IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.24/84

BETWEEN FRANCIS SYDNEY DIXON

Appellant

A N D THE POLICE

Respondent

Hearing: 29 February 1984

Counsel: M.J. Knowles for Appellant
G.K. Panckhurst for Respondent

Judgment: - 2 MAR 1984

JUDGMENT OF WHITE J.

This is an appeal against a conviction on a charge of disorderly behaviour entered in the District Court at Christchurch on 18 November 1983 when the appellant was fined $40.00 plus costs.

The general ground of appeal is that the learned Judge in the Court below was wrong in finding that disorderly behaviour had been established. The grounds of appeal have been stated by Counsel in the points of appeal and the matter has been carefully argued by both Counsel.

I have noted Mr Knowles' observation that the appellant was not represented in the District Court and I

agree that that is a factor in considering the evidence. I should add that it was not suggested that there should be a rehearing and, having read the evidence, I am satisfied such a course was unnecessary.

As far as the facts are concerned, the Judge in the District Court accepted the evidence of two 15 year old girls. There was no dispute that the appellant, who was unknown to the girls, had walked up to them in Cathedral Square when they were on the way to the pictures on a Saturday afternoon. The evidence was that the appellant had stopped and stared at one of the girls "up and down" (as it was put) and said: "Wor, look at those legs." The girls had walked quickly away and the appellant had seemed to go on his way. A little later, however, when the girls came out of the Regent Theatre toilet they saw the appellant again about 10 metres away and he had called out to them: "Do you know me?" or some similar words. The evidence of the girls was that they were "embarrassed" and "frightened" by these events. On the second occasion they had hurried away and joined a group of teenagers. A little later they had reported the circumstances to two constables who were in the Square. The constables had spoken to the appellant and gave evidence, one stating that the girls were "visibly upset and frightened". These were the brief facts which had to be viewed objectively.

The only issue, the Judge said, was whether the conduct constituted "disorderly behaviour". He referred to two cases, Melser v. Police /1967/ N.Z.L.R. 437 and Messiter v. Police /1981/ N.Z.L.R. 586 and quoted the

headnote in the former, as follows:

> "To justify conviction on a charge of disorderly behaviour the conduct must have caused or been likely to cause disturbance or annoyance to others present. It must tend to annoy or insult such persons as are faced with it sufficiently deeply or seriously to warrant the interference of the criminal law.
>
> There must be conduct which not only can fairly be categorised as disorderly but also as likely to cause a disturbance or annoy others considerably."

The Judge came to the conclusion that the conduct of the appellant was in that category and that the offence was proved.

I refer now to the grounds of appeal. Relying on the decision of Mahon J. in Auckland City Council v. Lodge Catering Services Ltd. /1981/ 2 N.Z.L.R. 567, Counsel submitted that behaving in a disorderly manner is a different offence from behaving in an offensive manner or addressing indecent or abusive words to another person. He also submitted that the prosecution, to establish disorderly behaviour, was bound to adduce evidence relevant to the appellant's behaviour. These propositions were not disputed.

Mr Knowles' basic submission was that "behaviour" in the context of S.4(1) of the Summary Offences Act "must mean something more than words" and that there was no evidence of physical actions by the appellant but only evidence of what he had said.

It was also submitted that the charge might more appropriately have been under S.4(1)(b) or S.4(1)(c)(i) or (ii

Substitution of such a charge by this Court was opposed, however, on the grounds that the prosecution evidence was simply the evidence of the appellant's words which did not constitute an offence against any part of S.4.

Mr Panckhurst made it clear during Mr Knowles' argument that he did not intend to submit that there should be any substitution of an alternative charge. Accordingly, the matter for determination was simply the question as stated by the Judge in the District Court. Mr Panckhurst joined issue with Mr Knowles, submitting that there was evidence of physical actions by the appellant, as well as words, which justified the conviction in accordance with the accepted principles.

Although Mr Knowles submitted there was no evidence of physical action by the appellant, only evidence of words, I think it is fair to say that he did not dispute the findings of fact as to the actions of the appellant. He submitted that when the appellant's behaviour was considered as a matter of degree it was insufficient to "warrant a conviction under the criminal law". As I understood Mr Knowles' submission, it was that all the evidence must be looked at objectively to determine whether there was reprehensible conduct and whether that conduct was of such a degree as to warrant a conviction.

Mr Knowles relied on passages from the judgment of Turner J. in Melser's case at p.444, as follows:

> "To insult a woman, for instance, though it must always be reprehensible, is not always criminal - it is a matter of degree whether such conduct is in any case sufficiently grave to bring it within the ambit of some particular section of a criminal statute."

For completeness, it is necessary to quote also the following later passage from the same page of the judgment:

> "Disorderly conduct is conduct which is disorderly; it is conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well conducted and reasonable men and women, is also something more - it must, in my opinion, tend to annoy or insult such persons as are faced with it - sufficiently deeply or seriously to warrant the interference of the criminal law."

That test is to be found summarised in the headnote which, as I have noted above, was the test the Judge in the District Court set out in his reasons for judgment.

Mr Panckhurst submitted, and I agree, that in the present case the question whether there was disorderly conduct depended on the combination of words and actions and that the tests to be applied are stated authoritatively in Melser's case. Mr Panckhurst submitted the matter had been explained further by Hardie Boys J. in Messiter v. Police /1980/ 1 N.Z.L.R. 586 and he respectfully adopted the observation of the learned Judge at p.591 that "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". And the learned Judge instanced a case where offensive words could constitute an offence if spoken in a way that could be heard by other persons as well as those to whom they were addressed, or "if they are addressed to an individual

in circumstances that amount to an intrusion upon his rights as a user of a public place".

Mr Panckhurst submitted that the evidence clearly established "a stopping of the girls" which was deliberate and that the appellant's actions of stopping, looking one of the girls up and down and making the comment, followed by the later incident of a similar nature, was a combination of physical actions and words which was properly found to establish the charge of behaving in a disorderly manner in breach of S.4(1)(a).

Having considered the cases and, in particular, the reasoning of the judgments in the Court of Appeal in Melser's case, I am satisfied that it has not been shown that the Judge was wrong in finding that the appellant's behaviour seriously offended in a manner which would "meet with the disapproval of well conducted and reasonable men and women". Further, I am satisfied that there was evidence which the Judge could properly accept as showing that the conduct was likely to disturb, and in fact did disturb, the two young girls. I consider the facts justified the expressed concern of the Judge regarding the "actions" of an adult male intruding upon the rights of the girls as users of a public place "sufficiently seriously" to warrant "the interference of the criminal law". In my opinion the conclusion reached by Cooke J. (presiding) in the Court of Appeal in Rehutai v. Police (C.A. 206/81, judgment unreported 26.4.82) supports the conclusion I have reached. That case, which was referred to in argument,

arose out of a charge under the Police Offences Act 1927 of using obscene language in a public place and related offences. At p.8 of his judgment Cooke J. said:

> "Whether the incident was sufficiently serious to warrant an arrest and prosecution was a question of fact and degree. From his stress on the particular circumstances it may be inferred that the District Court Judge thought that it was. Further, one way of disposing of it if he had regarded it as too trivial for the law's interference would have been to discharge the defendant under s.42 of the Criminal Justice Act; it is of some significance that he did not even advert to the possibility of taking that familiar course. And the High Court Judge was plainly of the opinion, as the words already quoted from his judgment show, that the interference of the criminal law had properly been regarded as warranted in the circumstances."

For these reasons the appeal is dismissed.