IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP No 76/9l

BETWEEN NOBILANGELO CERAMALUS

Appellant

AND POLICE

Respondent

Hearing: 26 April & 3 May 1991

Counsel: Appellant in person
Kate Evans for respondent

Judgement: 5 July 1991

JUDGEMENT OF TOMKINS J.

The Appeal

The appellant was charged that on 12 December 1990 at Birkenhead, he in a public place, namely Fitzpatrick Bay, behaved in an offensive manner. That charge was heard in the District Court at North Shore on 24 January 1991. On 14 February 1991 McElrea DCJ delivered his decision in which he convicted the appellant. He was discharged without penalty. He was not ordered to make any payment towards costs, nor to witnesses expenses. He has appealed against that conviction.

The charge was laid pursuant to S.4(1)(a) of the Summary Offences Act 1981. It provides that a person commits an offence who:

> '(a) in or within view of any public place behaves in an offensive or disorderly manner.'

There was a further charge of intentionally and obscenely exposing his genitals. The appellant having been found guilty of offensive behaviour, the police did not press that more serious charge--a course that was approved by the Judge who considered that the offensive behaviour charge was the more appropriate.

Facts

On 12 December 1990 three teachers took 105 children from the Chelsea Primary School in Birkenhead to Fitzpatrick Bay in Birkenhead for the purpose of a 'cook-out.' The age of the children ranged from 8 to 11. At the relevant time, there were five teachers present.

Upon the reaching the beach at about 10am, wood was collected and twelve fires built between the high and low tide marks towards the northern end of Fitzpatrick Beach. Eight or nine children gathered around each fire to cook the food they had brought with them.

At about 11am the appellant walked from the northern end of the beach around from Soldiers Bay. He was naked. He carried his towel under his arm. He walked past the children, then turned, returning in a northerly direction to a position about halfway along the beach. He laid out his towel and lay upon it, face up. Occasionally he rested on his elbows to see what the school group was doing. He was approximately 10 metres from the nearest fire, about 8 or 9 metres from the children around the fire.

The teachers observed the appellant and what he had done. One returned to the school and reported these events to the principal. The principal telephoned the police. About an hour later a police constable arrived. He requested the appellant to move further down the beach, away from the group. The appellant refused. He was then arrested and taken to the Takapuna police station, via Soldiers Bay, where his clothes were in a neighbouring reserve.

The Judge found on the evidence given by a witness called by the appellant, that this beach is listed in a publication put out by the free beach movement of New Zealand as one which nudists commonly use. The appellant claimed that it is well known locally to be such a beach. The Judge found there to be a conflict of evidence on this, concluding that although the beach may have been one used by nudists commonly, it was not generally known as such among the general public in the area. The Judge found that the appellant was a nudist--the appellant prefers the word 'naturist', which he considers has a similar, but not identical meaning--who had used Fitzpatrick Bay for 6 or 7 years. He also found that the appellant believed very strongly and firmly in the benefits of nudism for physical and mental health.

It was the appellant's evidence, not challenged by the prosecution, and accepted by the Judge, that he made no obscene gestures, and no obscene comments. He lay upon the beach sunbathing--although it appears that the sun was hardly out, if at all.

The Judqe's Decision

The Judge in his decision set out the facts in somewhat more detail than I have done. He reviewed certain authorities relating to the offence, concluding that, for reasons he set out in detail in his decision, the charge of offensive behaviour was proved. The police not seeking a conviction in respect of the alternative charge, that was dismissed. The Judge considered this to be in the nature of a test case, and that the appellant believed he was within the law. It was for those reasons that the appellant was convicted and discharged without penalty.

Behaviour

The appellant submitted that the word 'behaviour' in the context of this section is a matter of action, not a matter of appearance. Thus, a person's behaviour may be described as walking excitedly, or even being excited, but being naked is not, in fact, behaviour. It was the difference, he submitted, between actions and appearance. So the appellant submitted that when he walked naked past the children his behaviour was the act of walking, but his state of nakedness was not an action, and therefore not behaviour.

I do not accept that submission. In my view the behaviour of the appellant, in the circumstances of this case, embraced his actions in walking along the beach and lying upon it in the state in which he was while he did so. It is the combination of these factors that amounted to his behaviour on this occasion.

This approach is consistent with that adopted by O'Loughlin J in the Supreme Court of South Australia in *Khan V Bazeley* (1966) 40 SASR 481. The appellant had been charged with behaving in an offensive manner in walking along a street with a tee-shirt, on which was printed a slogan. The slogan was held to be offensive. It was argued on behalf of the appellant that his action in walking down the street wearing a tee-shirt did not amount to behaviour. At 486 the Judge said:

> 'Hence, in arguing that there was "no behaviour" that could be attacked, (counsel for the appellant) was relying upon the fact that the wearing of an item of apparel was an ordinary event and that it could not be classified as coming within the word "behaviour" as its derivative is used in S.7 of the Act. With this I must join issue; the mere fact that the appellant was wearing the tee-shirt, that it was part of the appellant's apparel, readily visible and not covered by any form of outer clothing, was quite properly regarded by the learned Stipendiary Magistrate as behaviour.'

In the same way as walking wearing a tee-shirt bearing an offensive slogan is behaviour, so can be walking naked.

Offensive

The central issue in this appeal, as in the District Court, was, accepting that the actions of the appellant in the condition he was amounted to behaviour, whether that behaviour was offensive.

The appellant submitted that this issue involved matters of general public importance. He submitted that the human body is not an illegal object, it is not a threat to human society. Nakedness on a beach, he contended, is therefore a valid form of free expression. It is not proscribed by the Act, either in the letter or in the intent. Socially objectionable behaviour does not come under the Act.

The social as well as the legal importance of these issues has been recognised by the Courts. In *Melser & Others v Police* (1967) NZLR 437, the Court of Appeal was concerned with a conviction on a charge of disorderly behaviour. McCarthy J at page 445 observed:

> 'The task of the law is to define the limitations which our society, for its social health, puts on such freedoms. Sometimes the law defines with precision the boundaries of these limitations: often the definition is stated only in general terms. In these latter cases, the Court must lay down the boundaries themselves, bearing in mind that freedoms are of different qualities and values and that the higher and more important should not be unduly restricted in favour of lower or less important ones.'

Later he observed that an offence against good manners, a failure of good taste, a breach of morality, even though these may be contrary to the general order of public opinion, are not enough to establish that offence.

Similarly, in *Messiter v Police* (1980) 1 NZLR 586, where the charge was one of using insulting words in a public place, Hardie Boys J commenced his judgement by saying:

> 'Within the modest phrases of S.3D of the Police Offences Act 1927, there lies a field of great constitutional importance. For here is laid out one part of the frontier between individual liberty and public right, between the individual's freedom of speech and expression and the State's right to intervene to protect the wider interests of the community. In obtaining and maintaining definition of this frontier, Courts and academicians have laboured and the blood of martyrs has been spilled.'

The appellant submitted that the word 'offensive' has two essential meanings, namely aggressive, its prime meaning, and objectionable, its secondary meaning. It was his contention that the word was used in the context of this section in its primary meaning, so that offensive behaviour is that which has, in essence, the quality of attack and thus is likely to cause a counter-attack, leading to a conflict which would need to be quelled. He contended that the word offensive is the adjective from the word offence, not from the word offend. An offence is an attack on the state, that is, on public order. This interpretation, he submitted, was given weight by the draughtsman using the expression 'offensive behaviour' not 'behaviour that offends'.

The interpretation he advances is within the definition of the adjective 'offensive' in the Oxford English Dictionary, 2nd edition (1989) where it is given the meaning:

> 'pertaining or tending to offence or attack; attacking; aggressive; adapted or used for purposes of attack; characterised by attacking. Opposed to defensive.'

The alternative meaning is expressed in the definition in the same dictionary:

> 'Giving or of a nature to give offence; displeasing; annoying; insulting.'

The appellant's contention that the word has the former, not the latter meaning, whilst it may be linguistically attractive, is not supported by authority. In *Price v Police* (1965) NZLR 1086, Haslam J, in considering an appeal from a conviction for offensive behaviour, said at 1088:

> 'If consideration be needed to the adjective "offensive", then it must be differentiated here, if only by its context, from its use elsewhere. An offensive weapon is one that can be used for purposes of aggression; and offensive trade is one that is noxious or noisome; and offensive conduct or behaving in an offensive manner, can, I think, be defined as a course of action calculated to cause resentment or revulsion in right-thinking persons...'

Similarly, in *Rogers v Police* (M 873/75, Auckland Registry, 6 August 1975) an appeal against a conviction for behaving in an offensive manner, being naked on a beach on Waiheke Island, Wilson J said at P2 of the unreported judgement that:

> '... the behaviour in the case of offensive conduct must be such as is likely to arouse feelings of resentment or revulsion in persons whose views are representative of the community having regard to the time and place and the circumstances of the behaviour.'

In *R v Smith* (1974) 2 NSWR 586, the Full Court of New South Wales rejected the same contention as that advanced by the appellant, holding that the word offensive is used in the second, not the first, of the dictionary meanings to which I have referred.

There are three principles that emerge clearly from the authorities.

First, the test is objective. So the Court must consider whether the behaviour would be regarded as offensive in the mind of a reasonable man. It is not necessary for the Court to prove that persons present found the behaviour to be offensive. It is sufficient if the Court considers it would be so regarded by persons whose views are representative of the community: *Rogers* at p.2 of the unreported decision, *O'Connor v Police* (1972) NZLR 379 at 381. It includes conduct that is calculated to annoy or give offence to other people, even if that result is not actually intended: *Densley v Mertin* (1943) SASR 144, Napier CJ at 145.

In applying the objective test, the Court has regard to current community attitudes. Behaviour that may have been regarded as offensive in previous times may, because of changing community attitudes, be no longer so regarded. As the appellant vividly put it in his submissions, in 1975--the date when Wilson J gave his judgement in *Rogers--a* woman would have been liable to prosecution for baring her breasts on Takapuna Beach. Now, 16 years later, he said it is a common sight, one which brings retribution from neither the state, nor the local council.

Secondly, the judgment of the conduct in question is, in every case, a matter of degree depending upon the relevant time, place and circumstances: *Wainwright v Police* (1968) NZIR 101, Wild CJ at 103. *Kinney v Police* (1971) NZLR 924, Woodhouse J at 625. Behaviour that will be regarded as offensive in one place, or under certain circumstances, will not be so regarded in another place or under other circumstances.

Thirdly, the behaviour must amount to interference with the rights of others sufficiently serious to warrant the interference of the criminal law; it is not enough that the conduct charged should be disapproved by the majority as merely ill-mannered or in bad taste: Turner J in *Melser* at 444. In *Messiter* Hardie Boys J at 591 said that it need not be an interference with the rights of persons generally. It may be an interference with the rights of only one person, but to be an interference of sufficient seriousness it must, 'be something in the nature of an intrusion, something uninvited, something imposed upon another member of the public'. So it is open to the Court to conclude that, although behaviour may have been offensive, it may not be so to such a degree as to warrant the intervention of the criminal law. In that event the offence has not been committed.

By what test is the Court to judge whether conduct that may be generally regarded as offensive is sufficiently so to justify the intervention of the criminal law? In a line of cases in Australia, a somewhat more restricted meaning has been adopted. That meaning, in my view, is helpful in categorising the type of offensive behaviour that comes within the section. In *Wurramura & Pregelj v Haymon* (1987) 24 A Crim R, Asche J at 197 pointed out that little assistance can be gained from the dictionary meaning of the word 'offensive' because it is plain that under the equivalent Australian provision the word has a much more restricted meaning. He was referring to the Oxford English Dictionary, including such expressions as 'hurtful', 'harmful', 'injurious', 'displeasing 'annoying', and 'insulting'.

The definition that seems now to be generally accepted in Australia is that enunciated by O'Bryan J in *Worcester v Smith* (1951) VLR 316, when he held at 318 that in order to come within the meaning of 'offensive behaviour', the behaviour:

> '...must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.'

That description was adopted by Pape J in *Inqils V Fish* (1961) VR 607, by Mitchell J in *Ellis v Fingleton* (1972) 3 SASR 437, by O'Loughlin J in *Khan,* and by Asche J in *Wurramura.*

In my view this is a helpful description of the degree of offensive behaviour required to be proved in order to warrant the interference of the criminal law.

Conclusion

It remains then to apply those principles to the circumstances of the present case, bearing in mind that the law on offensive behaviour is neither for the unduly sensitive nor the totally permissive--it strikes a balance; Asche J in *Wurramura* at 199.

Although the test is objective, evidence of the effect that the conduct had on persons present can be of assistance in determining what would be the attitude of responsible members of the community, an approach adopted by Wilson J in *Rogers.*

Two of the teachers gave evidence. Mrs Mulcahy, who is the acting deputy principal of the school, when asked her reaction said:

> 'I wasn't at all impressed. I thought it showed distinct insensitivity towards the children and there was plenty more of the beach left that he could have sat on ... I was quite offended because I really thought he had removed parental choice.'

She said the teachers told the children to ignore the appellant. There was no suggestion that the teachers should take the children away. She said that one little fellow came over to her and said that he thought it was 'disgusting'.

The second teacher who gave evidence, Miss Cross, when asked her reaction said she thought it was bizarre considering there were so many children there. She added:

> 'I felt no strong objection to someone sunbathing nude, but I didn't feel that it required them to put themselves close to me and the children'.

Later, she said that she thought it was 'silly' for him to do what he was doing and therefore she didn't know what other odd behaviour to expect. She did not approach him because she didn't feel comfortable about going up to a naked man who was not her husband.

In 1989, about a year before, similar events occurred. The children were on the beach with their teachers having a cook-out. The appellant arrived, as was his habit, naked. He remained on the beach. On that occasion those in charge of the children took no action. However, it appears that he was some distance further away from the children--how far is not clear.

From this evidence it seems that those directly concerned regarded the appellant's behaviour as unimpressive, insensitive, inappropriate and in bad taste, but one does not get the impression that his behaviour aroused in the teachers feelings of anger, disgust or outrage.

I have little doubt that in this day and age and in that place--a place where it was not uncommon for persons to sunbathe in the nude--adults on the beach would not be offended, in the more restricted meaning of that word as used in the section, by the appearance of the appellant, naked. The real issue in this case is whether the presence of the children results in the behaviour becoming offensive in the sense of arousing anger, resentment, disgust or outrage. It is no easy task to determine what, in all of these circumstances, would have been in the mind of the reasonable person. Certain perhaps more sensitive members of the community would have been deeply offended--aroused to feelings of anger and disgust. Others more permissively inclined would regard the behaviour as perfectly acceptable. But I have reached the conclusion that the average reasonable person would regard the conduct in much the same way as the teachers present on this occasion and on the previous year, namely as inappropriate, unnecessary, and in bad taste, but not arousing feelings of anger, disgust, or outrage. That reaction, in my opinion, falls somewhat short of the reaction required to be established beyond reasonable doubt, in order to amount to offensive behaviour sufficient to justify the interference of the criminal law.

It follows that the appeal must be allowed and the conviction quashed.

Signed,

Tomkins J.