Neutral Citation Number: [2024] EWCA Crim 1040

Case No: 202300814 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Crown Court at Northampton
Garnham J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE GRIFFITHS
and
THE RECORDER OF MANCHESTER, HH JUDGE DEAN KC
(sitting as a judge of the court of Appeal, Criminal Division)

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Between:

(1) JOSHUA SMITH	**Appellants**
(2) EMILY BROCKLEBANK	
(3) ALASDAIR GIBSON	
(4) LOUIS McKECHNIE	
(5) DAVID BALDWIN	
- and -	
THE KING	**Respondent**

- -
- -

Nadesh Karu for the **1st & 2nd appellants, Robbie Stern for the 3rd & 4th appellants, Rabah Kherbane for the 5th appellant (all assigned by the Registrar of Criminal Appeals)**
Simon Jones & Ms Priya Bakshi (instructed by **CPS Appeals and Review Unit**) for the **respondent**

Hearing dates: 26 June 2024

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Approved Judgment

This judgment was handed down remotely at 10:30 a.m. on 13 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Holroyde:

1. The new statutory offence of causing a public nuisance, contrary to section 78 of the Police, Crime, Sentencing and Courts Act 2022 ("s78" and "the Act"), came into force on 28th June 2022. These appellants, and their co-accused Bethany Mogie, were the first defendants to be convicted of the offence. They now appeal against their convictions with the leave of the single judge.

s78:

2. It is appropriate to begin by citing in full the terms of the statutory offence. Part 3 of the Act contains provisions relating to public order. It includes s78:

> "**78 Intentionally or recklessly causing public nuisance**
>
> (1) A person commits an offence if –
>
> (a) the person –
>
> (i) does an act, or
>
> (ii) omits to do an act that they are required to do by any enactment or rule of law,
>
> (b) the person's act or omission –
>
> (i) creates a risk of, or causes, serious harm to the public or a section of the public, or
>
> (ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and
>
> (c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.
>
> (2) In subsection (1)(b)(i) 'serious harm' means –
>
> (a) death, personal injury or disease,
>
> (b) loss of, or damage to, property, or
>
> (c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.
>
> (3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.
>
> (4) A person guilty of an offence under subsection (1) is liable–

> (a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both.
>
> (5) In relation to an offence committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 (increase in magistrates' court power to impose imprisonment) the reference in subsection (4)(a) to the general limit in a magistrates' court is to be read as a reference to 6 months.
>
> (6) The common law offence of public nuisance is abolished.
>
> (7) Subsections (1) to (6) do not apply in relation to -
>
> (a) any act or omission which occurred before the coming into force of those subsections, or
>
> (b) any act or omission which began before the coming into force of those subsections and continues after their coming into force.
>
> (8) This section does not affect –
>
> (a) the liability of any person for an offence other than the common law offence of public nuisance,
>
> (b) the civil liability of any person for the tort of public nuisance, or
>
> (c) the ability to take any action under any enactment against a person for any act or omission within subsection (1).
>
> (9) In this section 'enactment' includes an enactment comprised in subordinate legislation within the meaning of the Interpretation Act 1978."

3. The Act contains no other provision relating to, or defining any of the terms used in, s78.

The facts:

4. The appellants and Ms Mogie took part in a pre-arranged protest or demonstration at the British Grand Prix Formula 1 motor race held on 3rd July 2022 at the Silverstone circuit in Northamptonshire. On the day before the race, they had recorded a video stating what they were planning to do as part of the Just Stop Oil ("JSO") campaign. Their aim was to occupy part of the race track, dressed in distinctive orange JSO t-shirts and holding a JSO banner, in order that their message would be captured on camera and widely broadcast. The appellant David Baldwin spoke on video of

"disrupting" the Grand Prix. The appellant Louis McKechnie spoke on video of being "f…ing terrified" about what he was going to do on the following day.

5. The Silverstone circuit is situated on private land, to which spectators were admitted on payment of the admission charge. The appellants and Ms Mogie each purchased a ticket which gave them access to the grounds, including areas near the race track. Access to the track itself, and to the land immediately adjacent to it, was prohibited to spectators. Barriers and fences were in place.

6. The appellants had gone to the track equipped with their JSO t-shirts. Most of them changed into those shirts before making their demonstration. The appellant David Baldwin was equipped with cable ties and superglue. Ms Mogie was also carrying superglue.

7. After the race had begun, the appellants and Ms Mogie climbed over a chain link fence. The appellant David Baldwin got no further: he was pulled back by a race marshal. The others passed another fence and a barrier onto a grassed area at the side of the track, and then onto a section of the race track itself known as the Wellington Straight.

8. There was a serious collision on the first lap of the race, involving three of the 20 cars which were taking part. As a result, red flags were displayed, which required the drivers to slow down, not to overtake and to travel round the circuit and return to the pits. It appears that the appellants may have intended themselves to cause a red flag to be displayed, by entering the prohibited area after the cars had passed on their first lap; but in the event, the race was interrupted by the collision.

9. When the appellants climbed the fences and entered the prohibited area, the 17 remaining cars were still on the circuit and most were passing along the Wellington Straight: the red flag had already been displayed, and the cars were therefore not at racing speed. By the time the appellants reached the track itself, 15 of the cars had passed. The appellants went onto the track and sat down in a line which obstructed about half the width of the track. The remaining two cars passed them: CCTV footage showed that the appellant Joshua Smith initially took up the position furthest onto the track, but then hastily moved closer to the grass verge as one of the cars approached. Within a minute, marshals removed them from the track and they were arrested. The appellant Alasdair Gibson spoke to the police about his reasons for having to do "risky shit like this".

The trial:

10. The appellants and Ms Mogie were charged with conspiracy to cause a public nuisance (count 1) and causing a public nuisance contrary to s78(1) and (4) of the Act (count 2). They stood trial before Garnham J ("the judge") and a jury in the Crown Court at Northampton. The prosecution elected to offer no evidence on count 1, and the trial proceeded on count 2. The particulars of the offence charged in that count alleged that the six accused –

> "… without reasonable excuse did an act, namely entered the Silverstone motor circuit during a Formula 1 race and that created a risk of serious harm to a section of the public,

> intending or being reckless that it would have such a consequence."

11. The prosecution case was put on the basis that the serious harm risked by the defendants' conduct was death or personal injury: the jury were not invited to convict on the basis of a risk of serious distress, serious annoyance, serious inconvenience or serious loss of amenity. It was also made clear that the prosecution alleged that the defendants had been reckless as to the risk, not that they had intended their actions to result in death or injury.

12. CCTV footage showing the appellants' actions was played to the jury. Evidence was adduced that the marshals had been instructed not to go onto the track unless told by the race controllers that it was safe to do so.

13. At the conclusion of the prosecution evidence, all the accused made submissions of no case to answer. They referred, amongst other case law, to *AG v PYA Quarries* [1957] 2 QB 169 ("*PYA* Quarries") and *R v Rimmington* [2006] 1 AC 459 ("*Rimmington*"). In very brief summary, their principal submissions were that the Act replicated the common law test set out in *Rimmington*; that an essential element of that test was whether the actions contemplated were likely to inflict significant injury on a substantial section of the public; and that no reasonable jury could be satisfied on the evidence that they had created a risk of serious harm to a section of the public. They argued that the prosecution case had been put on the basis that the persons at risk were the drivers, the marshals and the defendants themselves; but, it was submitted, the only two drivers who had not already passed along the Wellington Straight before the defendants reached the track were "individuals" rather than a section of the public; only one or two marshals had entered the track before race control had said it was safe to do so, and they could not amount to "a section of the public"; and the defendants could not be guilty of causing a public nuisance to themselves.

14. The appellant David Baldwin additionally submitted that no reasonable jury could be satisfied that he was guilty as a secondary party. In particular, it was argued on his behalf that the evidence could prove only that he intended to participate in the original agreement which the defendants explained when recording their video on the previous day. That plan, it was submitted, involved the defendants waiting for all the cars to pass before going to sit on the track; and there was no evidence that this appellant had knowledge that his co-accused would in fact sit on the track when two cars were still to pass.

15. All the submissions were opposed by the prosecution.

16. The judge rejected the submissions, for the reasons which he explained in a written ruling.

The judge's ruling:

17. The judge reminded himself of the test set out in *R v Galbraith* 73 Cr. App. R. 124. He identified the elements of the offence under s78 which the prosecution had to prove; noted that he had previously ruled that the defence of reasonable excuse was not available to the accused who had trespassed in order to protest; and referred to the

principles of secondary liability stated by the Supreme Court in *R v Jogee* [2016] UKSC 8.

18. The judge took as his starting point the words of the statute, but he accepted the submissions of the accused that it was legitimate to look at authorities setting out the common law offence of nuisance, and that *Rimmington* provided the definitive guidance on that issue: the offence of public nuisance required proof of a risk imposed on the public or a section of it, not one imposed on separate individuals. He further accepted a submission that the prosecution must satisfy an objective test of proving that the accused created a risk of serious harm to a section of the public in the events which in fact occurred. He noted that by the time the defendants reached the track, the red flags had been displayed and the vehicles were slowing down, were not overtaking and were returning to their pits.

19. The judge held that even in those circumstances, it was plainly open to the jury to conclude that there was in fact a serious risk of harm. Although the cars had slowed down because of the red flag, the risk was still substantial. In paragraphs 32 to 36 of his ruling, the judge explained his reasons as follows:

> "32 … These were FI motor cars up to 2m in width, still travelling at some speed as demonstrated on the videos the jury have seen. The presence of the defendants sitting perhaps half way across a track some 12m in width, created, the jury may conclude, an obvious risk of collision or accident. That risk was increased by the damaged condition of the last car which could be seen on the videos spitting out either debris or sparks as it passed the seated defendants.
>
> 33 The risk of harm was posed to the drivers of the vehicles and to the defendants themselves as the vehicles passed the defendants. It would be open to the jury to conclude that there was a risk the drivers of the last cars would not see them sat down as they were, or would not properly judge the position of what, for the drivers, would have been unexpected obstructions on the track, or that the defendants would be struck by material thrown out from the passing vehicles. If there was a collision, or a threatened collision, between a pedestrian trespassing on the track and an FI car, it would be open to the jury to conclude that there was a consequential risk to marshals as they rushed to remove the defendants or assist those involved.
>
> 34 The jury would be entitled to take into account their own assessment of the speed of the vehicles and the proximity of the defendants. They would be entitled to have regard to the design of the grand prix track with its grass verge, crash barriers, debris fencing and secondary fencing, all apparently designed to reduce the risk of harm that originated on the track but span out towards the spectators. They would be entitled to have regard to the management of the track and the race, and the rules of racing, all apparently designed to minimise the risk

> faced by drivers, staff and spectators in normal racing conditions and when the red flag is displayed.
>
> 35 Those put at risk of harm are, in my judgment, properly characterized by Mr Jones as the "Silverstone community"; the drivers, the marshals and others, including those who trespass onto the tracks. Those potentially at risk were not deliberately targeted individuals; they included anyone at Silverstone who might be affected by the defendants' actions, including their fellow protesters. No individual defendant could say it was only him or her who was at risk. The defendants were all put at risk by the actions of each other. It would be open to the jury, on the evidence heard to date, to find that the defendants did not discriminate in their choice of who they put at risk. On that basis the threat was, in Denning LJs words, widespread and indiscriminate.
>
> 36 All those put at risk share the common characteristic of being involved in the Grand Prix in one way or another. The attempts of the defendants to atomise that community, to reduce it to its constituent parts in an effort to characterize them as a series of unrelated individuals is wholly misconceived. It is plainly open to the jury on the prosecution's case to say that this was a section of the public."

20. The judge went on to rule, in paragraph 37, that it would be open to the jury to find that each defendant intended or was reckless as to whether their conduct would create a risk of such harm. There was evidence that they intended to disrupt the Grand Prix. He continued:

> "It will be for the jury to decide whether or not the defendants knew the red flag had been signalled when they climbed the fences, crossed the crash barriers, ran across the 14 metres or so of grass verge and/or when they sat down on the track. The agreed facts will greatly assist them on that. As Mr Kherbane rightly submits, this is a subjective part of the test, but there is, in my view, powerful evidence to support a conclusion that that test has been met. The nervousness with which, the jury might conclude, the defendants are seen on the videos to cross the verge, and their hesitancy in choosing where exactly to sit on the track, might also assist the jury in deciding whether they intended, or were at least reckless of, the risks they were running."

21. The judge also rejected the submissions made on behalf of the appellant David Baldwin alone. He held that there was sound evidence on which the jury could conclude that the primary offence had been committed by the other defendants and that David Baldwin had encouraged them to commit it:

> "After all, he made the Twitter video with the others in which he expressly indicated he planned to disrupt the Grand Prix; he

> was in the same part of the Silverstone grounds as the others immediately before they accessed the track; he was wearing the same orange t-shirt; he had to be pulled back from the fence, otherwise he would have joined them at least in climbing onto the grass verge. It is difficult to see how it could be said first, that all of that did not amount to encouragement to the others; second, that Mr Baldwin did not intend by that conduct to encourage the others; or third, that the others were not aware that they had Mr Baldwin's encouragement or approval. Certainly it would be open to the jury to conclude that that was so."

The trial (continued):

22. The trial then continued, and each of the accused gave evidence.

23. The judge provided counsel with draft directions of law and heard submissions on that topic. We understand that he had initially intended that his directions as to the legal ingredients of the offence would include the following:

> "… that risk of serious harm has to be posed to the public or a section of the public. A 'section of the public' would include those working and driving at Silverstone together with those visiting Silverstone, a category that would include the defendants themselves."

24. That part of his draft was, however, revised following defence objections. Paragraph 18 of the written directions which he read to the jury said (with the emphases shown):

> "As to the second, namely that **that conduct created a risk of serious harm to a section of the public**, there are two issues for you to consider. First, did this action create **a risk of serious harm**? That is an objective test; in other words you answer by reference to all the facts as you find them to be. 'Risk' is an ordinary English word and you should give it its ordinary meaning. 'Serious harm' for present purposes is to be defined as death or personal injury. Second, that risk of serious harm has to be posed to **the public, or a section of the public**."

25. The judge also provided the jury with a written route to their verdicts, which included the following two questions:

> "Are you sure that the conduct of the defendant whose case you are considering created a risk of serious harm, namely death of personal injury?
>
> Are you sure that the risk of serious harm was posed to a section of the public?"

26. On 10th February 2023 the jury returned guilty verdicts. At a later date, Emily Brocklebank, Louis McKechnie and Bethany Mogie were sentenced to suspended sentences of imprisonment, and the other appellants to community orders.

The grounds of appeal:

27. All six defendants gave notice of appeal against their convictions. Ms Mogie subsequently abandoned her appeal. The five appellants have the leave of the single judge to appeal on grounds relating to the submissions of no case to answer. The single judge refused David Baldwin's application for leave to appeal against conviction on further grounds specific to his case. Counsel for David Baldwin initially sought to renew most of those grounds, but ultimately abandoned all but one of them.

28. In the event, the hearing before this court focused on the following grounds. All five appellants argued that the judge was wrong to refuse their submissions of no case to answer, in particular because he should have held that no jury properly directed could find that the appellants had created a risk of serious harm to a "section of the public". All five further argued that the judge failed to give any sufficient or adequate direction to the jury as to how to consider what amounted to "a section of the public". Mr Kherbane on behalf of the appellant David Baldwin renewed his application for leave to appeal against conviction on the ground that there was insufficient evidence to establish secondary liability in his case.

29. The submissions of counsel for the appellants and for the respondent essentially repeated and expanded the arguments which had been considered by the judge. We are grateful to all counsel for their helpful submissions. We shall refer only to some of them, but we have taken them all into account.

30. We have also taken into account supplementary written submissions made after the hearing, which set out the directions which the appellants contended the judge should have given if (contrary to their primary submission) he was entitled to leave the case to the jury. Counsel for the appellants jointly suggested possible directions, and Mr Kherbane added further suggestions. Again, we are grateful to counsel for their assistance. With all respect to them, however, we take the view that each of the suggestions raised more questions than it answered, and none could be adopted as correct.

Case law:

31. We turn to consider the two cases, decided under the common law, on which the appellants' counsel particularly rely.

32. *PYA Quarries* was an appeal in civil proceedings in which an injunction had been granted restraining the defendants from carrying on their quarrying business in such a manner as to cause a public nuisance by dust and vibration. The defendants argued that their conduct amounted, at most, to a private nuisance affecting only a limited number of local residents. The principal judgment was given by Romer LJ, who reviewed previous cases and said at p184 that he would not attempt a precise definition of a public nuisance. He continued:

> "It is, however, clear, in my opinion, that any nuisance is 'public' which materially affects the comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as 'the neighbourhood'; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."

33. Denning LJ (as he then was) agreed with Romer LJ's judgment and added at pp190-191 the following further observations on the difference between a public and a private nuisance:

> "The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But that does not help much. The question, 'When do a number of individuals become Her Majesty's subjects generally?' is as difficult to answer as the question 'When does a group of people become a crowd?' Everyone has his own views. Even the answer 'Two's company, three's a crowd' will not command the assent of those present unless they first agree on 'which two'. So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."

34. In *Rimmington* the House of Lords was considering an appeal by a defendant who had sent 538 separate letters and packages containing racially offensive material to black persons, and had been charged with an offence of causing a public nuisance, contrary to common law. The Court of Appeal had dismissed his appeal against a preparatory ruling, holding (as conveniently summarised in the headnote) that –

> "… an individual act of causing a private nuisance such as making an offensive telephone call or sending an offensive communication by post could not become a criminal public nuisance merely by reason of the fact that the act was one of a series; that individual acts causing injury to several different people rather than to the community as a whole or a significant section of it could not amount to the offence of causing a public nuisance, however persistent or objectionable the acts might be; that the sending of racially offensive material by post to different individuals as alleged against the defendant in the first case lacked an essential ingredient of the offence of causing a

> public nuisance in that it did not cause common injury to a section of the public; and that, accordingly, the defendant could not be charged with causing a public nuisance"

35. Lord Bingham of Cornhill reviewed case law concerned both with criminal and with civil public nuisances, including *PYA Quarries.* He quoted a passage from the judgment in *R v Madden* [1975] 1 WLR 1379 ("*Madden*") at p1383, in which James LJ had said -

> "It is quite clear that, for a public nuisance to be proved, it must be proved by the Crown that the public, which means a considerable number of persons or a section of the public, was affected, as distinct from individual persons."

36. Lord Bingham held that the common law offence still existed, and was sufficiently certain to comply with article 7 of the European Convention on Human Rights because (paragraph 36) –

> "A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: is so, an obvious risk of causing a public nuisance would be apparent; if not, not."

37. He concluded, at paragraph 38, that the facts alleged against the defendant did not cause common injury to a section of the public and so lacked the essential ingredient of common nuisance.

The Law Commission's report:

38. The appellants also rely on the Law Commission's report number 358, Simplification of Criminal Law – Public Nuisance and Outraging Decency, published in 2015.

39. The Law Commission, having reviewed the common law offence and considered responses to its earlier consultation paper, recommended that the existing offence should be replaced by a statutory offence which included a fault element of intentionally or recklessly causing a public nuisance, and which also incorporated a defence of reasonableness. It suggested that the conduct elements of the statutory offence should consist of –

> "(1) voluntary conduct by the defendant (including omissions, where the defendant is under a duty at common law or by statute);
>
> (2) which causes:
>
> (a) serious harm to members of the general public or a section of it; or
>
> (b) obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large."

40. The Explanatory Notes to the Act state that s78 gives effect to the Law Commission's recommendations that "the common law offence of public nuisance should be replaced by a statutory offence covering any conduct which endangers the life, health, property or comfort of a section of the public or obstructs them in the exercise of their rights".

41. The appellants submit that s78 should accordingly be interpreted in accordance with the common law principles, in particular those stated in *PYA Quarries, Madden* and *Rimmington*. They argue that it was therefore incumbent upon the prosecution to prove that their actions risked serious harm to "a significant section" of those present at Silverstone, or to "a substantial section of the public", or to "a representative cross-section of those present a Silverstone" or to "a considerable number of persons … as distinct from individual persons". They submit that the evidence was insufficient to meet that requirement; that the prosecution could prove no more than a potential risk to a limited number of individuals, who could not be turned into "a section of the public" by referring to them as "the Silverstone community"; and that the judge should therefore have allowed the submissions of no case to answer. Alternatively, if the judge did not err in allowing the case to go to the jury, they submit that he should have assisted the jury in their approach to the ingredient of "a section of the public" by directing them in some or all of the terms quoted earlier in this paragraph. They submit that those errors by the judge render all the convictions unsafe.

Analysis:

42. Like the judge, we must start with the plain words of the statute. We think it important to note at the outset three features. First, that the common law offence of public nuisance has been abolished by s78(6). Secondly, that although it followed the recommendations of the Law Commission, Parliament did not adopt the precise wording which the Commission had recommended. And thirdly, that s78(1)(b) refers simply to "the public or a section of the public": it gives no further definition of the latter phrase, and in particular it does not use any of the qualifying adjectives ("significant", "substantial", "representative", etc) which appear in the judgments concerned with the common law ingredients of public nuisance. If Parliament had wished to qualify the phrase "a section of the public" in any of those ways, it could and would have done so.

43. Accordingly, whilst we accept that the statements of principle in the case law predating the Act may sometimes be of some assistance, we emphasise that those statements related to a common law offence which has been abolished and replaced by the new statutory offence. We therefore do not accept that s78 must be interpreted precisely in accordance with what was said in the case law relating to the common law offence. In particular, we do not accept that s78 must be interpreted as if all or any of the qualifying words which appear in the old cases had been included. The approach advocated by the appellants would require judges to read into s78 words which Parliament chose not to use. In our judgement, it would be wrong for judges to do so.

44. We also reject the submission made by some of the appellants to the effect that an offence of public nuisance could not be committed on private land to which the public would only be admitted upon purchasing a ticket. There is nothing in s78 which limits its ambit in such a way. The section is concerned with harm to "the public or a

section of the public". Persons do not cease to be members of the public when they enter (for example) a racecourse or sports stadium. We note that in *Rimmington* the offensive letters must have been received on private property, and that in *PYA Quarries* both the offending quarry and the neighbouring properties affected by dust and vibration were on private land; but neither case suggests that those features were relevant to the issue of whether a public nuisance had been committed.

45. What, then, is the correct approach when (as in this case) defendants are alleged to have acted in a way which created a risk of serious harm to the public or a section of the public? In many cases, no doubt, it will be obvious that the evidence adduced by the prosecution is capable of satisfying a jury that the ingredients of an offence contrary to s78 have been proved. But where, as here, the sufficiency of the evidence is called into question, judges should in our view proceed as follows.

46. First, in a case such as this, it is important to remember that the focus must be on the risk of harm which was created, not on whether any harm was in fact caused. The risk must be real, not fanciful. We agree with the judge that it is necessary to consider the circumstances which actually obtained; but, depending on the facts of the particular case, it may also be necessary for the jury to consider the circumstances which would have obtained if other persons, over whom the defendants had no control, had behaved in a different, but foreseeable, way. It is also necessary to be clear about the time at which the risk is to be evaluated. In the present case, the risk was created (as the prosecution had rightly contended) when the defendants trespassed onto the prohibited area, and therefore at a time when all, or most, of the cars were travelling at some speed along the Wellington Straight. It is artificial, and wrong, to evaluate the risk only when the defendants sat down on the track: it was readily foreseeable that marshals might react swiftly to the trespass (as indeed they did in the case of David Baldwin) and try to detain the defendants as they crossed the grass towards the track, or as they reached the edge of the track. It was also foreseeable, as the judge noted, that marshals wishing to clear the track or to assist someone who was injured might go onto the track notwithstanding that they had not yet been authorised to do so.

47. Secondly, identification of the relevant risk necessarily involves identification by the jury of the persons who are placed at risk. In the present case, those persons were not limited to the drivers of the last two cars and to the one or two marshals who went onto the track before the last two cars had passed: they included all the drivers who were on or approaching the Wellington Straight when the defendants trespassed into the prohibited area, and all the marshals, and others who might assist the marshals, who were in a position to react to that trespass.

48. Thirdly, where more than one person is accused of a s78 offence, it will be necessary to consider whether each of the co-accused can himself or herself be identified as a member of the relevant "section of the public". The terms of s78 do not specifically exclude them; and because it is not possible to foresee all the circumstances in which s78 offences may be charged, we do not exclude the possibility that in some circumstances one or more co-accused may properly be so identified. We think, however, that such circumstances will be rare. The language of the section as a whole points strongly to its application being limited, at least in all but unusual circumstances, to an act or omission by an accused which causes, or risks, harm to persons who are not themselves taking part in the commission of the public nuisance.

Moreover, in many cases (including this) those charged will be alleged to have acted in concert, or to have encouraged or assisted one another in the commission of the public nuisance. In such circumstances, we think it will be particularly difficult to say that one co-accused was committing a public nuisance against persons including another co-accused. In the present case, for example, the evaluation of the risk must necessarily take into account that the defendants were acting as a unit, requiring the intervention of more marshals than would have been needed to detain a single trespasser, and creating an obstruction which covered about half the width of the track.

49. Fourthly, a question of fact will then arise as to whether the persons whom the jury find to have been put at risk of serious harm can properly be described as "a section of the public". Rephrasing or paraphrasing those words is unlikely to assist, for the reasons vividly expressed by Denning LJ in *PYA Quarries*. If an offender creates a risk of harm to only a single person, it would not be possible to find a risk to "a section of the public". As a matter of common sense, the greater the number of persons placed at risk, the easier it is likely to be to conclude that they can properly be regarded as "a section of the public". But, as counsel for the appellants realistically accepted, there is no minimum number. A "section of the public" is, in our view, simply a group of persons within a larger group or body of persons. It will be a question of fact in each case whether the smaller group can fairly be described as "a section of the public".

50. In deciding that question, the status held by particular persons, or their reasons for being present at the relevant place at the relevant time, may be relevant considerations but are not determinative. Persons are not necessarily excluded from the category of members of the public merely because they are present in some specific or official capacity, or in the course of their employment. Nor are they necessarily excluded from that category merely because their status gives them access to areas which are prohibited to other members of the public.

51. We have indicated that we do not think it right to import into s78 qualifying words such as are to be found in the case law. It does, however, remain necessary to distinguish a "section of the public" from a series of individuals. Conduct which is specifically directed against, or gives rise to a risk of serious harm specific to, an individual will not be sufficient; and that will be so, even if the conduct is repeated on separate occasions against a number of individuals. The important consideration is whether it can properly be said that the conduct is directed generally and collectively against a group of persons who can fairly be regarded as "a section of the public", or puts such a group generally and collectively at risk of serious harm, without discriminating between individual members of the group.

52. Where a submission of no case to answer is made, a judge will have to consider whether, in accordance with the familiar *Galbraith* principles, a jury properly directed could properly find, on one view of the evidence, that all the ingredients of the s78 offence were proved.

53. If the judge answers that question in the affirmative, it will then be for the jury, applying the ordinary English words used in s78, to decide on the facts whether the accused's conduct created a risk of serious harm to a section of the public. The judge will no doubt wish to identify the features of the evidence which should be considered

by the jury when deciding the issues of fact which arise in the circumstances of the particular case; and will also wish to remind the jury of the arguments on each side about whether the ingredients of the offences have been proved. It may be convenient for the judge to direct the jury along the lines of the stepped process which we have outlined in paragraphs 46-51 above. But it is unnecessary, and in our view will generally be undesirable, for the judge to attempt to rephrase the statutory language.

54. Having endeavoured to give that general guidance, we return to the present case. We address first the two grounds of appeal which all the appellants have leave to argue.

55. It follows from what we have said above that we respectfully disagree with the judge's focus on the risk which was created when the defendants reached the track itself. But insofar as that was an error, it was one which worked to the advantage of the appellants, and cannot in itself be said to render their convictions unsafe.

56. It also follows from what we have said above that we respectfully disagree with the judge's finding that the defendants themselves were part of the relevant "Silverstone community". That error, however, does not vitiate his ruling on the submissions of no case to answer. Had the judge excluded consideration of the defendants, and considered only the drivers, marshals and any others whom the jury might find on the evidence to have been put at risk, he would rightly have reached the same conclusion: namely, that it was open to the jury to find that the defendants' conduct had created a risk of serious harm to a section of the public. We agree with the judge's conclusion that the arguments of the defendants were a misconceived attempt to "atomise" the relevant section of the public and to reduce it to its constituent parts in order to characterise them as a series of unrelated individuals. We therefore reject the first ground of appeal

57. The case was, accordingly, properly left to the jury. Should the judge have directed the jury about how to approach their decision as to whether the persons put at risk constituted a section of the public? In particular, should he have directed them specifically to exclude the defendants themselves from that consideration? Certainly the judge could have said rather more than he did. We think it would have been better if he had given a direction along the lines we have indicated in paragraphs 49-51 above, and had expressly directed the jury not to include the defendants themselves when considering who was put at risk. But the directions which the judge gave, and his route to verdicts, contained no error of law; and given the submissions made by the parties in response to the judge's initial draft directions, we do not think he can be criticised for directing the jury as he did. The route to verdicts required the jury to consider the correct questions; and although the judge did not expressly exclude consideration of the defendants themselves, he said nothing to suggest that the jury should include them. Given the strength of the prosecution case, taking into account only the risk to drivers, marshals and others who might assist the marshals, we are satisfied that the terms in which the judge directed the jury do not render the convictions unsafe. The second ground of appeal therefore also fails.

58. We turn finally to the renewed application by David Baldwin for leave to appeal on a further ground specific to his case. We can address this briefly. We agree with the single judge that the judge's reasoning, which we have quoted in paragraph 21 above, is unimpeachable and that this proposed ground of appeal is without merit. It has the appearance of a somewhat cynical attempt by the appellant to rely on the speed of a

marshal's response – itself an indication of the high degree of risk created by persons trespassing onto the prohibited area when cars were moving round the track – to distance himself from the conduct of his co-accused who managed to clear the fences.

Conclusion:

59. For the reasons we have given, we refuse the renewed application by David Baldwin for leave to appeal against conviction, and we dismiss the appeals of all the appellants.