A responded to whatever he reasonably believed King said or did by taking part in the killing? The fact that a defendant's will to resist has been eroded by the voluntary consumption of drink or drugs or both is not relevant to the test."

In my opinion, what the Lord Chief Justice said in the present case and in *Graham* was entirely correct. In my opinion, this question also B falls to be answered "yes".

I, therefore, consider that these appeals should be dismissed, the first certified question answered in the negative and the second and third in the affirmative.

Solicitors: *Messrs Hogan Harris and Co.*, Clapham, for the appellants Howe, Bannister and Burke.

C *Messrs Mackesys*, New Cross, for the appellant Clarkson.

Director of Public Prosecutions, for the Crown.

Reported by: William Scott, Esq., O.B.E., LL.B., *Solicitor*.

D

QUEEN'S BENCH DIVISION

November 7, 1986

(Glidewell, L.J., Otton, J.)

E

Hirst and Agu v. Chief Constable of West Yorkshire

Highways – wilful obstruction – meaning of "lawful excuse" – relevance of reasonableness – s. 137, Highways Act 1980.

F The appellants were members of a group of animal rights supporters who were demonstrating on a highway outside a shop which was selling furs. The demonstration took the form of displaying banners and offering leaflets to passers-by. The appellants were arrested. In due course they were convicted by the justices of wilfully obstructing, without lawful authority or excuse, free passage along the highway, contrary to s. 137 of the Highways Act 1980. The Crown Court, following *Waite v. Taylor* (1985) 149 J.P. 551, found that standing on the highway offering leaflets and holding banners was not incidental to its lawful user, and that therefore the appellant had wilfully obstructed the highway. G Accordingly, they dismissed appeals against conviction. On appeal to the Queen's Bench Divisional Court by way of case stated.

Held (allowing the appeal): (a) The correct approach to be followed when trying cases under s. 137 was to begin by asking whether there was an actual obstruction of such a scale that the *de minimis* principle could not be applied; if there was such an obstruction, the next question was whether it was wilful in the sense of being deliberate; and if the obstruction was wilful, the final question was H whether there was lawful authority or excuse; (b) examples of lawful authority

would include permits and licences granted under statutory provisions; (c) A examples of lawful excuse would include activities otherwise lawful in themselves which were reasonable in all the circumstances; therefore (d) the convictions would be quashed because the Crown Court had not considered the reasonableness of the appellants' conduct. *Waite v. Taylor* (1985) 149 J.P. 551, disapproved.]

Appeal: by way of case stated against a decision of the Crown Court sitting at Leeds, dismissing an appeal against convictions imposed by the West Yorkshire B justices, sitting as a magistrates' court at Bradford.

James Wood, for the appellants.

Rodney Grant, for the respondent.

JUDGMENT

Lord Justice Glidewell: This is an appeal by case stated by the Crown C Court at Leeds, which on November 5, 1985 dismissed appeals by the present appellants, being Mr. Hirst and Miss Agu, and four other persons who are not now appealing, against their conviction by West Yorkshire justices sitting as a magistrates' court at Bradford on July 2, 1985. Each of the appellants was charged "that on January 19, 1985 at Bradford he/she without lawful authority or excuse did wilfully obstruct the free passage along a highway, namely Darley Street, by D protesting outside and in the doorway of a shop called "Lady at Lord John" and by so demonstrating thus attracting attention from passers-by, who gathered in groups and in so doing blocked Darley Street contrary to s. 137 of the Highways Act 1980."

The facts found are set out clearly, as one would expect, in the case stated by the Crown Court and are as follows:

"On the morning of Saturday January 19, 1985, each of the E appellants was a member of a group of animal rights supporters, who went to Bradford City Centre in order to exhibit banners bearing slogans and to offer leaflets to passers-by. In the course of time, these appellants and the other members of the group were outside the shop premises called "Lady at Lord John" which was selling furs and which is in Darley Street, which is a spacious pedestrian precinct but which at the time was busy with people F passing to and fro.

"Each of the appellants stood in varying parts of Darley Street and each was either offering leaflets or holding a banner or was stood in support of and in concert with those who were offering leaflets or holding banners."

At approximately 11.45 a.m. Sergeant Hopwood arrested Miss Agu G who was with three other persons, who are not appellants, in Darley Street. He arrested her for conduct likely to cause a breach of the peace, and it is noticeable that that charge was not proceeded with in the magistrates' court.

The remaining appellant, Mr. Hirst, together with some four other people who were appellants in the Crown Court, were arrested shortly afterwards by Inspector Slocombe in the entrance to the shop. They had H

[illegible] and Agu v. [illegible]ef Constable of West Yorkshire

Queen's Bench Division

Glidewell, L.J.

gathered there to protest against the arrest of the first four, but they were no longer distributing leaflets. Inspector Slocombe ordered them to leave, telling them that their actions led him to believe that a breach of the peace was likely. They refused and they were arrested for obstructing the highway and for conduct likely to cause a breach of the peace. They also were not charged with that second offence.

The appellants' contentions were in summary that there was no actual obstruction of the highway (certainly none was found by the Crown Court) and that they were acting singly, though by agreement with each other, distributing leaflets or holding banners and that was not an unreasonable use of the highway. They submitted that the prosecution had to prove in order to substantiate the charge that they were making an unreasonable use of the highway.

The matter is expressed this way in para. 5 of the case stated, which sets out their contentions:

"The appellants further contended that leafleting in the circumstances of this case was quite lawful and to convict on this evidence would make any peaceful protest on the highway or the mere presence of protesters on the highway an offence under s. 137 of the Highways Act 1980."

The respondent, both in the Crown Court and in this court, contended "that unless the presence of the appellants upon the highway was for the purpose of its lawful use (i.e. passing and re-passing over and along it) or some purpose incidental to that lawful use then their presence on the highway constituted an obstruction. He further contended that the question of 'reasonableness' did not fall to be decided if the court was satisfied that the presence of the appellants upon the highway was not for the purpose of its lawful use or some purpose incidental to it."

The Crown Court expressed its conclusion in the following terms:

"We considered ourselves bound by the decision in *Waite v. Taylor* (1985) 149 J.P. 551. We found that to stand in the highway offering and distributing leaflets or holding a banner was not incidental to its lawful user, and accordingly that each of the appellants had wilfully obstructed the highway contrary to s. 137 of the Highways Act 1980. We therefore dismissed the appeals.

"The question for the opinion of the High Court is whether, upon the above mentioned statements of fact, we came to a correct determination and decision in point of law."

We have been most helpfully referred to a number of authorities on s. 137(1) or its predecessor in earlier Acts. The first in point of time to which we were referred which is strictly not binding upon us but of great authority was a decision of the Divisional Court in Ireland, the case of *Lowdens v. Keaveney* (1903) 2 I.R. 83. There the defendant was convicted under a similar section of the statute when a band went down a narrow street in Belfast, blocking it, despite a police warning. The magistrates had not considered before they convicted whether [illegible] of the street was reasonable or not. Lord O'Brien, C.J., at p. 87 [illegible]

[illegible] West [illegible]

Queen's Bench Division

Glidewell, L.J.

the criminal offence under the section with questions arising in common law nuisance, as did Gibson, J. at p. 89. They both held that it was necessary for the court to consider whether the activity being carried on in the highway was reasonable or not and, because the magistrates had not considered that question, the conviction was quashed.

Much more recent authority, which is binding on us, is that in *Nagy v. Weston* (1965) 129 J.P. 104; [1965] 1 All E.R. 78, a decision of this court. In that case the defendant parked a hot dog van in St. Giles Street, Oxford. He was convicted under s. 121(1) of the Highways Act 1959, which is in identical terms to the present section. The conviction was upheld, but Lord Parker, C.J., giving a judgment with which the other two members of the court agreed, put the position in a way which in my view establishes the major authority for the consideration of questions arising under this section. He first of all quoted the case stated which concluded with the words:

"The question for the opinion of the High Court is whether we correctly interpreted the meaning of the words 'wilfully obstruct', and whether the facts of the case are capable as a matter of law of justifying a conviction."

Lord Parker proceeded:

"In my judgment, the answer to those questions is clearly yes. Counsel for the appellant concedes, as, indeed, he is bound to concede, that any occupation of part of a road, thus interfering with people having the use of the whole of the road, is an obstruction. He also concedes that wilful obstruction is when the obstruction is caused purposely or deliberately. He goes on, however, to say that, before anyone can be convicted of this offence, two further elements must be proved, first that the defendant had no lawful authority or excuse, and, secondly, that the use to which he was putting the highway was an unreasonable use. For my part I think that excuse and reasonableness are really the same ground, but it is quite true that it has to be proved that there was no lawful authority. It is really difficult to think of any argument that could be used in the present case to the effect that the appellant had lawful authority to obstruct the highway if what happened was an obstruction. It is undoubtedly true — counsel for the appellant is quite right — that there must be proof that the use in question was an unreasonable use. Whether or not the use amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends on all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and, of course, whether it does in fact cause an actual obstruction as opposed to a potential obstruction. So far as this case is concerned, the magistrates, in the finding that I have already read, have clearly found that, in the circumstances, there was an unreasonable use of the highway. Indeed, on the facts stated, it is difficult to see how they could conceivably arrive at any other conclusion. I would dismiss the appeal."

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Agu v. Constable of W. Yorkshire

Queen's Bench Division

Glidewell, L.J.

That statement of the law was approved by Lord Denning M.R. in the Court of Appeal in the case of *Hubbard and Others v. Pitt and Others* [1975] 3 All E.R. 1. It is however right to remind oneself that Lord Denning in that case, first of all, was dissenting from the other two members of the court and, secondly, that the passage in question is in any case obiter. That was a case of civil nuisance in which Lord Denning, like the Judges in the Irish case to which I have referred, treated the question to be decided in civil nuisance cases of like kind as equivalent to the question to be decided under this section of the statute. In my view, it is a passage which is correct and which I would adopt. He said this under the heading "The Law of Highways" at p. 7, at A:

> "If the defendants had been guilty of wrongful obstruction of the pavement, the police could have intervened and taken them before the magistrates. This is provided by s. 121 of the Highways Act 1959 . . ." which he set out.
>
> "In order to be an offence under this section, it has been authoritatively said . . ." and then he quoted a passage from the judgment of Lord Parker in *Nagy v. Weston*, which I have just quoted.
>
> Lord Denning went on: "In the present case the police evidently thought there was no breach of this law. The presence of these half-a-dozen people on Saturday morning for three hours was not an unreasonable use of the highway. They did not interfere with the free passage of people to and fro. Of course, if there had been any fear of a breach of the peace, the police could have interfered: see *Duncan v. Jones*. But there was nothing of that kind."

Lord Parker's judgment in *Nagy v. Weston* was more recently approved by the Court of Appeal, Sir John Donaldson, MR, giving the judgment of the court in *Hipperson v. Newbury Electoral Officer* [1985] 1 Q.B. 1060, at p. 1075E.

We were referred also to a number of recent decisions arising out of prosecutions under this section. *Jones v. Bescoby and others*, a decision of this court on July 8, 1983, which is unreported, the court consisting of Robert Goff, L.J., as he then was, and the late Forbes, J., was a case in which hospital employees were picketing a hospital in Halifax in pursuit of a claim for higher wages. They blocked an entrance to the hospital, preventing a delivery vehicle from entering. The magistrates acquitted on a charge under s. 137 saying that what the employees were doing was a reasonable use of the highway, largely because it was of short duration.

Forbes, J., said at p. 4 of the transcript:

> "The correct approach for the justices in a case of obstruction is to ask themselves first: Was the defendant exercising his right to the use of the highway? Only if the answer to this is 'yes' is it appropriate to go on and ask: Was the obstruction of such duration that in the circumstances it was an unreasonable user of the highway?"

The court concluded that in that case the defendants were not exercising their right to use the highway and thus allowed the appeal.

In *Waite v. Taylor* (1985) 149 J.P. 551, another division of this court had before it an appeal by case stated in relation to the acquittal of a busker who had been juggling with fire sticks in a pedestrian precinct. May, L.J., said at p. 553, having referred to three of the cases to which that court had been referred, including *Nagy v. Weston*:

> "For my part I do not propose to recite passages from the judgments in those three cases because I have reached the conclusion that the underlying principle in all these cases can be relatively simply stated. In so far as a highway is concerned members of the public have the right to pass and re-pass along it. That does not, however, mean that one must keep moving all the time. However, if one does stop on a highway then *prima facie* an obstruction occurs, because by stopping you are on a piece of the very highway that somebody else may wish to pass and re-pass along. Where, however, your stopping is really part and parcel of passing and re-passing along the highway and is ancillary to it (such as a milkman stopping to leave a milk bottle on a doorstep) then this is not an obstruction within the meaning of the subsection with which we are concerned.
>
> "On the other hand, where stopping on the highway cannot properly be said to be ancillary to or part and parcel of the exercise of one's right to pass and re-pass along that highway, then the obstruction becomes unreasonable and there is an obstruction contrary to the provisions of the subsection."

That is the passage upon which the Crown Court in the present case based its decision.

In *Cooper v. Metropolitan Police Commissioner* (1985) 82 Cr. App. R. 238, the most recent authority, yet another division of this court, consisting of Lloyd, L.J. and Tudor Evans, J., considered a case of a club tout who was engaging people in conversation on the highway in order to try to persuade them to enter the club. He was convicted both by the magistrates and on appeal to the Crown Court and on further appeal by way of case stated to the Divisional Court the appeal was further dismissed. It was held, dismissing the appeal, that the Crown Court were entitled to find that what he was doing was an unreasonable use of the highway.

Tudor Evans, J. gave the first judgment, and he said at p. 242:

> "Speaking entirely for myself, the principle of law which seems to apply in this case upon the authorities (and we have been referred to a substantial number of them) is this: a member of the public has a right to pass and re-pass along a highway and to do everything which is reasonable thereto. For example, a member of the public exercising that right undoubtedly has a right to look in a shop window or to talk to a passing friend without committing an offence. However, if as a matter of fact and degree a member of the public's use of the highway is so unreasonable so as to amount to an obstruction, then an offence under the Highways Act 1980 may be committed. If that is right, then it follows that it is a question of fact and degree in every case, as some of the authorities which have been very helpfully recited to us by counsel, show."

Lloyd, L.J. delivered a concurring judgment.

Now it is clear in the present case that the Crown Court did not consider whether the defendants' use of the highway was reasonable or not, because that court, considering itself bound by *Waite v. Taylor*, decided that handing out leaflets and holding banners was not incidental to the lawful use of the highway to pass and re-pass and therefore, that the reasonableness of that activity was not relevant.

As I have already said, in my judgment *Nagy v. Weston* is the leading modern authority and it does not apply so rigid a test as that found in the judgment of May, L.J. in *Waite v. Taylor*, with the greatest respect to him. In *Nagy v. Weston* itself, the activity being carried on, that is to say the sale of hot dogs in the street, could not in my view be said to be incidental to the right to pass and re-pass along the street. Clearly, the Divisional Court took the view that it was open to the magistrates to consider, as a question of fact, whether the activity was or was not reasonable. On the facts the magistrates had concluded that it was unreasonable (an unreasonable obstruction) but if they had concluded that it was reasonable then it is equally clear that in the view of the Divisional Court the offence would not have been made out.

That is why Tudor Evans, J. approached the matter in the recent decision of *Cooper* and I respectfully agree with him.

As counsel pointed out to us in argument, if that is not right, there are a variety of activities which quite commonly go on in the street which may well be the subject of prosecution under s. 137. For instance, what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? In my judgment that is a question that arises. It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates, in my view.

To take another even more mundane example, suppose two friends meet in the street, not having seen each other for some time, and stop to discuss their holidays and are more or less stationary for a quarter-of-an-hour or twenty minutes. Obviously, they may well cause an obstruction to others passing by. What they are discussing has nothing to do with passing or re-passing in the street. They could just as well have the conversation at the home of one or other of them or in a coffee shop nearby. Is it to be said that they are guilty of an offence and the reasonableness of what they are doing is not in issue? In my judgment it cannot be said.

Some activities which commonly go on in the street are covered by statute, for instance, the holding of markets or street trading, and thus they are lawful activities because they are lawfully permitted within the meaning of the section. That is lawful authority. But many are not and the question thus is (to follow Lord Parker's dictum): have the prosecution proved in such cases that the defendant was obstructing the highway without lawful excuse? That question is to be answered by

deciding whether the activity in which the defendant was engaged was or was not a reasonable use of the highway.

I emphasize that for there to be a lawful excuse for what would otherwise be an obstruction of the highway, the activity in which the person causing the obstruction is engaged must be inherently lawful. If it is not, the question whether it is reasonable does not arise. So an obstruction of the highway caused by unlawful picketing in pursuance of a trade dispute cannot be said to be an activity for which there is a lawful excuse. But in this case it is not suggested that the activity itself — distributing pamphlets and displaying banners in opposition to the wearing of animal furs as garments — was itself unlawful.

I suggest that the correct approach for magistrates who are dealing with the issues which arose and arise in the present case is as follows. First, they should consider: is there an obstruction? Unless the obstruction is so small that one can consider it comes within the rubric *de minimis*, any stopping on the highway, whether it be on the carriageway or on the footway, is *prima facie* an obstruction. To quote Lord Parker:

> "Any occupation of part of a road thus interfering with people having the use of the whole of the road is an obstruction."

The second question then will arise: was it wilful, that is to say, deliberate? Clearly, in many cases a pedestrian or a motorist has to stop because the traffic lights are against the motorist or there are other people in the way, not because he wishes to do so. Such stopping is not wilful. But if the stopping is deliberate, then there is wilful obstruction.

Then there arises the third question: have the prosecution proved that obstruction was without lawful authority or excuse? Lawful authority includes permits and licences granted under statutory provision, as I have already said, such as for market and street traders and, no doubt, for those collecting for charitable causes on Saturday mornings. Lawful excuse embraces activities otherwise lawful in themselves which may or may not be reasonable in all the circumstances mentioned by Lord Parker in *Nagy v. Weston*. In the present case the Crown Court never considered this question. in my judgment, carefully though they dealt with the matter, they were wrong not to do so, and I would, therefore, allow the appeal.

Mr. Justice Otton: I agree. The courts have long recognized the right to free speech to protest on matters of public concern and to demonstrate on the one hand and the need for peace and good order on the other.

Otton, J.

In *Hubbard v. Pitt* [1975] 3 All E.R. 1, to which my Lord, Lord Justice Glidewell, has already referred, Lord Denning at another passage at pp. 10D to 11B said as follows:

> "Finally, the real grievance of the plaintiffs is about the placards and leaflets. To restrain these by an interlocutory injunction would be contrary to the principle laid down by the court 85 years ago in *Bonnard v. Perryman* and repeatedly applied ever since. That case spoke of the right of free speech. Here we have to consider the right to demonstrate and the right to protest on matters of public concern.

Hirst and Agu v. Chief Constable of West Yorkshire

Queen's Bench Division

Otton, J.

These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority — at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St. Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. Hundreds were killed and injured. Afterwards the Court of Common Council of London affirmed 'the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances'. Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order without threats or incitement to violence or obstruction to traffic, it is not prohibited: see *Beatty v. Gillbanks.* I stress the need for peace and good order. Only too often violence may break out; and then it should be firmly handled and severely punished. But, so long as good order is maintained, the right to demonstrate must be preserved. In his recent inquiry on the Red Lion Square disorders, Scarman, L.J. was asked to recommend 'that a positive right to demonstrate should be enacted'. He said that it was unnecessary: 'The right of course exists, subject only to limits required by the need for good order and the passage of traffic'. In the recent report on Contempt of Court, the committee considered the campaign of the *Sunday Times* about thalidomide and said that the issues were 'a legitimate matter for public comment'. It recognized that it was important to maintain the 'freedom of protest on issues of public concern'. It is time for the courts to recognize this too. They should not interfere by interlocutory injunction with the right to demonstrate and to protest any more than they interfere with the right of free speech; provided that everything is done peaceably and in good order."

Although Lord Denning was dealing with the use of an interlocutory injunction, I consider that the passage is of importance when considering whether persons behaving like these appellants have committed a criminal offence of wilful obstruction where there is under s. 137(2) of the Act a statutory right of arrest without warrant.

On the analysis of the law, given by my Lord, Lord Justice Glidewell, and his suggested approach with which I totally agree, I consider that this balance would be properly struck and that the "freedom of protest on issues of public concern" would be given the recognition it deserves.

Appeal allowed with costs out of central funds. Convictions quashed, but cases not remitted to the Crown Court.

Solicitors: *Rhys Vaughan, Esq.,* Manchester, for the appellants.
The Solicitor, West Yorkshire Metropolitan Police, for the respondent.

Reported by: Ian McLeod, Esq., LL.B., B.A., *Solicitor.*