IN THE HIGH COURT OF JUSTICE CO/30/98

QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

Royal Courts of Justice
Strand
London WC2

Friday, 24th April 1998

B e f o r e:

LORD JUSTICE KENNEDY
(Vice President of the Queen's Bench Division)

-and-

MR JUSTICE BLOFELD

- - - - - - -

HENRY FELIX

-v-

THE DIRECTOR OF PUBLIC PROSECUTIONS

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MR T CROSLAND (instructed by Claude Hornsby & Cox, London W1V 2JA) appeared on behalf of the Appellant.

MISS T BROMLEY-MARTIN (instructed by the Crown Prosecution Service, Crown Court Section, London SW1 1RZ) appeared on behalf of the Respondent.

J U D G M E N T
(As approved by the Court)

Friday, 24th April 1998.

LORD JUSTICE KENNEDY: Blofeld J will give the first judgment.

MR JUSTICE BLOFELD: On 15th December 1995 an information was preferred against this Appellant that he on 1st December 1995 at Edgware Road, London W2 deposited from a place in the open air to which the public were entitled or permitted to have access without payment and left three cards in such circumstances as to cause, or contribute to, or tend to lead to, the defacement of a place in the open by litter, contrary to section 87(1) of the Environmental Protection Act 1990.

On 1st March 1996 he appeared before the Marylebone Magistrates and was convicted of this offence. He appeal against that conviction at the Knightsbridge Crown Court. His appeal was heard on 10th April 1996 and dismissed. He then asked the Crown Court to state a case. At first they declined to do so. That resulted in an application being made to this court and this court requested the Crown Court to state a case. They duly did so. That Case Stated is before this court. By agreement there have been some minor amendments made by both the parties today.

The facts found by the Crown Court were that on 1st December 1995 this Appellant affixed three cards to the inside of a telephone box in Edgware Road, advertising the services of a prostitute. The telephone box was enclosed by three sides, a roof and a door, with a gap of some six inches at the bottom all round.

In addition to the Case Stated, at the request of this court on the occasion of the application, a photograph has been provided showing the familiar type of telephone kiosk with which we are all familiar, which shows that there is, in fact, a gap of some six inches open to the air on all four sides of the kiosk.

I return to the facts found by the Crown Court. The cards in question were not identified by the police officer and not removed. There was, however, evidence accepted by the Crown Court that cards of this type cause litter problems when they fall, or are removed to, the ground. The Crown Court had its attention drawn to section 87 of the Environmental Protection Act 1990. The relevant parts of section 87 are as follows:

"(1) If any person throws down, drops or otherwise deposits in, into or from any place to which this section applies, and leaves, any thing whatsoever in such circumstances as to cause, or contribute to, or tend to lead to, the defacement by

liter of any place to which this section applies, he shall ... be guilty of an offence.

...

(4) In this section 'public open place' means [any] place in the open air to which the public are entitled or permitted to have access without payment; and any covered place open to the air on at least one side and available for public use shall be treated as a public open place."

The Crown Court also had their attention drawn to a number of decisions at different Crown Courts. Some of those decisions went one way and some the other. They are the decisions of R v Mallon, decided at the Knightsbridge Crown Court on 5th December 1994; R v Binns and R v Mallon, decided at the Southwark Crown Court on 15th July 1995; and R v Felix, R v Harding and R v Timmins, decided at the Knightsbridge Crown Court on a date which is not disclosed on the transcript before this court, but appears to have been either late 1997 or early 1998. As far as I am aware, there is no relevant decision by this court.

The summons that this Appellant faced could have been better worded. First, it inelegantly used the phrase "deposited from a place". Nothing turns on that, but more importantly the summons used the words "from a place in the open air", which indicated that the prosecution were bringing their case on the first part of the definition in section 87(4). It would have been open to them to use in place the words "public open place", which would then have allowed them to rely on either the first or the second definition. In my view, as the summons was drafted, the prosecution was only entitled to conviction if the first part of the definition was proved. Nevertheless, as this is a matter that has vexed the courts, I propose in the remainder of this short judgment to deal with both of the definitions in subsection (4) in the hope that it will assist courts elsewhere in the future.

Mr Crosland for the Appellant submits that the words in subsection (4) are clear. He submits that the word "open" is the most important word and he contrasts it with the word "enclosed". Another word that could be used to contrast it with is "covered". He emphasises that this kiosk had three sides and a door which was normally closed. He submits, therefore, that this type of kiosk does not come within the definition in section 87(4). He draws our attention to the definition of "open air" in the Oxford English dictionary. He emphasises that there are only small gaps at the bottom of each of the four sides of the kiosk.

Miss Bromley-Martin submits that this kiosk is a place in the open air, because it does have gaps at the bottom of each

of the four sides through which the open air can flow, and that that is sufficient. Alternatively, on the second part of the definition in subsection (4), she submits that it is a covered place open to the air on at least one side, because part, at least, of one side is always permanently open to the air.

In my judgment, this particular type of telephone kiosk is neither a public open space, nor a covered place open to the air on at least one side and available for public use. If a telephone kiosk of this type was a "public open space" under the first part of subsection (4), then it is difficult to understand why it was necessary to include the second part of subsection (4) with its reference to "any covered place". In my view, that indicates that "public open place" should be interpreted to exclude any covered public place unless it comes within the second part of subsection (4).

Turning to the second part of subsection (4), this kiosk is clearly a covered place and is clearly available for public use. The question is, is it open to the air on, at least, one side? It has three fixed sides and one door which is normally closed, except for access and egress. In my view, it simply does not come within that definition of being open to the air on, at least, one side. It is not sufficient to say that because it has some six inches at the bottom that are permanently open, it comes within that definition.

On those findings, as far as I am concerned, that would enough to dispose of this matter. However, Mr Crosland makes some other submissions. He submits that the cards were not thrown down, dropped, or otherwise deposited in, the kiosk. He submits that affixing cards to the kiosk does not bring them within the phrase "otherwise deposits in". In my view, the words in this section are extremely wide and "deposits" means no more than places or put. Certainly, on the finding of facts by the Magistrates, this Appellant placed cards in this kiosk. Consequently, I reject his submissions on that point.

He further submits that a telephone kiosk does not come within this section for it is not a place to which the public are entitled or permitted to have access without payment, because the normal person would go into a telephone kiosk in order to pay to make a telephone call. Once again, I can deal with this point quite shortly. It may be that many people do go into a telephone kiosk in order to make a telephone call for which they pay, but others may not. In my view, the

words of this section are sufficiently wide to include a telephone kiosk of this type.

Finally, Mr Crosland attempted to urge the court to consider what was said before the Parliamentary Committee. I need only say that, for my part, I find the words of this section clear and, therefore, it is not appropriate to look at what was said before the Parliamentary Committee.

I, therefore, turn to consider the four questions that were posed by the Magistrates. The first question was:

"Is a telephone box enclosed on all sides but for a six inch gap at the bottom a 'public open place'?"

I would answer that question: "No".

The second question is:

"Having selected the first part of the definition section for the wording of the summons, were the Crown prevented from relying upon the second part?"

I would answer that question: "Yes, as they drafted the summons".

The third question is:

"Did the Appellant leave the card 'in such circumstances as to cause, or contribute to, or tend to lead to, the defacement by litter of any place?"

I would answer that question: "Yes".

The fourth question is:

"Are the words "throw down, drop, or otherwise deposit' appropriate to affixing a card to a side or a wall?"

I would answer that final question: "Yes".

LORD JUSTICE KENNEDY: I agree.

MR CROSLAND: My Lords, I ask only that costs be paid from central funds and for an Order for legal aid taxation?

LORD JUSTICE KENNEDY: Do you want to say anything about either of those applications, Miss Bromley-Martin?

MISS BROMLEY-MARTIN: No, my Lord.

LORD JUSTICE KENNEDY: Very well, there will be Orders accordingly.

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