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IN THE SUPREME COURT OF NEW ZEALAND
NELSON DISTRICT
NELSON REGISTRY

M. No: 1402

BETWEEN RICHARD GEORGE HURST

Appellant

A N D POLICE

Respondent

Hearing: 30 and 31 October 1972

Judgment: 16 NOV 1972

Counsel: Smith for the appellant,
Rabone for the respondent.

JUDGMENT OF QUILLIAM J.

This is an appeal against conviction and sentence on a charge of behaving in an offensive manner.

There are few specific findings of fact by the Magistr but the main facts, which were not greatly in dispute, appear to be as follows. At approximately 11.30 p.m. on the 13 July 1972 two constables observed the appellant, who was in the company of some others, apparently concealing something under his clothing. The constables stopped the appellant and endeavoured to find out what he was concealing. What the appellant had was a tin of glue which he and his companions evidently intended to use in order to affix some anti-war posters to an army buildi g. He declined, however, to tell the constables that he was concealin . The constables, persisted in their attempts to find out and this led to a conversation of some fifteen minutes. When the [illegible] they were making no progress

radioed for assistance and were joined by a sergeant who took over the questioning of the appellant. The appellant protested that the police had no right to detain him and he asked the constables whether they were arresting him. They said they were not and confirmed in their evidence that at no stage were they in a position to arrest him. One of the constables conceded that he had prevented the appellant from leaving during the course of the questioning by standing in front of him and butting him with his chest. The sergeant conceded that there was physical contact between himself and the appellant when he stood in front of the appellant who then pushed past him. The sergeant denied, however, that he prevented the appellant from leaving.

During the discussion between the sergeant and the appellant the latter at one stage pulled some Peace badges from his pocket and then put them away again. He then took out a cloth badge containing a swastika sign and pressed it against the shoulder of the sergeant's tunic saying "This would be better on you". The sergeant told the appellant that he found his action offensive and the appellant then said that he (the sergeant) was "one of them". The appellant was then arrested and charged with offensive behaviour. He was convicted and fined $100.

The appeal against conviction was based upon two grounds. The first was that the actions of the appellant did not constitute offensive behaviour under s. 3D of the Police Offences Act 1927, and the second was that the appellant's action was in any event legally justifiable

as the police were exercising an illegal restraint on his freedom. Section 3D, so far as is material, is as follows:

> " Every person commits an offence ... who, in or within view of any public place ... or within the hearing of any person therein, behaves in an ... offensive ... manner ...".

Dealing with the first ground it is necessary to consider what constitutes offensive behaviour so as to come within the statute. This was considered by Haslam J. in Price v. Police (1965) N.Z.L.R. 1086 where at p. 1088 His Honour said:

> " 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; an 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 (c.f. s. 126 Crimes Act 1961 - "with intent to insult or offend"). "

That definition was applied by Wilson J. in Derbyshire v. Police (1967) N.Z.L.R. 391, and I also respectfully adopt it. The question for determination here was accordingly whether the actions and words of the appellant were calculated to cause resentment or revulsion in right-thinking persons. This is not an enquiry to be made as an objective exercise but must be related to the circumstances of the case. It must also be observed that, while the conduct of the appellant was undoubtedly stupid, cheeky and perhaps arrogant, this does not necessarily mean that it was also offensive within the meaning of s. 3D.

It must be observed that behaving in an offensive manner only becomes an offence if it is

"in or within view of any public place ... or within the hearing of any person therein". The essence of the offence is therefore the impact upon the public, or perhaps one should add, upon the right-thinking members of the public. An act therefore which may be offensive if committed in the presence of women may not be so regarded if seen or heard only by men. This is a matter of importance in the present case because the evidence did not disclose that the appellant's action was seen by anyone other than the sergeant and one constable. It was therefore the sergeant and the constable who were to be regarded as the right-thinking persons who were subjected to resentment or revulsion. The constable gave no evidence of the impact upon him of what the appellant did. The sergeant, on the other hand, said that he regarded what the appellant did as offensive to himself. The mere fact that he said so does not, of course, make the action an offensive one. A closer look at the sergeant's evidence makes it difficult to understand upon what basis it was he found the action offensive. What he said was:

> " I regarded this as offensive to myself in the inference it made of me in reference to the uniform I was wearing and what I represent. I have been in the service a number of years. The authority is there within my regulations as to the wearing of unauthorised decorations. It is not permitted. If I wear unauthorised decorations, departmentally I would be charged."

It seems, if one can make anything at all of this passage, that the sergeant was not offended in his person but by reason of a slur of some kind being cast upon his uniform and upon the police force. The reference to unauthorised decorations I find altogether incomprehensible.

If the appellant's action and words had taken place in the presence or hearing of members of the public who might have been led thereby to think that the sergeant was acting in a dictatorial or overbearing manner then, depending on the other surrounding circumstances, it may well have been that the conduct should have been regarded as offensive. What the appellant did, however, was to make a cheeky and stupid gesture towards the sergeant alone. One cannot help feeling that the sergeant's reaction was in the circumstances a little over-sensitive. No doubt his patience had been tried by the appellant but I find myself unable to conclude that the right-thinking person, finding himself in the position of the sergeant, could be calculated to have felt that the appellant's actions and words caused him resentment or revulsion. The incident itself, occurring as it did in isolation from any member of the public, was hardly to be regarded as justifying the attention of the criminal law. In the particular circumstances disclosed in the evidence I find it necessary to take a different view from that of the Magistrate. I also find it unnecessary to consider the alternative ground of appeal.

The appeal is allowed and the conviction quashed. There will be no order as to costs.

Solicitors: Hunter, Smith & Co., NELSON, for the appellant,
Crown Law Office, WELLINGTON, for the respondent.

Williams J.