IN THE SUPREME COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M.No. 152/77

BETWEEN [redacted] S.

APPELLANT

A N D THE POLICE

RESPONDENT

Hearing : 17th February 1978

Counsel : M.J. Knuckey for Appellant
D.L. Wood for Respondent

Judgment : 17th February 1978

ORAL JUDGMENT OF CHILWELL J.

The issue in this appeal is whether the conduct of the appellant was such as to warrant the intervention of the law in the way of a prosecution under Section 3D of the Police Offences Act, 1927.

The primary charge against the appellant in the lower Court was that he behaved in an offensive manner in a public place, namely, Princes Street, Dunedin.

The Magistrate, in my judgment, correctly determined as a question of fact that the appellant had urinated alongside or at the showroom window of the D.C.C. Electricity Department showroom. The particular locus in quo was about 30 yds. from the central portion of the Octagon area of the inner city.

The word "offensive" has several meanings in the Shorter Oxford Dictionary ranging from "aggressive behaviour" through "displeasing and annoying behaviour" down to "repulsive behaviour".

Having regard to the other types of conduct referred to in Section 3 D, I take the view that Parliament

intended the word "offensive" to come within the fourth category in the Oxford Dictionary which I quote :-

> "causing unpleasant sensations; nauseous, repulsive."

Speaking generally, I think one can say that the act of urinating in the presence of others is regarded as repulsive by right-thinking members of the public. However, it is a matter of degree and whether urinating is or is not repulsive must depend upon the circumstances pertaining at the time. I doubt if right-thinking members of the public would be repulsed by seeing a child urinating out of necessity in a fashion sufficiently modest for a child nor would I think right-thinking members of the public, seeing an adult urinating in a ditch alongside the road in the countryside because of necessity would regard that as repulsive. But if he or she did it in a flamboyant manner it may be regarded as repulsive.

As counsel have correctly observed, most of the reported decisions on Section 3 D relate to disorderly behaviour rather than offensive behaviour. However, the principles in the cases appear as an attractive guide in a case such as the instant one. As it happens, there is an unreported decision concerning offensive behaviour. I refer to RODGERS v. POLICE, a decision of Wilson J. delivered on the 6th August 1975. The decision related to nude bathing at Palm Beach, Waiheke Island, Auckland. I do not think I am going beyond my function in observing that the decision has provoked a considerable amount of discussion in Auckland both favourable and unfavourable. That is to be expected having regard to the emphasis which some people place today on their so called "liberty" to go about unclothed.

At the forefront of his judgment His Honour said that the common feature within the cases is that :-

> "there must be something in the behaviour which

is alleged against the defendant which calls for the intervention of the law in order to prevent some more serious offence taking place".

The Section in question is a "law and order" section. It seems to me that His Honour's comment is correct. I adopt it.

I accept Mr. Wood's submission that the test to be applied by the Court is an objective one. Wilson J. said :-

> "The Court is required to apply the objective test not whether any individual person was in fact offended, but whether the behaviour was likely to offend representative members of the community in the time, place and circumstances of the behaviour."

It may have surprised some who listened to the judgment, when delivered, to learn that in the end His Honour came to the view in that case that the prosecution had not proved beyond reasonable doubt at the time in question, at the place in question and under the circumstances in question, that people were likely to be offended. It seems that the beach in question had been used for some time for nude bathing, that a fair number present on the day in question were nude bathers. Wilson J. took the view that having regard to the people who were actually there and the way in which they behaved these matters gave the Court adequate guidance as to the objective considerations to be applied in the circumstances of that particular case. It would seem that the test applied by him was somewhat similar to that put to a jury in a personal injury claim based on negligence where, though the jury are instructed to take an objective view of liability, they are nevertheless instructed to deal with the facts before them and not to deal with a vacuous situation.

I observe that His Honour, when advancing a judicial definition, has come to a conclusion similar to my own on the interpretation to be placed upon the expression "offensive manner". He said :-

> "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 the place and the circumstances of the behaviour. 'Likely', means 'more likely than otherwise'."

It seems to me that the last sentence equates with the notion of balance of probabilities: that is to say, something more probable than not.

In another unreported decision, that of O'DEA v. POLICE 26th April, 1972, Mahon J., while recognising the objective test, nevertheless also approached it from the point of view of the precise circumstances pertaining in that case. Like Wilson J. he came to the conclusion that the prosecution had not sufficiently proved the necessary degree of annoyance to right-thinking members of the public because it appeared to him that those members of the public, on the facts of that case, would probably not have observed the actions of the defendant in burning the Union Jack during the course of a demonstration.

The offence in the present case occurred at 2 a.m. The Magistrate found, as a fact, that the only other persons present apart from the Police Officers were members of the defendant's own party. That finding of fact is justified by inference from the description given by the Police Officers of the persons present. There was evidence that there were one or two passers-by through the Octagon but that does not seem to have been a feature of his Worship's judgment. The impression which the notes of evidence make upon my mind is that the Octagon and this particular part of Princes Street were virtually free of people as would be expected at 2 a.m. in the morning. In that respect the case is somewhat similar to O'DEA v. POLICE where, although other members of the public were about, persons likely to be affected by the conduct in question were thedemonstrators themselves. In the present case the persons likely to be affected, as the evidence stands, were the groups of youths in the motor

cars. There were some females within the groups.

The Magistrate referred to the fact that some of them may or may not have been friends of the defendant but having regard to his finding that they were members of the defendant's party, in applying the onus of proof, he was obliged, in my judgment, to assume that they were in company with the appellant and accordingly more likely to be in tune with his activities that evening rather than the contrary.

So far as the Constables are concerned, what they saw could not have offended them because they were not sure that the appellant had urinated. They had their suspicions. These, upon investigation, proved to be correct. But merely to suspect that a person might be urinating ought not, in my view, bring about feelings of resentment or revulsion.

The learned Magistrate took the view that the simple fact that other persons were present, including the Police Officers, brought the matter within Section 3 D. Indeed, he used the expression "well within". It is my judgment that the learned Magistrate failed properly to consider the principles applied in the two unreported decisions to which I have referred and which, in themselves, are based upon the Court of Appeal decision in MELSEN v. POLICE (1967) N.Z.L.R. 437 and the decision of Woodhouse J. in KINNEY v. POLICE (1971) N.Z.L.R. 924.

Having regard to the totality of the evidence, I have come to the conclusion that the prosecution did not prove beyond reasonable doubt that at the time and place and in the circumstances and having regard to the people who were present there were peoplelikely to be offended in the sense of having their feelings aroused to the point of resentment or revulsion.

In my judgment, therefore, the case did not warrant the intervention of the "law and order" provision

contained in Section 3 D. There is no doubt that the offence of a casting offensive matter was committed. It would have been more appropriate for the Police to have proceeded by way of a summons under Section 3 (a) of the Act. Indeed, the evidence indicates that Constable Ratton intended to proceed in that fashion until such time as the appellant became uncc-operative. It is easy, sitting in this rarified atmosphere, to seem to criticise the conduct of the Police who, in situations such as this, have a particularly difficult duty to perform. In this case I have come to the conclusion that the Constables were in error: they should have continued to deal with the matter under the provisions of Section 3 (a).

Accordingly, so far as the appeal on the main charge is concerned, it is allowed. The conviction is quashed.

So far as the second charge of resisting arrest is concerned, it clearly cannot stand becausee, in my view, having regard to the evidence, the Police had no warrant for changing their minds merely because after the event of urination had been concluded the defendant and some of his friends became difficult to deal with. The appellant gave the Constables his name and address as required by Section 315 (2) (c) of the Crimes Act, 1961. He supported it by showing the Constables his driving licence.

In my judgment the Constables had no justification for arresting the appellant. Accordingly, the charge of resisting arrest must go. The appeal is allowed and that conviction is also set aside.

P. Edwards J.

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