IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2009-485-135

NICHOLAS LOWE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 16 February 2010

Appearances: M Bott for the appellant
M Snape for the respondent

Judgment: 2 March 2010

JUDGMENT OF CLIFFORD J

Introduction

[1] The appellant, Mr Lowe, was convicted on 20 August 2009 by two Justices of the Peace on one count of offensive behaviour under s 4(1)(a) of the Summary Offences Act. Mr Lowe was ordered to pay a $200 fine and $130 costs.

[2] Mr Lowe now appeals to this Court against that conviction.

Background

[3] Mr Lowe is a committed cyclist and naturist. He competes naked in naturist sporting events. He also competes naked in some ordinary sporting events, such as the Coast to Coast race. Mr Lowe's evidence before the Justices, and in an affidavit filed in this appeal, was that he has been competing and training naked for many years without any complaint.

[4] On 15 March 2009, which was "World Nude Bike Day", Mr Lowe was training on his bike in the nude. He was wearing a helmet, in accordance with safety regulations, and a heartbeat monitor across his chest. Somewhere near the Akatarawa Cemetery in Upper Hutt, Mr Lowe was seen by Ms Chamley, the complainant. Ms Chamley was driving along Akatarawa Road. Her five month old son was in the car with her. On seeing Mr Lowe, Ms Chamley stopped and called the police. The police subsequently stopped and spoke to Mr Lowe. He had by then ridden his bike some distance further along Akatarawa Road, away from Upper Hutt as I understood matters. The police explained that someone had called saying that they had found his behaviour offensive. Mr Lowe is recorded as having stated at that point "oh well, I know the law, if someone finds it offensive I have to put my clothes on", and then having immediately put on a G-string.

[5] Mr Lowe was subsequently charged with behaving in an offensive manner under s 4(1)(a) of the Summary Offences Act 1981. A hearing was held before the Justices. Mr Lowe appeared on his own behalf to defend that charge.

[6] The Justices of the Peace found the charge to be proven. Their brief judgment, in its entirety, is set out below:

> [1] We find the prosecution has proved the case, as the witness was good enough for us. She was quite concerned about it, Ms Chamley, and the police officers saw you in the nude and we classify that as offensive behaviour, and it says so in our manual.
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> [2] Unfortunately Mr Lowe we understand all your submissions and we understand your concern, but we are going by this manual here, the Infringement Fine Manual and Guide No. 1 believe it or not is offensive behaviour. We have to come to our conclusion we could fine you quite a substantial sum of money, but we are not going to do that we are going to

> fine you $200.00 and $130.00 court costs. You have got the right to appeal that if you wish.

[7] Mr Lowe originally appealed against the decision of the Justices on the grounds that it was wrong in fact and law.

[8] In written submissions filed on Mr Lowe's behalf, the following detailed grounds of appeal were identified:

> a) The Court failed to apply the correct evidentiary burden of "proved beyond reasonable doubt," preferring instead a standard of "good enough for us".
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> b) The Court failed to give reasons as to why the evidence of [the complainant] was "good enough for" [them].
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> c) The Court failed to apply the correct test in assessing whether the appellant's behaviour was offensive in two ways:
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> > i) The Court found [the complainant's] level of upset at seeing Mr Lowe as being "quite concerned about it", rather than whether she was actually disgusted by what she saw; and
> >
> > ii) Even if [the complainant] was personally disgusted, [the test is whether the appellant's behaviour] was "capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs".
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> d) The Court, in reaching its decision, … abdicated its function to objectively assess the evidence before it, … preferring to find itself bound by a publication – "the Infringement Fine Manual Guide" – a document of unknown legal standing.

Discussion

[9] This is an appeal under s 115 of the Summary Proceedings Act 1957. In general terms, an appeal such as this proceeds by way of a re-hearing on the basis of the evidence taken in the District Court.

[10] Mr Lowe filed an affidavit for the purposes of this appeal. He did so without leave. That affidavit set out matters that were effectively disclosed by the transcript of proceedings, together with some limited additional factual material. After discussion, Mr Snape for the police accepted that in the circumstances of this appeal

the Court could have regard to Mr Lowe's affidavit, to the extent that it did constitute new evidence.

[11] During the hearing of Mr Lowe's appeal I was also provided by Mr Bott with copies of a range of printed material reporting on instances of public nudity (for example, a group of naturists aged from 12 to 80 riding the Otago Central Rail Trail in the nude). That material was tendered in support of Mr Bott's submission that public attitudes to public nudity have changed, and that Mr Lowe's reported experience – of never before having received a complaint as to his nude cycling – accurately reflects a tolerant community attitude to this type of behaviour. I understood that Mr Bott provided copies of that material to Mr Snape, or at least showed the material to Mr Snape before passing it to me. Mr Snape did not raise any issue as to my being provided with that material.

[12] Such evidential material was in my view, therefore, admitted by consent and I do not otherwise need to consider further the question of the admissibility of fresh evidence on an appeal.

[13] Mr Lowe is, as noted above, a committed naturist. As such, no doubt his personal view is that it is appropriate to be nude in a wide range of situations where others would consider that such behaviour was, at best, inappropriate. This case is not, however, about the acceptability of Mr Lowe's views about nudity. Nor is it, in my view, the role of this Court in this appeal to endeavour to set down broad guidelines as to when nudity in a public place may or may not constitute offensive behaviour. Rather, this is an appeal against Mr Lowe's conviction, in the circumstances outlined above, for offensive behaviour. The question I must decide is whether or not, in accordance with established legal principles, that conviction should be upheld.

[14] In saying that, I am not unmindful of the comments of Tompkins J in *Ceramalus v Police*,[1] a case where nudity on a public beach within sight of primary school children and their teachers was held not to constitute offensive behaviour.

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1 *Ceramalus v Police* (1991) 7 CRNZ 678.

There Tompkins J commented as follows, adopting remarks of McCarthy J in *Melser v Police*:

> 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 prescribed by the Act, either in the letter or in the intent. Socially objectionable behaviour does not come under the Act.
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> The social as well as the legal importance of these issues has been recognised by the Courts. In *Melser v Police* [1967] NZLR 437, the Court of Appeal was concerned with a conviction on a charge of disorderly behaviour. McCarthy J at p 445 observed:
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> > 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 Courts 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.

[15] In my view, the way the courts over time lay down boundaries in areas such as these is by responding to particular cases and by deciding whether, as regards the particular facts in question, the relevant offence – here offensive behaviour – has been properly established.

[16] Of the various points of appeal advanced by Mr Lowe, the most significant – in terms of this appeal by way of re-hearing – is whether the Justices of the Peace did, as Mr Lowe asserts, apply the wrong test in determining whether his conduct was offensive or, if they applied the right test, whether they did so correctly?

[17] In *Brooker v Police,* a Supreme Court case concerning disorderly and not offensive behaviour, Blanchard J set out the following test for offensive behaviour: [2]

> …Behaviour which is offensive is behaviour in or within view of a public place which is liable to cause substantial offence to persons potentially exposed to it. It must, in my view, be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs.

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2 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 (SC), at [55] per Blanchard J.

[18] In *R v Morse* Arnold J expressed his view of that test in the following terms: [3]

> …I note three features of Blanchard J's description of offensive behaviour:
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> (a) First, offensive behaviour is described by reference to its likely impact on persons potentially exposed to it. Unlike disorderly conduct, there is no requirement of a tendency to disturb or violate public order.
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> (b) Second, the subjective reactions of those actually exposed to the conduct are not determinative. Rather, the test incorporates an objective element by requiring that the conduct be capable of causing "substantial offence" by affecting the minds of reasonable persons in one of the ways described. But the "reasonable persons" are the same type of people as those actually subjected to the conduct.
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> (c) Third, in assessing the reasonable reaction, the circumstances in which the conduct occurs must be taken into account.

[19] The substantive elements of offensive behaviour can, therefore, be seen as involving "substantial" offence, and as "arousing real anger, resentment, disgust or outrage". The test is to be objectively applied, in terms of the reference to a "reasonable person", but the reasonable person is to be one "of the kind actually subjected to it in the circumstances in which it occurs".

[20] I turn now to the decision of the Justices. Although Mr Lowe had endeavoured to place submissions before the Justices based on the *Brooker* decision, that was not a matter the Justices referred to. Their core conclusion is expressed in the following terms:

> She was quite concerned about it, Ms Chamley, and the police officers saw you in the nude and we classify that as offensive behaviour, and it says so in our manual.

[21] Ms Chamley herself had given evidence at the hearing to the following effect, when asked what her reaction had been when seeing Mr Lowe riding his bike in the nude:

> A: I just wondered what was going on, why was he biking completely naked, you know you are sort of wondering what he was thinking.
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> Q: And your own personal feelings how did you feel when you saw that?
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> A: Fairly disgusted to be honest.

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[3] *R v Morse* [2009] NZCA 623, at [21].

[22] In re-examination, after Ms Chamley had confirmed to Mr Lowe that she had not been able to see his genitals, the prosecutor asked her to tell the Court again how she felt when she had seen his actions. She replied:

> Fairly disgusted. I wouldn't say I was victimised by it [Mr Lowe had asked her whether she felt victimised]. I mean there were probably – there were other people around that haven't come forward as witnesses but I'm pretty sure they may feel the same way yeah.

[23] By reference to the complainant's own reactions, and the Justices' assessment of them, I conclude that the Justices did not apply the correct legal test. It is difficult, as Mr Bott submitted, to know what test they had in mind. There is no relevant mention of the offence of offensive behaviour in the manual they referred to. Whilst Mr Lowe had, apparently, endeavoured to draw their attention to the principles expressed in *Brooker*, the Justices did not refer to them at all. Furthermore, the Justices' categorisation of Ms Chamley's reaction as being "quite concerned", and their subsequent finding that Mr Lowe's behaviour did constitute offensive behaviour, indicates that they had in mind a lower test than that set out in *Brooker* and confirmed in *Morse.*

[24] As noted above, that test requires behaviour liable to cause substantial offence, or capable of "wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs".

[25] In applying that test, I note first that Ms Chamley's evidence was that she was "quite disgusted". The qualifier "quite", together with the way in which she described her immediate reaction as being one of wondering what was going on, wondering why a man was biking completely naked, in my judgement did not indicate that Mr Lowe's behaviour had satisfied the test of causing "substantial offence" of "real anger, resentment, disgust or outrage". Offensive behaviour is not, of course, judged solely by the described reaction of a person who complains about it. The test is an objective one, as has often been observed. Nevertheless, I think evidence from a complainant which fails to show that they themselves felt a

sufficient level of disgust or outrage is a relevant consideration. I note that Tompkins J took a similar approach in *Ceramalus v Police.*[4]

[26] Turning to the objective approach, the Crown submitted that Mr Lowe's behaviour was to be distinguished from other cases where public nudity had not been held to constitute offensive behaviour, such as the earlier *Ceramalus* decision of Tompkins J, particularly by reference to the fact that it took place on a public road. In that, Mr Snape referred me to a later decision involving Mr Ceramalus.[5] There Mr Ceramalus had walked naked along a public residential road, when he had been returning from nude sunbathing. He was found guilty of offensive behaviour in the District Court, that conviction was upheld by the High Court and his application for leave to appeal was declined by the Court of Appeal. The Court of Appeal recorded that the complainant in that case was a neighbour of Mr Ceramalus. She was recorded as being shocked that Mr Ceramalus was parading his nakedness beyond the confines of his own property. She had previously seen him naked on his own property and occasionally he had come onto her property while still naked. That was behaviour which she had reluctantly tolerated. But she felt differently about him appearing naked on the street.

[27] It was the Crown's submission that Mr Lowe's behaviour, as it involved him cycling naked along a *public* road, was – as had been found in that later *Ceramalus* decision as regards a person walking naked on a *public* street – capable of causing offence as specified in *Brooker*, and his conviction should be upheld.

[28] Here, Mr Lowe was cycling on a relatively quiet rural road. He was not walking naked in a suburban street. The complainant confirmed that she had not been able to see his genitals. Furthermore, I do not consider that a person driving along a road, or even walking along it, would be exposed to Mr Lowe's nakedness in the way they would be exposed to the nakedness of someone walking along a suburban street. A car would pass Mr Lowe at some speed. Mr Lowe would no doubt also pass a pedestrian at some speed. The opportunity for exposure to his nakedness would therefore be considerably less than would be the case when a

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4 *Ceramalus v Police* (1991) 7 CRNZ 678.
5 *R v Ceramalus* [1996] BCL 915.

person walks naked along a suburban street. The particular circumstances here are, in my view, quite different from those in the later *Ceramalus* case.

[29] Moreover, the way the complainant described her reaction, and in particular the Justices' assessment of that reaction as the complainant being "quite concerned", supports the conclusion that, in these particular circumstances, the test set down for offensive behaviour has not been satisfied.

[30] On that basis, I allow Mr Lowe's appeal. In doing so I note, at the risk of repeating myself, that this judgment does not mean that nude cycling cannot constitute offensive behaviour. In other circumstances a court would need to consider whether that type of behaviour could arouse real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs. That is a question to be assessed on the particular facts of each case.

[31] In terms of the approach of the courts in *Brooker, Morse* and other cases, I have considered whether there may have been some element of freedom of expression in Mr Lowe's behaviour. As noted, the day on which this behaviour was observed was World Nude Bike Day. Mr Lowe's behaviour could possibly be seen as an expression of opinion of support in that context. Having said that, however, I note that Mr Lowe himself referred at his trial to it "coincidentally" being World Nude Bike Day. The element of freedom of expression would not, therefore, appear to have been high in Mr Lowe's own mind, and in any event does not here require further analysis.

[32] In these circumstances, I do not consider it necessary to review Mr Lowe's other points of appeal in great detail. In terms of the extent of the Justices' reasoning, whilst their decision was short, it did encapsulate their reasons. Put simply, they considered Ms Chamley's evidence sufficient to establish the offence. There is in my judgement no reason to conclude that they did not apply the correct criminal standard of beyond reasonable doubt. I think it would have been preferable if the Justices had been referred to the *Brooker* test, and had reflected that in their decision. At the same time, and as evidenced by the wide range of views Judges of

the Supreme Court and the Court of Appeal have expressed in the cases I have referred to, the test is not a straight forward one. In the circumstances, it is perhaps not surprising that the Justices chose to take a reasonably straightforward and matter of fact approach to their task.

[33] Finally, and as I have noted, the reference by the Justices to their manual is somewhat mysterious, as the manual on its face does not appear to contain any relevant reference.

[34] This appeal is therefore allowed, and Mr Lowe's conviction and sentence quashed.

"Clifford J"

Solicitors: M Bott, Barrister, Wellington for the appellant (Michael@blackstonechambers.co.nz)
The Crown Solicitor, Wellington for the respondent (mws@lcc.co.nz)