NZLR

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

M.503/71

No Special Consideration

BETWEEN TIMOTHY RICHARD SHADBOLT
Appellant

A N D THE POLICE
Respondent

291 1 X

Hearing: 20th March, 1971.

Counsel: Littlewood for Appellant.
Satynand for Respondent.

Judgment: 26th August, 1971.

JUDGMENT OF HENRY, J.

Appellant was charged that he did on March 21st, 1971, use indecent language in Albert Park, Auckland, which is admittedly a public place. He was convicted and fined $100 together with costs $11.50. He now appeals against both conviction and sentence. The relevant statutory provision is Section 48 of the Police Offences Act, 1927, which reads:-

> " 48. Every person who uses any profane, indecent, or obscene language in any public place or within the hearing of any person in such public place is liable to imprisonment for any term not exceeding three months or to a fine not exceeding two hundred dollars. "

Appellant conducted his own case in the Court below but Counsel appeared on appeal. In accordance with a practice note a memorandum of the grounds of appeal was filed. It is a lengthy document but not very illuminating. However, it was stated at the Bar that there was no dispute on any question of fact and that the substantial question was whether or not, as a matter of law, the words spoken were indeed within the meaning of that term in Section 48. There was also a further question, not very clearly defined, whether the learned Magistrate had improperly excluded evidence. It was conceded that, although it was claimed that the judgment and certain comments of the

learned Magistrate were wrong, this was not relevant on appeal because this Court is now called upon to make findings of law on facts not in dispute subject only to the question whether or not relevant evidence was improperly excluded.

A riot, it was so called, had taken place at Mt. Eden Prison and, on Sunday, March 21st, at about 2.15 p.m. a "demonstration" was held in Albert Park. Appellant was prominent as a speaker. It had been advertised on television on the Saturday evening. The estimate of the gathering was some 300 people. The area is well known. It is near a floral clock and not far from Princes Street and is sited near one of the entrances to the park. Appellant used a "loud hailer" to address the gathering. It is clear that appellant's purpose was to publicise prison conditions as, indeed, it was his right to do so. He himself said he gave a long very emotional and passionate speech about conditions in New Zealand gaols today, about which he felt extreme disgust. Appellant said he could not recall using the words complained of and that he could not remember the exact context of his speech, but he knew he did not say anything he felt was offensive to anybody.

Appellant called the Reverend Ian Donald Borrie who said he heard the words of the complaint but he added that they did not cause him any particular offence as he has heard them on numbers of occasions. This was offered by witness without being asked any question which required such an answer. The next witness for the defence was a Mr. Howard. He agreed that some of the words were used. An attempt was made by this witness to give examples of other language of an indecent nature he had heard on "numerous occasions" in the area. This witness also claimed that the words were used "in a context which probably "justified using them". For some reason the learned Magistrate was criticised for remarks made on the last two matters. In my judgment both matters are irrelevant and the remarks made were entirely proper. Mr. Howard, who was accompanied by his wife

and daughter (age not given) seemed quite unconcerned with the language used. Two other witnesses, Mr. Ivan Donald Williams, a science student, and Mr. Brian Watson, a barman, were also called. Neither gave any relevant evidence other than to confirm the general atmosphere of the meeting. Mr. Watson's only contribution seemed to be that he had personally used indecent language in the same area. Not unnaturally he proffered a statement that he was not "particularly offended".

Now it is in the setting in which I have just stated that Appellant, in describing prison conditions, used certain words, in a context later set out, to describe how prisoners performed their bodily functions in confinement in their cells. The question is whether or not in the circumstances so stated the words are within the word "indecent" as it appears in Section 48. The word itself is not defined. It is used in the expression "profane, indecent or obscene". Counsel for Appellant referred to the Latin maxim "noscitur a sociis" as being an aid to construction. For myself I cannot see that it applies. The maxim applies where general and special words are associated, in which case general words may be restricted in their meaning by reason of their association with particular words. I do not here see any association of general and special words except that it has been said on high authority that obscene is at one end of the scale and indecent is at the other end, and that which is obscene is indecent but what is indecent is not necessarily obscene: R. v. Stanley (1965) 1 All E.R. 1035. Reference was made by Counsel for Appellant to legislation concerning indecent documents. I do not find this helpful because special statutory enactment has imported definitions and tests which are not applicable to Section 48.

In a changing society it is not always easy to adjudge what is at a particular time profane, indecent or perhaps even obscene. Many instances are clear but there are others where individual opinions may properly differ and it is for the Court

to determine each case on its own particular circumstances by applying those tests which have, by reason of reported decisions, been accepted as the standards to be applied. There is a constant struggle to give a freedom of choice of conduct where in earlier times informed public opinion restricted conduct. I take the liberty of citing two passages from a paper read by Mr. W. J. Scott on "Indecency in Literature" issued by the New Zealand Council for Civil Liberties (Inc.). They read:-

> " The fact is, however, that all of us, however emancipated and free from inhibitions and moral prejudices we may consider ourselves, have a shock-free limit, and the great majority of us soon reach the point where we are ourselves ready to condemn something as obscene and agree to its suppression by the courts, especially when children are involved. The range within which most people probably make this judgment of indecency is not so very wide. Because all ordinarily law-abiding people in a democratic society do make the judgment at some point, they accept the necessity for laws that will enable the line to be drawn arbitrarily but at a point generally acceptable - a rough and ready social compromise. The for-the-time-being definition given by the courts operating the law is then established and accepted. "

> " This judgment in turn depends on how we determine good and evil, that is to say, on our moral, religious, intellectual, economic and aesthetic values; which are, in their turn, bound up with our conception of man, and of the basic demands of his nature. In other words, our solution of such problems is based on our vision, by which we are consciously or unconsciously guided, of what constitutes a fulfilled human life, as contrasted with Mill's 'cramped and warped', 'pinched and hidebound' natures. To protest against the laws governing censorship or personal morals as intolerable infringements of personal liberty pre-supposes a belief that the activities which such laws forbid are fundamental needs of men as men, in a good (or, indeed, any) society. To defend such laws is to hold that these needs are not essential, or that they cannot be satisfied without sacrificing other values which come higher - satisfy deeper needs - than individual freedom, determined by some standard that is not merely subjective, a standard for which some objective status - empirical or a priori - is claimed. "

I have described the circumstances in which the words complained of were uttered. As to their context it is best described by the exhibit put in by one of the witnesses, Miss B. It reads:-

> " They were used in the context of the following, describing conditions experienced in a prison cell:
>
> > " They eat in this cell
> > They sleep in this cell
> > They piss in this cell
> > And they shit in this cell."
>
> The other word "bullshit" was used in referring to a previous charge and "crapping" was used also in connexion with all conditions. "

All of the words in inverted commas were included in the charge. It has been said by eminent judges that "indecent" has no definite legal meaning. Indeed to attempt to define the term, when the Legislature has refrained from so doing, would be to usurp the legislative function. All a court can do is to consider the circumstances in which the language is used and to consider such language in its modern and popular acceptance: Purves v. Inglis (34) N.Z.L.R. 1051, 1053; it is always a matter of degree: Melser v. Police (1967) N.Z.L.R. 437, per Turner, J. at p. 444. In R. v. Stanley (supra) it was stated that the word "indecent" was something that offends the ordinary modesty of the average man or that offends against recognised standards of propriety. The decided cases are no more than illustrations of the application of facts to the statute. In every case the question is whether the facts come within the words of the Act: per Lord Loreburn in John Stewart & Son (1912) Ltd. v. Longhurst (1917) A.C. 249, 255. In the same case Lord Buckmaster said that an attempt to define a fixed boundary is almost impossible to achieve: ibid p. 259.

Applying the standards which have been referred to I am of the clear opinion that the language used was in the circumstances indecent. I do not overlook the much broader

view taken today in respect of words referable to bodily functions and sexual activity. The fact remains that the words were used in a public park and broadcast by means of a loud hailer. The fact that the area has beenusurped as some kind of a public forum is also beside the point - that is clear from the description of the area already given. Men, women and children are interested in that part of the park and in using the entrance and otherwise enjoying the same without being subjected to the language used by Appellant. Some claim, not clearly defined, was made that questions in cross-examination were wrongly disallowed. In my judgment nothing relevant and admissible put forward was excluded and no line of such questioning was improperly stopped. The rulings made by the learned Magistrate were in each case correct in law, and no substantial argument was put forward on appeal to show otherwise.

The appeal against conviction is accordingly dismissed. Appellant also appeals against sentence. It was claimed that no enquiry was made into his means but the matter was taken no further. He has been previously convicted for wilful trespass (5 times), disorderly behaviour (twice) and for using indecent language. In the previous cases fines up to $125 have been imposed, also 4 months' periodic detention and one year's probation. No ground has been made out to show that the penalty was in this case clearly excessive or that any other ground under Section 121 (3) of the Summary Proceedings Act, 1957, arose for interfering with the sentence.

The appeal is dismissed with costs $30.00 and the conviction and penalty are affirmed.

Solicitors:

Stone & Littlewood, Auckland, for Appellant.

Crown Solicitor, Auckland, for Respondent.