AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2019:000186

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 O'Donnell J. delivered the 24th day of July, 2020.

1. I agree with both Charleton J. and O'Malley J. that it was open to the jury in this case, both on the evidence and on the manner in which the jury was instructed, to conclude that the conduct here amounted to communication with the victim coming within s. 10 of the Non-Fatal Offences Against the Person Act 1997 ("the 1997 Act") and that, therefore, the appeal against the decision of the Court of Appeal upholding the appellant's conviction should be dismissed. For that reason, it might be unnecessary to express any concluded view on the issue discussed by my colleagues – albeit arriving

at different conclusions – as to whether the conduct here could be said to amount to "besetting" within the meaning of s. 10. However, since the issue is unlikely to reach this court again for some time, and since I am unable to agree fully with either of my colleagues, I will set out, as briefly as possible, my views on the issue for what they are worth.

2. I fully agree with O'Malley J. that the version of "besetting" advanced by the prosecution in this case – that it could be said that the victim was beset in the sense of beset with temptations, dangers, or difficulties – was inadequate. I also tend to agree with her that such a meaning would be insufficient to constitute a criminal offence and, furthermore, that the section requires physical acts by the accused that can be described as besetting and that have the results described in subs. 2 of s. 10. I also agree that the expanded meaning given to "besetting", in the sense of beset with dangers, would be so broad as to render redundant the whole definition of the offence contained in subs. 2. It is therefore, on that ground alone, an unlikely interpretation of the term. Finally, I also agree with her that there is a general principle of statutory interpretation (and it is perhaps misleading to call any principle of statutory interpretation a "rule") that it is normally to be expected that a word used in one part of a statute will have the same meaning in another part of the same statute. It is clear that the term "besetting" in s. 9 requires the physical presence of the accused at one of the specified places. I would, however, for my own part, refrain from definitively agreeing with the conclusion to which O'Malley J. comes: that a victim is beset by someone who stations themselves with hostile intent around them or the place where they may be, and shall briefly explain my hesitation in that regard. In doing so, however, I recognise that the definition contained in the judgment of O' Malley J. represents the majority view of the Court and should be taken as a definitive statement of the interpretation to be given to the term

"besetting" in s. 10. Indeed, even if there was greater disagreement, I would be prepared to accept that, in the light of the valid arguments raised as to the meaning of the word, the principle against doubtful penalisation might require the narrower interpretation to be adopted in any case.

3. First, it seems clear to me that s. 9 must be read in the light of the provisions of the Conspiracy and Protection of Property Act 1875 ("the 1875 Act"). The 1997 Act expressly repeals s. 7 of that Act. Furthermore, that Act was, as I understand it, the statutory origin of the well-known term "watching or besetting", and appears to have been its introduction to the language of the criminal law. Section 7 of that Act is almost identical, in terms and structure, to the provisions of s. 9 of the 1997 Act. For present purposes, it provided:-

> "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,–
>
> …
>
> 4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place;
>
> …
>
> shall, on conviction thereof by a court of summary jurisdiction, or on indictment as herein-after mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.
>
> …

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

4. The clear similarity in language and structure between s. 9 of the 1997 Act and the repealed provisions of s. 7 of the 1875 Act suggests strongly that s. 9 is, in effect, a re-enactment of the previous section and is to be interpreted in the same way as the 1875 Act was prior to 1997.

5. However, for me, this is the first warning light. The 1875 Act comes from an unhappy period in the common law when Victorian courts in the United Kingdom (including, at that time, Ireland) reacted to the activities of the nascent trade union movement by tending to find that union activities were in breach of both civil and criminal law. A range of decisions during that era gave rise to the ingrained suspicion in the Trade Union movement of courts, which was slow to dissipate. The common law then tended to be subject to statutory repeal or qualification brought about as a result of political agitation by unions leading, in turn, to a perhaps misplaced criticism that trade unions were being treated favourably by the grant of immunities from both civil and criminal law. While the 1875 Act creates criminal offences, it was, in fact, an important piece of liberalising legislation and was welcomed by the Trade Union movement. Thus, s. 3 of the Act provided, for example, that "[*a*]n agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime".

6. Section 7 of the Act, although creating an offence, was also seen as a liberalising measure because of the proviso for merely obtaining or communicating information,

which was understood as permitting peaceful picketing. To some extent, the criminal law and law of tort were distorted and complicated by these developments. One of the areas which arose in the aftermath of the 1875 Act (and which is of some relevance here) is the difficult question of whether peaceful picketing, when not being conducted in furtherance of a trade dispute, constituted a tort. This is an issue admirably discussed and analysed in A. Kerr and G. Whyte, *Irish Trade Union Law* (Butterworths, 1985) .

7. Section 7 of the 1875 Act, as effectively re-enacted in s. 9 of 1997 Act, is therefore, in my view, a somewhat unsteady starting point from which to attempt a definitive interpretation of the concepts of "watching" or "besetting" when encountered in s. 10. Furthermore, the principle that a word used in a number of places in the same statute is intended to have the same meaning unless the contrary intention is apparent is of little assistance here precisely because it is clear that s. 10 is intended to apply the concept of besetting in an entirely different setting and circumstances, and arguably with a more extensive meaning or, at least, application.

8. It is quite clear that, prior to 1997, a person could only beset a place and not a person. The statutory language refers to besetting the "house or place where a person resides, or works, or carries on business, or happens to be". However, s. 10 only applies to something done to persons. It also appears possible that besetting may be capable of being carried out by telephone since that phrase is specifically included in the 1997 Act, although there may remain a question as to whether this qualification was intended to apply to only one of the forms of harassment specified in s. 10. Finally, the section does not reproduce the well-known phrase "watching or besetting", or indeed "watches or besets" as used in s. 9 (and traceable therefore to the 1875 Act), but instead uses the terms individually, separated by the term "pestering". It is telling that I am not aware of the distinction being made between the two concepts in any contested case. For the

most part, watching travels with besetting and the two are treated as what occurs if picketing is not lawful. Standing back from the Act for a moment, it seems clear that there has been an attempt in s. 10 to gather all the possible terms describing the many ways in which the novel offence of harassment could be committed. There seems, therefore, to be a deliberate change of register between s. 9 and s. 10 so that the concept of besetting in s. 9 cannot be automatically mapped on to the word when used in s. 10. I understand that O'Malley J. agrees with Charleton J.'s analysis to this effect and that the word in s.10 is no longer limited to the meaning attributable to it by the 1875 Act.

9. I agree that the offence is not established by posing a question of whether the victim can be said to have been beset in the sense of beset by dangers or trouble. That is, as O'Malley J. points out, a figurative use of language and it is doubtful that it is sufficient to establish the criminal offence. I am reluctant to come to the same definitive conclusion about the question of whether the victim can be said to have been beset by the communications in question and other actions of the accused. At the risk of misplaced pedantry in an area in which I claim no expertise, that does not appear to me to be answered by reference to the use of figurative language. The formulation of being beset by danger, or beset by communication, or beset by a person all use the passive voice, but that, in my view, is not impermissible and may indeed sometimes be useful. The question of whether A was beset by B is as valid as the question of whether B beset A.

10. Here, what is alleged (whether formulated actively or passively) is besetting in a physical and not figurative or metaphorical sense by the doing of certain things and, in this case, by the sending of a letter directly to the victim with further letters to her employers and others, and by posting offensive leaflets in the victim's neighbourhood. There is no doubt that if, for example, the accused had stood in front of the victim's

house or place of work, holding placards containing the same offensive messages as were pasted on to lamp posts in the victim's area, that such conduct could constitute besetting if the other aspects of the offence were established.

11. If, however, the accused simply posted the placard in some waste ground at the front and back of the victim's premises, and similarly at her place of work or perhaps paid someone to do so, it is, at a minimum, not clear to me that this too could not constitute besetting even though the accused would not have stationed herself with hostile intent around the victim or the place where the victim lived, worked, or happened to be. While I agree, therefore, that physical action is necessary to constitute besetting for the purpose of s. 10, I am reluctant to agree that it is necessarily as limited as the concurring judgment of O'Malley J. would hold in requiring the presence of the accused around the victim or the place where he or she lives, works, or happens to be. It would, in my view, be sufficient if the conduct and actions of the accused took effect near or around the victim. Even then, it would be necessary to satisfy the requirements of persistence and establish the requisite subjective and objective elements of the offence.

12. What is clear to me is the Law Reform Commission's observations on the 1997 Act, and the desirability of statutory updating, are, if anything, more justified now than when first made. It is unnecessary, and probably undesirable, to set out the ways in which an imaginative lawyer might suggest it may be possible to harass a person and make their lives miserable without necessarily falling foul of the 1997 Act. It is regrettably the case that developments in communications and general technology in the quarter century since the 1997 Act was enacted have only emphasised the many ways in which people, sometimes themselves disturbed, and sometimes simply malicious, can torture their fellow human beings, and the dreadful psychic toll that such behaviour can exact on those who have the misfortune to be the victim of it. It is highly desirable that this

area of law is reviewed, and the law updated to provide effective statutory protection from harassment.