THE SUPREME COURT

[Supreme Court Appeal No: 186/2019]

O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.
Baker J.

BETWEEN:

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

PROSECUTOR/RESPONDENT

-AND-

EVE DOHERTY

ACCUSED/APPELLANT

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 24th day of July 2020.

1. I agree that this appeal should be dismissed, and have reached this conclusion for, in large part, the same reasons as Charleton J. In particular, I agree that the sending of a "To whom it may concern" letter to the victim's workplace, the leafletting in the neighbourhood of her home and the sending of emails, all of which were matters that were bound to come to her attention, can readily be seen as constituting communications with her. While it is true that the prosecution concentrated on its interpretation of the word "besetting", the trial judge clearly instructed the jury that it was open to them to reach a verdict on the basis of the letters and leaflets.

2. However, I wish to express my disagreement with the meaning attributed by the Court of Appeal to the word "besetting" as employed in s.10 of the Non-Fatal Offences Against the Person Act 1997. The Court concluded that the word is not a legal term of art and no longer has the meaning attributed to it in cases concerned with the phrase "watching or besetting" as used in the Conspiracy and Protection of Property Act 1875. I would agree with the judgment up to that point, and also with the analysis of O'Donnell and Charleton JJ. on this aspect.

3. The Court of Appeal went on to endorse the definition adopted by the trial judge to the effect that to "beset" meant "to trouble persistently". This finding has led to a divergence of views among the members of this Court as to the correct interpretation of the section and, while any observations on this aspect are necessarily *obiter* in light of the agreement with respect to "communication", I consider it desirable to give some indication of my own view.

4. Since the Act of 1997 does not define the word, it is necessary to examine its use carefully in its statutory context. I think it useful to start with s.9, which deals with the offence of coercion. The section reads, in relevant part, as follows:

9.-(1) A person who, with a view to compel another to abstain from doing or to do any act which that other has a lawful right to do or to abstain from doing, wrongfully and without lawful authority –

(a) uses violence to or intimidates that other person or a member of the family of the other, or

(b) injures or damages the property of that other, or

(c) persistently follows that other about from place to place, or

(d) watches or besets the premises or other place where that other resides, works or carries on business, or happens to be, or the approach to such premises or place, or

(e) follows that other with one or more persons in a disorderly manner in or through any public place,

shall be guilty of an offence.

(2) For the purpose of this section attending at or near the premises or place where a person resides, works, carries on business or happens to be, or the approach to such premises or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of subsection (1)(d).

5. It seems to me to be clear that, at least for the purposes of s.9, "besetting" requires the physical presence of the accused in one of the specified places.

6. The offence of harassment is created in s.10. Subsections (1), (2) and (3) are all relevant here and provide:

10.-(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.

(2) For the purposes of this section a person harasses another where –

(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall

> *not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.*

7. It seems to me that each mode of committing the offence requires physical action by the accused that is in some way directly connected to the victim. "Following", for example, would require some form of physical tracking of the victim by the accused. Liability would be unaffected by the means of transport used, but the accused must go where the victim goes. "Watching" could be done by looking through a window, or a telescope, or a webcam, but must involve sight of the victim. Given the structure of the section, it must be possible to carry out any of the specified actions on its own, although in any given case there may be a combination of actions. If that is correct, the definition of "besetting" cannot be satisfied simply by proof of another of the specified actions where that action is shown to have brought about the statutorily-defined consequences. There has to be, at least in theory, a way of "besetting" a person that might not involve following, watching, pestering or communication.

8. What, then, does the use of the word "besetting" mean in this context? In my view there are a number of difficulties with the interpretation adopted by the trial judge and the Court of Appeal. The first is that I would consider it to be an entirely inadequate description of any criminal offence. The second point is that it results in the word "besetting" having a completely different meaning in s.10 to that which must be applicable to s.9 – this is clearly concerned with physical presence in a particular place. Such a difference is, I think, unlikely (although not impossible) in the absence of a special definition for the purpose of either section. According to Bennion on *Statutory Interpretation* (6th ed., p. 1034), it is to be presumed that a word or phrase is not to be taken as having different meanings within the same instrument, unless this fact is made clear:

> "Where therefore the context makes it clear that the terms has a particular meaning in one place, it will be taken to have that meaning elsewhere."

9. This is a principle only, rather than a rule, but it is a useful principle. (For examples of its application, see *The State (McGroddy) v. Carr* [1975] I.R. 275 and *The People (Director of Public Prosecutions) v. Brown* [2018] IESC 67.) In the context of the Act of 1997, I would accept that the meaning of the word "beset" in s.9 may be coloured by its use in the phrase "watches or besets", and that in s.10 it is clearly separated from the action of "watching". However, I would take the view that the meanings in the two sections cannot be seen as entirely dissimilar in the absence of express words to that effect.

10. Thirdly, the interpretation upheld in the Court of Appeal results in the word "beset" taking over the whole definition of the offence as set out in s.10(2), while leaving no clue as to the nature of the actions that must be proved, and nothing to distinguish it from the other modes of committing the offence. It ends with a circular, and somewhat meaningless, provision under which it could be said that a person commits an offence if they cause someone distress by troubling them.

11. The judgment of the Court of Appeal refers at some length to the definition given by the Oxford English Dictionary. Having noted that the dictionary provides three principal categories of meanings of the word, and having set them out, the judgment observes that the only major category of potential relevance is the one headed "To set about, surround". The first subcategory is "to set (a thing) about with accessories or appendages of any kind". The second subcategory listed is "to set or station themselves round, to surround with hostile intent", with the examples given including a person being set upon or assailed, a place being surrounded, and a gateway or road being occupied so as to prevent passage. The third subcategory is labelled by the dictionary as being "figurative" – this is the category which speaks of temptations, dangers and difficulties.

12. Having set out the subcategories in some detail the judgment, unfortunately, gives no indication as to which of these potential meanings is to be attributed to the word as used by the legislature. Some are clearly irrelevant – the Act does not penalise a person who sets jewels into a necklace. The judgment simply goes on to say that the word is not a term of art and must be given its ordinary and natural meaning. However, counsel for the prosecution is quoted, apparently with approval, as saying of the complainant in this case that she was "beset on all sides" by what had been done, that she was "very much beset on all sides by the material that had been disseminated". Asked what this meant, counsel said that she was "hemmed in" and "surrounded" by the information wherever she went. Asked if he meant this metaphorically, counsel said that he was speaking literally.

13. However, with respect, this is not literal language. Counsel was using the word "beset" in *one* of the senses given in the dictionary definition referred to in the judgment – the one labelled "figurative". To say of someone that they are beset by dangers, or troubles, or problems is to use language figuratively. Figurative language is not an appropriate basis for a criminal offence.

14. The members of this Court have not reached a unanimous view as to what the word means in the legislation under consideration. It seems reasonable, therefore, to characterise it as being somewhat ambiguous. Given that the Court is here dealing with legislation creating a criminal offence, it is in my view necessary to seek out the narrowest meaning available in order to observe the constitutional principle that criminal liability should not be imposed by the use of vague and uncertain words.

15. I consider that the word as used in the section requires a physical action that is carried out by the accused, that can be described as "besetting" and that has the results described in subs.(2). It seems to me that the only interpretation that makes sense in the context of this criminal statute, and that accords with the use of the word in s.9, is the second subcategory of the dictionary definition referred to above. I would suggest, therefore, that a victim may be beset by someone who stations themselves, with hostile intent, around them or the place where they are. I believe that the presence of the accused is necessary (although I accept that this could in many cases involve an overlap with the other statutory concepts of "watching", "following" and, perhaps, "pestering" or "communicating") because it seems to me that this accords more closely the meaning of

the word as used in s.9 of the same Act, with the dictionary definition and with the requirements of certainty and clarity in penal statutes.

16. It should be noted that the word "hostile" here does not have to involve proof of angry or violent intentions, since the offence can be committed recklessly. What is to be proved is set out in s.10.

17. In my view, therefore, where it is alleged that the accused committed the offence of harassment by besetting the complainant, it should be explained to the jury that it must be proved that the accused was persistently in, or close to, a place where the complainant was. The presence of the accused in that place must have been without lawful authority or reasonable excuse. Such presence must, intentionally or recklessly, have seriously interfered with the complainant's peace and privacy or caused alarm, distress or harm, in circumstances where a reasonable person would realise that it would have that consequence.

18. The foregoing is not intended to be a script, and each element of the offence may, depending on the facts of the case, require an explanation related to that case.

19. I agree with the observation of Charleton J. that "besetting" is an arcane word in the modern era. It is entirely possible that, in fact, the meaning with which it is most frequently used in normal conversation is the figurative sense discussed above. This, in itself, makes it an unsuitable word for use in the context of criminal statute, in the absence of either a definition for the purposes of that statute or an obviously applicable common law interpretation, since its meaning to any particular person may vary according to individual impressions. I also fully agree with the view expressed by O'Donnell J. that it is highly desirable that the statute should be updated.