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Transcript of Proceedings

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COURT OF APPEAL

de JERSEY CJ
McPHERSON JA
DOUGLAS J

CA No 245 of 2001

JEANNIE ANNE DEL VECCHIO

and

MELISSA JANE COUCHY

Applicant

BRISBANE

..DATE 04/02/2002

..DAY 1

4th Floor, The Low Courts, George Street, Brisbane, Q. 4000

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MR A BOE (of Boe and Callaghan) for the applicant

MR C HEATON (instructed by the Director of Public Prosecutions (Queensland)) for the respondent

THE CHIEF JUSTICE: Mr Boe. 10

MR BOE: From the outset could I abandon the application to admit the evidence of Mr Callaghan? Could I also hand up just the one further supplementary point and two cases. One of them was omitted from the list and handed up with the papers. There's only one passage in Deitrich and I have tagged the passage. I'd formally amend the submission as noted in paragraph 2 to change the word "determine" to "assess".

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THE CHIEF JUSTICE: Just let us read paragraph 3 in particular if you would, Mr Boe.

McPHERSON JA: Mr Boe, what is social politics and what has the Court got to do with them?

MR BOE: They form part of the ----

McPHERSON JA: Yes, but what are they, first of all? Social politics?

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MR BOE: It's alleged ----

McPHERSON JA: I know what politics are. That's labour versus liberal et cetera.

MR BOE: Yes, I meant to use that term to describe small political issues such as the plight of indigenous people in this community.

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McPHERSON JA: What's that got to do with this case? The question is whether the words spoken were insulting.

MR BOE: The context is that the words are spoken by a drunk Aboriginal woman being interviewed by police and some might say that that's a feature that attends that portion of the community more than others.

McPHERSON JA: You mean that if I said these words I'd be guilty of an offence, but if she says them she's not?

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MR BOE: No, it's the context and in this context it's an Aboriginal woman and if the Court is assessing contemporary community expectations or standards, I'm just tritely recording that views differ on these matters.

THE CHIEF JUSTICE: Are you saying really that this sort of conduct is such an endemic feature of the Aboriginal presentation in these sorts of circumstances that it should be accepted by the general community as an ordinary aspect

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of life which doesn't regard this sort of censure - doesn't warrant this sort of censure?

MR BOE: Yes.

DOUGLAS J: But if really that's the term should the same apply for a down and out drunk and caucasian male-

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MR BOE: Yes.

McPHERSON JA: One law for the rich and another for the poor.

MR BOE: No. Perhaps ----

McPHERSON JA: That's contrary to our oath, you know?

MR BOE: Yes. Putting it that way, your Honour, I concede 20
that. In my submission, it's more that the law has got to
be realistic in applying this section in considering that it
impacts upon those who are supposedly less couth. I could,
I suspect, insult Mr Heaton effectively without resorting to
an expletive and vice versa. So the Court, in assessing
whether or not a person should be prosecuted with a criminal
sanction, has to take into account the fact that
contemporary community standards of that sort of language in
that sort of dialogue does not warrant criminal sanction. 30

McPHERSON JA: What evidence have we of contemporary
community standards?

MR BOE: That's a difficult question, your Honour. I've
been perplexed, that's why I've withdrawn the evidence of
Mr Callaghan as to whether subjective evidence is admissible
on what that standard or expectation is. The Magistrate in
this case chose to accept that by virtue of his appointment
and position he could assess it with what he knew. The
Magistrate ----- 40

McPHERSON JA: Well, it's a matter for judicial notice then.

MR BOE: Yes, but there have been cases and Magistrates have
been accepting evidence of what might or stating their
reference to evidence of what's on the television, what's in
the newspaper, what might be the subject of assessment by
press councils as to complaints made of words used to
newspapers et cetera. 50

THE CHIEF JUSTICE: I can't see how the press council's view
would matter but I can see that evidence of what actually

happens in the community might be admissible. Even though
Judges are usually well aware of these things, but ----

MR BOE: Yes. And the difficulty, your Honour, is that ----

THE CHIEF JUSTICE: But what is inadmissible is the view of a particular person as
to whether it's insulting.

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MR BOE: That's right.

THE CHIEF JUSTICE: And that's why really the evidence of the police officer here probably may have been relevant only to penalty, I suppose. The effect on her.

MR BOE: Yes, but there was one point somewhere where it's thought that the subjective taking of insult is admissible to establish that the words were capable of being insulting. I'm not sure if that's right, but the - it's clear that the police officer arrested because she was insulted. 10

Now, the offence was only committed if there's an assessment objectively made of the context of whether an offence is committed. She's taken it upon herself to say, "I'm aggrieved and there I can arrest". And I think that test has to be clarified if the section is to work effectively. Otherwise the mechanism of arrest can be used in an unfair way. 20

THE CHIEF JUSTICE: When you say here that "The offence is only committed if the words spoken are so insulting that a reasonable person in the light of prevailing community expectations considers that it warrants criminal prosecution in the context of where and when the words were uttered" The reference as assessment that it warrants prosecution is really a gloss on the test, isn't it? 30

MR BOE: I thought that they were fairly verbatim the approach taken in Dillon v. Byrne, and it's been a shorthand way of referring to many of the cases.

THE CHIEF JUSTICE: Yes, I can see that it's the end point.

MR BOE: Yes.

THE CHIEF JUSTICE: But I thought the test really was focussed more on simply what was objectively insulting in the context of reasonable community expectations - contemporary community expectations. 40

MR BOE: Yes, but with the rider that there can be very offensive or insulting conduct objectively, but some of it should not be receiving a criminal charge.

THE CHIEF JUSTICE: Oh, I suppose that the present point is whether leave should be granted on the basis that it was at least highly questionable whether this could objectively be viewed as in this day and age insulting language. so

MR BOE: Yes, and bearing in mind that it is a section that's evolving in how it captures conduct and that evolution is left to the Judges.

DOUGLAS J: Aren't you really only saying that it depends upon the context in which the words are used. Or if you like the surrounding circumstances, one of which might be the fact that the lady is a derelict, drunken, Aboriginal 60

person. Isn't that ultimately a matter for the Tribunal to decide?

MR BOE: Yes and I thought that I'd set out fairly carefully where the Tribunal didn't do that and this Court now has to do that.

DOUGLAS J: Well, I'm not so sure about that, you see. 10

MR BOE: Which part, your Honour? Whether or not ----

DOUGLAS J: I'm not so sure that the Court should be revisiting that.

MR BOE: Well, it's ----

DOUGLAS J: If the Magistrate in the first place applied the correct test - he took into account the fact that she was a down and out Aboriginal person.

MR BOE: I'm not sure if he did in his reasoning.

THE CHIEF JUSTICE: Well, he may not have taken into account the Aboriginality of her, but I might say for my part I have some question as to whether that was relevant.

MR BOE: Yes.

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THE CHIEF JUSTICE: The relevance may have been that she was a person who was given to alcoholism, excessive regular consumption of liquor and encountered difficulties in public places.

MR BOE: And further a person that was lost and disorientated.

THE CHIEF JUSTICE: Yes.

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MR BOE: And a person who was being told she was going to be taken somewhere and a place she didn't want to go to. And a place that she could not have been lawfully taken to had she resisted in an appropriate fashion.

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DOUGLAS J: I just think to add the word "Aboriginal" stretches the bar too far; it's not necessary.

MR BOE: No; I don't embrace the height of the bar at including a racial aspect to my point. The fact is she is Aboriginal and I can't ignore that, nor should the Court.

DOUGLAS J: The fact is I'm Caucasian and all of us in this country have different racial backgrounds. It shouldn't matter.

MR BOE: It - well, it shouldn't matter but, in my submission, it does and it's because police, in my submission, would deal with Aboriginal people in this context must more than most of us do and it develops a relationship between the two parties in a community which needs to be considered objectively. It's not about whether or not police get offended or should Aboriginal people speak to police or should drunken people speak to police in this way. It's about what the community standard is about that dialogue. There wasn't anything further I was going to add, your Honour.

THE CHIEF JUSTICE: The words themselves, taken alone, are plainly insulting, aren't they?

MR BOE: They're capable of being insulting. 30

THE CHIEF JUSTICE: Yes.

MR BOE: I'm not sure, with respect ----

THE CHIEF JUSTICE: What you really rely upon is the heavily is the context.

MR BOE: Yes; although I think ----

THE CHIEF JUSTICE: A feature of the intoxication and the apparent helplessness of the woman - I'm sorry, I should say "the person" - and the hour of the day, and I suppose the absence of any real threat in her demeanour. 40

MR BOE: Your Honour's reference to gender highlights another error, in my submission, of thinking that a word is more inherently insulting, criminally.

THE CHIEF JUSTICE: "Used to a woman" was the point made below, wasn't it? 50

MR BOE: Yes.

THE CHIEF JUSTICE: I was trying to depersonalise the offender because I don't think, notwithstanding what you say, that race should be seen as playing a significant role in this.

MR BOE: Well, on the question of ----

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THE CHIEF JUSTICE:
the point you're trying to get

to, and we readily concede disadvantage, but I'm not sure that in the particular context here it was operative.

MR BOE: I only thought the issue related perhaps to leave on the question of - and this is the question of community standards as to what evidence as to the - the statistics suggest a higher proportion, a significantly higher proportion, of Aboriginal people are convicted and gaoled for this offence.

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DOUGLAS J: Yes; but, I mean, that on its own might only show that more Aboriginal persons commit these types of offences. I don't know whether that's true or not.

MR BOE: Whether they commit - whether or not they use that language? I'm sure it doesn't say that, but whether or not the apprehended -----

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DOUGLAS J: I'm sure that language is universal to anyone who speaks English in this country ---

MR BOE: Yes.

DOUGLAS J: ----- but used in different context.

MR BOE: Yes.

30 THE CHIEF JUSTICE: Do you want to say anything about the penalty aspect in addition to what ---

MR BOE: Nothing further. It's a difficult point as to when you have a trivial offence that's - is a repeat offender. The difficulty is that Ms Couchy's manifestations, per se, will, if I'm wrong on the appeal conviction, attract these charges for the rest of her life.

THE CHIEF JUSTICE: Although one would've preferred that it be visited with a Community Service Order.

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MR BOE: Well, that's unrealistic, with respect, your Honour.

THE CHIEF JUSTICE: Unrealistic?

MR BOE: Yes.

THE CHIEF JUSTICE: Why?

MR BOE: The - she's a person that can't even manage her own life. She lives on the streets.

THE CHIEF JUSTICE: Do I get the impression that she must've paid the fines in the past?

MR BOE: I can't - no, I don't think you can get that impression. I think it's more likely from - and I can only

say this from the Bar Table - that it's more likely that she gets picked up and serves out the warrants.

THE CHIEF JUSTICE: Serves the warrant.

MR BOE: Yes. She has been given community service back about 14 years ago which she breached.

DOUGLAS J: How old is she now; in her 50s?

MR BOE: No, no, she's only in her early 30s.

DOUGLAS J: In her 30s.

MR BOE: 31.

DOUGLAS J: She's got five children?

MR BOE: Six, I think.

DOUGLAS J:

THE CHIEF JUSTICE: Mr Boe, what's the - you'd know this: what's the current attitude at the Magistracy to drunkenness in a public place? Do they admonish and discharge as they used to or ----

DOUGLAS J: I don't think they bring that charge.

THE CHIEF JUSTICE: Don't bring it any more.

MR BOE: It used to be. Whether you were black or white, you were picked up and put into a holding cell for the night and then kicked home, you know, with your tuxedo or with your thongs and that's all that happened to you. That procedure doesn't seem to be taken. There's many reports in the village about how various agencies are not as supportive of Aboriginal people, et cetera, et cetera, so that might explain the comment about the compound being for fucking dogs or that might have been what she was referring to.

THE CHIEF JUSTICE: What's "the compound"?

MR BOE: It's a holding cell, but not charged.

THE CHIEF JUSTICE: What, in the Magistrates Court at the end of the ---

MR BOE: No, no, no, in various - I can't say for sure what she was referring to or what he was referring to but I am aware of places where - places like Murri Watch have a place where beds are available, et cetera, which are - serve both Aboriginal and non-Aboriginal people.

THE CHIEF JUSTICE: Thank you, Mr Boe. Mr Heaton?

MR HEATON: Just on that issue of the compound, which is probably getting of my point ultimately, but at that time in

New Farm Park there was a shelter that had been erected by the council for the purposes of the Aboriginal community that was living in that area, and I must admit that for my part I took that to be the compound, as it was sometimes referred to, certainly in the circles in which I mix, and I took it to be a reference to that.

THE CHIEF JUSTICE: And who maintained that facility? The council - who maintained that facility? Murri Watch, was it? 10

MR HEATON: Well - no. The council established it acknowledging that there was a homeless issue in New Farm Park and saw that as a means by which they could in some ways address it.

THE CHIEF JUSTICE: Then there was some controversy about it last year, I think. 20

MR HEATON: There was, and it all came unstuck in the end. But, anyway, that's probably getting off the point.

THE CHIEF JUSTICE: Yes.

MR HEATON: Ultimately, the respondent's position in relation to this matter is that the appropriate test was an objective one. The Magistrate apprehended that, applied the appropriate test to the circumstances, as he found them to be, and came to the conclusion that in all the circumstances the community's reasonable expectation would be that those words are insulting and so found and, in doing so, created no error - or committed no error. Therefore, there is no cause for this Court to then intervene in what was ultimately a decision of fact on his part, having regard to all the appropriate circumstances.

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THE CHIEF JUSTICE: Mr Boe comes close to saying that the conviction wasn't a reasonable result because the police officer should almost have expected this sort of conduct and simply shrugged it off, and that right-thinking members of the community, knowing the circumstances, would accept that.

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MR HEATON: Well that, ultimately, I suppose, is a matter that might get some - that might be attractive to the tribunal of fact in this case, being the Magistrate at the time in having regard to the community's reasonable expectations. The fact that this Magistrate found that the community's expectations do not include that police should have to tolerate this sort of language directed at them just because this is a drunk woman in the streets at 4 o'clock in the morning and they're trying to establish what the best course is to do with her.

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So, in effect, it's getting towards a point of reverse discrimination and I think this is the point that McPherson JA made earlier, that it really is expecting that because she's a drunk Aboriginal woman in Dixon Street in New Farm

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that the police are supposed to put up with this sort of thing, and I don't know that the community ----

DOUGLAS J: I think, to be fair, Mr Boe did abandon - maybe that's too strong a word - reduced emphasis upon the fact that she was Aboriginal and said the same test would apply to a down-and-out drunk Caucasian male.

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MR HEATON: That's true, but still ----

DOUGLAS J: The point really is, isn't it, I might not think I'd be insulted by such words from such a person, but this Magistrate did in applying the proper test?

MR HEATON: That's right.

McPHERSON JA: If it's a matter of contemporary community standards, though, there's only one way I can see it could be ascertained and that's by judicial notice. I suppose you could try to call evidence on it but how could you get anyone who is expert in that matter, either generally or in particular? Would it be contemporary standards in that part of Brisbane or contemporary standards throughout Australia? I can't see that anybody, even an expert or someone claiming to be an expert, could say what that was if you looked at, say, Tasmania or Hobart or Perth or some place well out in the country.

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So it would have to be, I think, judicial notice.

MR HEATON: Certainly.

McPHERSON JA: How do you challenge judicial notice on appeal? Do you know? I've never seen the point taken.

MR HEATON: No, I don't know. I can't---- 10

McPHERSON JA: It must be the impression that Magistrates have because, after all, they must see a lot more of these complaints of offences than any of us ever do or anyone else in the community ever sees. And I suppose they have to make up their minds. Is the test in the end whether it's reasonably capable of being regarded as contrary to contemporary community standards?

MR HEATON: I think that's right. Once we reach a point where the appropriate test is applied and the relevant circumstances have had regard to, it then really becomes a matter of whether or not it was reasonable for the Tribunal of fact or the Magistrate in this case to make that determination. 20

THE CHIEF JUSTICE: That's why Judges don't live in ivory towers.

MR HEATON: That's right. Similar to a situation, I suppose, where Juries are given the task of determining what is indecent where that is an element of a charge. 30

McPHERSON JA: Yes. It's easier to say it's a community standard if there's a Jury simply because they are supposed to represent the community in a way that, I suppose, individual Magistrates don't. But ultimately, the question must be, was the conclusion here that it was insulting; so unreasonable that would interfere with it.

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MR HEATON: And my submission is that it's not.

THE CHIEF JUSTICE: And the other point to be made is that Magistrates have an enormously wide exposure to the colour of daily life through their work every day, much broader than Judges in this Court for example. We see masses of it in the Criminal Court but Magistrates who see the hurly burly of daily life couldn't help but distil some sort of perception of community expectations.

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MR HEATON: Certainly.

THE CHIEF JUSTICE: Anything further, Mr Boe?

MR BOE: Just on that last point, the difficulty in leaving it to individual Magistrates is then you have the wide differences of approach from a Magistrate in this case to that Magistrate in Wellington who goes to the extreme other end of being extremely tolerant of the most extraordinary behaviour.

And that's why, if this Court is dealing with - if we pass all the procedural elements to get to this Court, that this Court has to accept the facts, take into account the inferences that the Magistrate drew, although it's difficult because of the summary assessment that he publishes; this Court has to embrace that standard in so far as how that is done, whether it's on just judicial notice or something other, one way could be, if this Court were concerned in that way, would be to admit evidence of a poll or an assessment done that politicians do as to what the community view is on a particular subject or to consult.

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I would have thought the experts in contemporary values; they would say that they are the politicians and the important point in this offence is that it has to change. The line in the sand does have to change as time goes by. And if a case comes before this Court, this Court should assess that and discharge that.

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THE CHIEF JUSTICE: I think the politicians would discourage us from polling, Mr Boe. They would say it's notoriously inaccurate.

MR BOE: Yes, but it does give some insight into what a local area of thinking might be.

McPHERSON JA: Well, this is state wide, this offence, and if there are similar statutes in other States, it covers the 30 whole of Australia. And I'm not at all sure that anybody wants to run a - what would it be? At least a 30 million dollar poll to find out whether the words "fucking cunt" are regarded as insulting or not. It seems to be an extraordinary sort of measure to take and one that wouldn't guarantee accurate results anyway.

Because I dare say they would want to know more about who was saying it, where and when.

MR BOE: Yes. The final point - if I can just emphasise that it's not the assessment of whether or not it's insulting that has to be found, it's whether or not ---

THE CHIEF JUSTICE: In the context and of course ----

MR BOE: Yes, such as to warrant a criminal sanction.

THE CHIEF JUSTICE: And this is ----

50 McPHERSON JA: How would you - how would you incorporate that in a poll? You'd have to put the facts of this case and say to everyone, "Do you think that was insulting?" Yes/No.

MR BOE: Well, how does the Magistrate answer it? The Magistrates ask the same question and it has to be, look, there is this unacceptable level of uncouth behaviour between a member between members of the community and

police. The police shouldn't have to attract that intervention.

McPHERSON JA: No, I think, with respect, that's not correct. It's simply a question, certainly for us, of whether it's unreasonable to regard such words as capable of being insulting.

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MR BOE: Or at least have some doubt about it.

McPHERSON JA: At this level, it's as I put it. Is it unreasonable for this Magistrate to have held in these circumstances that these words were insulting.

MR BOE: Beyond a reasonable doubt.

THE CHIEF JUSTICE: Where there has already been an appeal

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DOUGLAS J: You see, I recall a case of Bradbury v. Staines back a little - late 1960s where an actor was charged with saying the words "fucking boong" on stage as he kicked an Indian person in the gutter. Now, the Court there thought that the context of it being on stage was a context where such words, allowing for the licence the stage delivers, were not obscene. But this case is quite different, isn't it, because the Court below had to decide whether in the context of how and where these words were said, whether they were (a) capable of being insulting and in fact insulting.

McPHERSON JA: It's hard to believe that if those words were used to an Aboriginal or a person of colour, the words that Justice Douglas has just mentioned, anybody would fail to regard them as insulting. If you said to somebody 'f-ing boong" particularly if he was a person of colour and perhaps even if he wasn't, surely that would be regarded by everyone in Australia as insulting.

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MR BOE: Well, your Honour, I think it's difficult to make that point because I think the way in which a person speaks says much more about them and what they're intending to do. And I would have thought that on occasions, with respect, when I've been in a situation where words of racial discrimination might be used, I don't think I've been offended or insulted.

So I'm not sure if it can be said per se that simply because one has the attribute used to insult that you are insulted.

McPHERSON JA: Well, I don't know. You and others may be more tolerant than some but my impression is that words like that have been held under racially - racial laws in England that prohibit racial words - they've been held to be racially taunting and I would have thought that that was enough to make them insulting.

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MR BOE: In years past, your Honour with respect. I - I -

in so far as when it's reasonably clear that this is this young woman's natural manifestation, it's difficult to then say that because she uses words which are held by Judges in the past to be inherently insulting, that therefore the charge is made out.

The context has to be revisited in terms of what is said by the words when she knows that the police officer knows her and he's suggesting that she goes somewhere, and the next police officer comes and asks her her name, and she's observed by them as ranting and waving her arms around and incoherent and lost. To think that her utterances in opposing police attempts to curtail her behaviour that night there is somehow insulting, sufficient to attract a criminal charge, is a matter that needs to be carefully assessed against how the community views that situation in that context.

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THE CHIEF JUSTICE: We'll retire to consider this matter for a short time.

THE COURT ADJOURNED AT 10.49 A.M.

30 THE COURT RESUMED AT 10.53 A.M.

TAKE IN JUDGMENT

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