crisp's brother was also involved in the fight; he could have torn it. Undoubtedly, once he had joined in the fight on Crisp's side, they had a common intention to assault P.C. Tamakin. But there was no evidence that that they had any actual common intention to damage his shirt. Unless, therefore, intention is to be imputed to them on the basis of a reckless disregard of a risk (in the same manner as an intention to assault was imputed in R. v. Venna (1976) Q.B. 421), the intention necessary to establish the offence of wilfully damaging the shirt has not been proved. Before an intention can be imputed by reason of the reckless disregard of a risk, it must be established not simply that a reasonable person

would have been aware of the risk but that the accused person himself was aware of it. Such awareness may be inferred, in an appropriate case, from the accused person's conduct. The risk may be so obvious that, even in the heat of the moment, he would not have been unaware of it. But this is not such a case. Crisp and his brother were concerned with fighting P.C. Tamakin; they would not necessarily have turned their minds to the risk of his clothing being damaged. Mr. Dowiyogo's submission is correct; intention, actual or to be imputed from recklessness, to damage the shirt was not proved. Accordingly Crisp's appeal against conviction on the second count is allowed; the conviction on that count is quashed and the sentence set aside.

Mr. Dowiyogo's submissions on the third count, offensive behaviour, relate to the period before the assault on P.C. Tamakin occurred. As I have already noted, the learned resident magistrate's finding of guilt in respect of the offence appears to be on the basis of its having been committed after the fight started. The evidence does not establish offensive behaviour before the assault. Undoubtedly the assault itself constituted offensive behaviour; but, as that offensive behaviour was part and parcel of the assault, the count charging it should have been treated by the prosecution as alternative to, and not in addition to, the first count; and the learned resident magistrate, having convicted on the first count, should have declined to record a conviction on the third count. Although the finding of guilt on that count will not be disturbed, the appeal against the conviction will be allowed. The conviction is quashed and the sentence is set aside.

The appeal by the Director of Public Prosecutions in respect of the fourth count raises the question of the meaning of "disturbing the public peace". There is a dearth of authorities as to the meaning of "peace" in such a context. It might have either of two meanings, either absence of more than the ordinary, reasonable noises of everyday life or absence of discord. The Police Offences Ordinance 1967 is a short Act the purpose of which apparently is to enable the police to

intervene to prevent or terminate conduct which is causing, or is likely to cause, annoyance or nuisance to the public. Thus drunkenness in a public place, indecent behaviour where the public may see it and similar petty nuisances are made arrestable offences. The maximum penalty for any of the offences is a fine of $10 or imprisonment for one month. In that context the expression "disturbance of the public peace" clearly means the creation of a public nuisance by disturbance of its peace in the first of the senses to which I have referred above. In order to prove such a disturbance all the prosecution has to do is to establish that the public peace was in fact disturbed, i.e. that noise, not kept within the confines of a private building, not reasonable in all the circumstances and which caused or was likely to cause annoyance or nuisance to other persons, was in fact made. There is no need for any member of the public to give evidence that he was annoyed by the disturbance of the public peace. In the present case the commission of the offence by those operating the equipment which caused the emission of the noise is clearly established. But Crisp was not one of them, so far as has been proved. So, unless the evidence established that he was counselling, procuring, aiding or abetting them, he ought not to have been convicted on the fourth count. After the equipment had been turned off, he incited those operating it to turn it on again but they did not do so; so at that stage there was no offence for him to be counselling, procuring, aiding or abetting. From his attitude at that time and the manner in which he greeted P.C. Tamakin on his arrival it is more likely than not, on a balance of probabilities, that he was counselling, procuring, aiding or abetting the operation of the equipment before the constable's arrival; but the evidence does not establish that beyond all reasonable doubt. So the Director's appeal against Crisp's acquittal on the fourth count is dismissed.

Only the conviction on the first count remains standing. Mr. Dowiyogo accepts that any offence of assaulting a police officer in the execution of his duty is serious but argues

that, because Crisp's brother was only fined for his part in the assault, Crisp ought not to have been sent to prison. The learned resident magistrate stated clearly his reasons for differentiating between Crisp and his brother in imposing sentence. Crisp started the fight; his brother originally tried to pull him away and only joined in the fight some time later, possibly after having been caught a blow by P.C. Tamakin's baton. Those reasons were proper ones for the differentiation.

Although the offence of which Crisp remains convicted is serious, the conduct of P.C. Tamakin himself undoubtedly contributed towards its commission. In a situation where tact and patience were required from the constable, he went carrying his baton ready for use. It was unnecessarily forceful and provocative. In the circumstances, therefore, although generally a sentence of imprisonment is appropriate for an offence of assaulting a police officer in the execution of his duty, a fine is an adequate penalty in the present case. The sentence on the first count is set aside and a fine of $200 is imposed in its place.