

COURT OF APPEAL  
SUPREME COURT OF QUEENSLAND

CA NUMBER 245 of 2001  
NUMBER D1098 of 2001

Appellant: MELISSA JANE COUCHY  
(Defendant)

Respondent: CONSTABLE JEANNIE ANNE DEL VECCHIO  
(Complainant)

**Applicant's submissions**

**Course of Proceedings**

1. On 7 December 2000, the applicant was convicted and sentenced in the Magistrates Court at Brisbane to 3 weeks imprisonment in respect of one count of using insulting words contrary to section 7(1)(d) of the *Vagrants, Gaming & Other Offences Act* 1931.<sup>1</sup> On 8 December 2000 the Applicant lodged an appeal to the District Court<sup>2</sup> and was released upon entering into a recognisance.<sup>3</sup> She served 7 days imprisonment before being released. On 16 August 2001, Howell DCJ, sitting in the appellate jurisdiction of the District Court, dismissed the appeal against the conviction but allowed the appeal against sentence to time served of 7 days. On 12 September 2001, the applicant lodged her application for leave to appeal the decision of Howell DCJ to this Court.

**Leave to appeal**

2. The applicant may appeal to this Court only with its leave: s.118 (3) *District Court Act* 1967.<sup>4</sup> The applicant points to the following in this regard:
  - 2.1. The conviction has a significant impact on the applicant's liberty.<sup>5</sup>
  - 2.2. The offence, and similar offences under s.7 of the *Vagrants Gaming & Other Offences Act*, is frequently brought by police against indigent and indigenous Australians. The determination of the essential elements of the offence will have widespread impact on parties other than the applicant.<sup>6</sup> See *Cameron v Nominal Defendant* [2000] QCA 137 (18 April 2000).<sup>7</sup>

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<sup>1</sup> Section 7(1)(d): "Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear - uses any threatening, abusive, or insulting words to any person."

<sup>2</sup> Both the conviction and sentence were appealed.

<sup>3</sup> Pursuant to s. 222(2) of the *Justices Act*.

<sup>4</sup> Section 118(3) of the *District Court Act 1967*: "A party who is dissatisfied with any other judgment of a District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of appeal with leave of that court."

<sup>5</sup> Although Howell DCJ allowed the appeal against sentence, the conviction prompts consideration of a 3 year term of imprisonment that had been suspended by the District Court on 4 July 2000.

<sup>6</sup> It may have an effect on police in deciding whether to prefer charges, police prosecutors on whether prosecutions are maintained, legal aid authorities on whether to fund representation, defence lawyers on

- 2.3. The determination of “contemporary community expectations”<sup>8</sup> in respect of such prosecutions should attract the judicial authority of the Court of Appeal.<sup>9</sup>
- 2.4. The approach of the magistrate in convicting the applicant was wrong.
- 2.5. The approach of Howell DCJ in dismissing the appeal was wrong.

### Appeal against conviction

3. This Court may grant leave on conditions it considers appropriate. Section 118 does not otherwise provide the way in which the appeal is to be conducted. The following matters are noted: firstly an appeal to the District Court from the Magistrates Court is by way of rehearing,<sup>10</sup> secondly, there are some disparate views as to the proper test to be applied in an appeal from a decision of a magistrate to a District Court as are identified in *Butcher v. Woods*.<sup>11</sup> They are:
  - 3.1. as stated in *Bailey v. Costin*.<sup>12</sup>  
“the appeal could succeed only if no reasonable magistrate could have reached the conclusion which the magistrate did or if there was no evidence to support that conclusion”;<sup>13</sup> or
  - 3.2. as stated in *R v. Free*.<sup>14</sup>  
“Where findings on credibility are accompanied by reasons in which error is detected, the Court may interfere”; or
  - 3.3. as stated in *M v. The Queen*, as to whether a verdict of a jury was unsafe and unsatisfactory, i.e., whether the jury’s observations of the witnesses were sufficient to resolve any doubt entertained by the Appeal Court.
4. Since these decisions the *Uniform Civil Procedure Rules 1999* have come into force.<sup>15</sup> *Rule 745(2)*<sup>16</sup> expressly excludes application of *Rule 765*.<sup>17</sup> Accordingly there is no clear provision as to whether this Court conducts this appeal as either an appeal *stricto sensu*,

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whether to advise persons to plead guilty or not, as well as upon magistrates in determining these matters. See the comments of Wylie DCJ in *Lehmann v. Conway* (unreported), Townsville District Court, App No. 8 of 1991 (18 March 1991) at footnote [41] below.

<sup>7</sup> [Para. 16]:

“The Uniform Civil Procedure Rules have been in operation since 1 July 1999 but as yet there has been little authoritative discussion of them from this Court. The meaning of UCPR 361 has some general importance and interest to litigants beyond the interests of the present parties. There has been an error of law which has led to an injustice, especially when considering the spirit of UCPR 361 and the similar rules antedating it. Public policy recognises the desirability of encouraging litigants to make realistic offers to settle to avoid unnecessary trials. In these circumstances leave to appeal should be granted. The appeal should be allowed for the reasons given.”

<sup>8</sup> *Dillon v. Byrne* (1972) 66 QJPR 113

<sup>9</sup> There is at some evidence to suggest that there are widespread differences in the interpretation of these sections within the magistracy and the District Court judiciary. Contrast for example the recent decisions of Samios DCJ in *Poulton v. Daher* (unreported) D1289 of 2001, (15 October 2001) and of Wylie DCJ in *Lehmann v. Conway* (supra) and *Bryant v. Stone* (unreported), Townsville District Court, App No. 28 of 1990, (26 October 1990) against the reasoning of Howell DCJ in this case; and the decisions of Magistrate Clements in *Police v. Couchy*, Brisbane Magistrates Court, (15 September 2001) and a NSW magistrate in *Police v. Carr*, Wellington Local Court (8 June 2000) against the findings of Magistrate Herlihy in the present matter.

<sup>10</sup> Section 223(1): *Justices Act 1886*: “An appeal under section 222 is by way of rehearing on the evidence (“original evidence”) given in the proceedings before the justices.”

<sup>11</sup> (unreported) [1996] QCA 465 (22 November 1996)

<sup>12</sup> (unreported) CA No. 261 of 1993 (18 October 1993)

<sup>13</sup> In *Butcher v. Woods*, Fryberg J found that this approach had been overruled in *M v. The Queen*<sup>13</sup> whereas Thomas & Lee JJ did not decide.

<sup>14</sup> [1983] 2 Qd R 183 at 191-2

<sup>15</sup> *Rule 745(1)(b)*: “This part applies to an appeal to the Court of appeal from a decision of the District Court...”

<sup>16</sup> *Rule 745(2)*: “However rule 765 only applies to an appeal from the Supreme Court constituted by a single judge”

<sup>17</sup> *Rule 765* deals with the nature of appeal and application for a new trial.

rehearing or rehearing *de novo*. Rule 766 applies.<sup>18</sup> In all the circumstances it is submitted that the matter proceed as an appeal by way of rehearing or rehearing *de novo*. Given the issues raised in this appeal, this Court should not be hindered by procedural maxims or limitations, rather, it should determine the matter on its merits.<sup>19</sup> Under section 118(6) of the *District Court Act* this Court may grant leave “*on the conditions it considers appropriate*.”

### The relevant facts

5. The facts were not greatly in dispute either at trial or appeal below. They include:
  - 5.1. the applicant is an Aboriginal woman;
  - 5.2. she was confronted by police at about 4 am on 21 September 2000 in Dixon Street, New Farm; **[r.2, l.40]**
  - 5.3. she was intoxicated with alcohol; **[r.4, l.22]**
  - 5.4. she was appropriate in response to initial police inquiries conducted by a Sergeant Leslie McGahey – she knew him and he knew her; **[r.4, l.15; r.15, l.27; r.6, l.35]**
  - 5.5. when asked what she was doing, she told McGahey: “*I’m lost. Where am I?*” **[r.15, l.29]**
  - 5.6. the complainant is a female police officer who arrived shortly after with other police;
  - 5.7. the complainant first spoke to McGahey and then asked the applicant for her full name and address;
  - 5.8. the applicant initially ignored the inquiry and then used words to the effect of “*fuck you cunt*”, “*you fucking cunt*” or “*fucking cunt*”;
  - 5.9. the applicant has a ‘lazy eye’; **[r.10, l.55]**
  - 5.10. the words were uttered with no-one other than the 3 or 4 police in the vicinity; **[r.4, l.50]**
  - 5.11. the applicant does not dispute words of that kind were used by her.<sup>20</sup>

### Submissions before the Magistrate

6. It was submitted before the magistrate that in all the surrounding circumstances the words uttered were not relevantly insulting. In essence the submissions were that the words were uttered in frustration at her own predicament rather than directed at the complainant.
7. In convicting the applicant, the magistrate stated:
  - 7.1. that it is an objective test “*that is are those words used in the circumstances in which they are here insulting objectively;*” **[r.28, l55]**
  - 7.2. “*the words were used for a female police officer in the course of her duty;*” **[r.28, l.57]**

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<sup>18</sup> “*The Court of Appeal -*

(a) *has all of the powers and duties of the court that made the decision appealed from; and*

(b) *may draw inferences of fact, not inconsistent with the findings of the jury (if any), and may make any order the nature of the case requires.*”

<sup>19</sup> There need not be any great concern about the floodgates opening as most persons convicted of this offence are indigent.

<sup>20</sup> The applicant did not give or call evidence however her use of a form of those words was not disputed by her solicitor at trial.

- 7.3. *“the words are apparent on the face to be scornful abuse of that officer. Any other word other than “cunt” I think may have put a doubt in my mind but the word “cunt” itself, I would hold to be insulting of a female, be it a police officer or otherwise” [r.29, 2]*
- 7.4. *“That word coupled with the word “fucking” is, I would have thought, in today’s standards applying in Brisbane 2000 would be insulting when used in a loud voice at somebody who is asked one’s name and address;” [r.29, 1.5]*
- 7.5. *“...the words were insulting as they were used in the early morning of 21 September” [r.29, 1.10]*

### Observations on the evidence

8. Before the magistrate the applicant’s solicitor demonstrated that the complainant had given three different accounts as to the words used [r.7, 1.50 –r.8, 1.40]: *“fucking cunt”* in the police QP9; *“you fucking cunt”* in her statement and in her notebook and *“fuck you cunt”* in her evidence in chief. Although specific submissions were not advanced to the contrary, the magistrate found that the words *“you fucking cunt”* were used without determining why the complainant had previously noted and given evidence of other versions of the phrase.<sup>21</sup> It is unclear how the magistrate resolved the issue.<sup>22</sup>
9. There was no admissible evidence that the applicant was in fact involved in any activity that justified the intervention of police other than her apparent drunkenness.<sup>23</sup>
10. The complainant police officer described herself as *“a new kid on the block”* [r.6, 1.48], having been in the precinct for less than a month, and a police officer for *“nearly 18 months”*. [r.4, 1.1]<sup>24</sup>
11. Although not specifically addressed in cross-examination, the complainant was of course at liberty to speak to the applicant and indeed ask questions, however circumstances prescribed in section 33 of the *Police Powers & Responsibility Act 2000* were *not* in existence to *require* the applicant to state her name or address. [r.5, 1.10-20; r.6, 1.42-50]
12. From the applicant’s perspective, the police officer McGahey knew who she was and that had been acknowledged moments prior to the complainant’s questioning. The applicant was observed *“ranting and raving”* to herself [r.6, 1.30]. In these circumstances, the submission that the applicant’s expletives were borne out of her drunkenness and general frustration with her own predicament (*“I’m lost, where am I”*) rather than being directed at the complainant has some force.
13. The complainant’s evidence<sup>25</sup> included:
- 13.1. words of the kind alleged are used by her work colleagues; [r.10, 1.40];
- 13.2. *“I am not saying that I am a softie and things like - I mean I have been called things like that before”* [r.3, 1.40] and that this was the first time that she had been spoken to like this; [r.10, 1.35];

<sup>21</sup> The determination of the actual words used was somewhat important. To some, the word *“you”* and where in the phrase it is used might add an accusatorial slant to the phrase.

<sup>22</sup> Section 101 of the *Evidence Act* was not resorted to.

<sup>23</sup> Although the complainant gives a hearsay account of what she was asked to investigate, there was no evidence led to suggest that the applicant *had* caused the disturbance that the complainant was investigating. No evidence was led as to the correctness of the description of the person or the activity actually reported to police. The applicant has not been charged with any associated offence, indeed she was not even asked about any of it.

<sup>24</sup> It is safe to assume that she was non-Aboriginal.

<sup>25</sup> The evidence of subjective insult was strictly inadmissible as it is an objective test.

- 13.3. then she says the opposite: “*Well, I’d suggest to you that you probably would’ve heard worse the last time you were at the pub?—Than that being called to me? I’ve never been called that in my life.” [r.10, l.30];*
- 13.4. that she asked the name of the applicant essentially because that is what she always did;
- 13.5. the words generally were not insulting to her in the sense that other police officers use that language; rather, as she put it: “*I’ve never been called that that before in my life*” and “*no-one’s ever called me that*”; [r.10, l.30-40] and
- 13.6. “*... then all of a sudden I was hit with the abuse and I was shocked and I was insulted and I couldn’t believe that she said it.*” [r.3, l.10-20]

### The relevant law

14. The magistrate has in effect stated that the word “*cunt*” was inherently insulting to women generally and coupled with the word “*fucking*” was contextually insulting. This approach was simplistic and wrong in law.<sup>26</sup>
15. In *Dalton v. Bartlett*<sup>27</sup> the Full Court of South Australia held:  
 “*The primary purpose of language is to convey a message to others. It seems to me that the decency or otherwise of language used on a particular occasion must depend upon the meaning which it conveys, rather than upon the form of language when divorced from its meaning*”  
 and  
 “*I should say, however, that there appear in the learned magistrate’s reasons for judgement strong indications that he held the same opinion, pronounced erroneous in *Romeyko v. Samuels* that words like those in question here must necessarily be indecent in all contexts at least when uttered in a public place. In that case I said: ‘in my view, it is equally erroneous to hold that the common four-letter words are necessarily indecent in every context (*Bradley v. Staines* [1970] Qd R 76), and to hold that they can never be indecent at all.’*”
16. These passages were cited with approval in *Horton v. Rowbottom*<sup>28</sup> and *E (A Child)*<sup>29</sup>. In the latter, White J further noted:<sup>30</sup>  
 “*In *Melser v Police* [1967] NZLR 437, North P said that, to justify a conviction of disorderly behaviour the conduct must have caused or been likely to cause disturbance or annoyance to others present. Turner J said that the conduct 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.*”  
 and  
 “*In *Police v Christie* [1962] NZLR 1109 at 1113, Henry J said:  
 “The conduct must be serious enough to incur the sanction of a criminal statute. A conviction ought not to be entered unless the conduct or behaviour is such that it constitutes an attack upon public values that ought to be preserved. The prosecutions ought to be genuinely and fairly warranted in all the*

<sup>26</sup> See also section 101 of the *Anti-Discrimination Act* 1991(Qld):

**“Discrimination in administration of State laws and programs area**

A person who -

- (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or  
 (b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in -

- (c) the performance of the function; or  
 (d) the exercise of the power; or  
 (e) the carrying out of the responsibility.”

<sup>27</sup> [1972] 3 S.A.S.R. 549

<sup>28</sup> (1993) 68 A Crim R 381

<sup>29</sup> (1994) 76 A Crim R 343

<sup>30</sup> (supra) at p.350.

*circumstances to preserve orderly conduct in public places and that should appear on the evidence before a conviction is entered."*

17. In *Saunders v. Herold*,<sup>31</sup> Higgins J was considering an appeal by an Aboriginal man who, after being ejected from a Canberra Worker's club, was approached by police. He is alleged to have said: "*Why don't you cunts just fuck off and leave us alone*". In allowing the appeal it was observed: "*What constitutes behaving in an offensive manner depends very much on the circumstances. Conduct and language engaged in at a football match or squash court may be acceptable, or, at least, unremarkable, but offensive if engaged in during a church service or a formal social event*"
18. In reviewing these cases the authors of **Principles of Criminal Law**<sup>32</sup> assert at p. 795: "*In this case [E (A Child)] the obscenity of the language was measured in 'neutral linguistic' terms: using the word "fuck" merely as a general expletive did not violate community standards. However this approach does not reveal the true political context of the words. In this case, the accused was an Aboriginal youth who was resisting police authority to impose a curfew and to detain him without proper legal authority (this significant issue was not explored at trial or raised on appeal). In the absence of formal powers to detain him, offensive language provided the police with a 'holding charge' and a legal basis for exercising authority over the youth*" and "*Although the law determines offensiveness by reference to an 'objective test' based on community standards, it is not a value-neutral concept. The conceptions of good order and decency created and applied by both police officers and magistrates have the potential to operate unfairly against minorities who are perceived to be a threat to social order and/or police authority.*"
19. These observations of the misuse/misunderstanding of provisions like section 7(1)(d) are apt in this case. The term "*insulting*" in this context must be such as to be calculated to wound feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable person. See the analogous approach taken in *Worcester v. Smith*<sup>33</sup> as adopted in *Ball v. McIntyre*<sup>34</sup> when considering a similar provision.<sup>35</sup> Particularly in the latter case: "*... the word offensive in s.17(d) is to be found with the words 'threatening, abusive and insulting', all words which, in relation to behaviour, carry with them the idea of behaviour likely to arouse emotional reaction.*"
20. The proper approach that should be taken in determining this matter is to look at the surrounding circumstances to contextualise the purpose of the uttering; the manner in which the words are used; what is intended by the utterance; and the meaning conveyed to an objective reasonable person.
21. The words in this case were uttered by a drunken person in the street in response to police questioning. The appellant was entitled to ignore this questioning. Police officers are entitled to seek respect but it would be unrealistic for them to carry any sensitivity to the task of questioning drunkards. Given the dialogue between the applicant and the other police officer immediately prior to the conversation initiated by the complainant, it was clear that the applicant resorted to words such as " *fucking*" and " *cunt*" without intending to be or in fact objectively being offensive or insulting.
22. The subjective feelings of the complainant are understandable given the limits in her experience and perspective but irrelevant to the determination of the case. The trial before the magistrate miscarried substantially in evidence of subjective insult being led;

<sup>31</sup> (1991) 105 FLR 1

<sup>32</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law*, LBC Information Services, Pyrmont NSW, 2001

<sup>33</sup> [1951] V.L.R. 316

<sup>34</sup> [1966] 9 F.L.R. 237

<sup>35</sup> Section 17(d) of the Police Offences Ordinances: "*Any person who, in or near any public place, or within the view or hearing of any person therein behaves in a threatening abusive, offensive or insulting manner, shall be guilty of an offence*"

- the prosecution submitting on that fact; and the learned magistrate embracing notions of subjectivity in finding that the words uttered were prima facie “*insulting*” due to the complainant’s gender.
23. The overall context is the applicant is an indigenous Australian; she is usually itinerant; she is a chronic alcoholic who is frequently intoxicated; she was intoxicated at the time; she exhibits all the outward indicia of impoverishment, alcoholism and ‘under-sophistication’; she is probably less educated and socially less skilled in verbal communication in English than the average Australian; it was 4 am in a deserted street; when first approached by police she said that she was lost and wanted to know where she was; her identity was already known to one of the police; she knew this fact; the complainant had no legal basis to require the applicant to answer the questions that she had asked; the applicant is cross-eyed and the complainant’s assertion that the applicant was looking at her must be treated with some circumspection; she was “*walking back and forwards and ranting*”; the applicant had been appropriate with the police officer who she knew and the utterance of words was not accompanied with any threats of violence or actual violence to anyone else.
24. It is quite unreasonable to not entertain some doubt about whether the uncouth utterances might have been solely directed at the applicant’s own pained situation and not at the complainant. A reasoned assessment of the evidence reveals that there was no insult – the complainant, after considering organising ‘*Murri Watch*’ just got annoyed at the manifestations of the very drunkenness that she recognised needed assistance being provided<sup>36</sup> – and certainly any subjective insult taken did *not* warrant criminal sanction and incarceration. At the very least there had to be some doubt about that.
25. The above matters were raised in the appeal to the District Court [r.79-89]. Howell DCJ, gave short consideration before dismissing the appeal stating:  
*“It was appropriate in the circumstances in which the police officer found herself and the accused in Dixon Street at about 4 a.m. to ask the complainant her name and address. On the evidence accepted by the learned magistrate, the words used and accompanying circumstances and applying the tests stated by the appellate Court, in my view, left it clearly open to the learned magistrate to find that the words used were insulting and, for completeness, clearly intended to be insulting [r.72, 40-55]*  
*One must apply the objective test and the reasonable person, applying the objective test and looking at all the circumstances would understandably and reasonably come to a conclusion, beyond reasonable doubt, that the words were insulting and were intended to be insulting” [r.72, 1.60 to r. 73, 1.10]*
26. His Honour did not address the specific submissions as to the errors in the magistrate’s approach, and, given his finding that the words were not only “*insulting*” in all of the circumstances but “*were intended to be insulting*” suggests that his Honour embraced the magistrate’s approach; [r.73, 1.2] and [r.35, 1.31]: *His Honour: “Can it seriously be said on any test that that’s not insulting?”*

### Contemporary community standards

27. It is important to note that it is not for the court to set standards by its decision upon the impugned behaviour. Rather the court’s finding merely “*represents an expression of*

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<sup>36</sup> [r.3, 1.40] *“I am not saying that I am a softie and things like - I mean I have been called things like that before. But I think the thing that shocked me the most was the fact that we were trying to ascertain the safest possible outcome for her that night given that it was that time of the morning. It was dark. She was by herself. We were then all of a sudden I was hit with this abuse and I was shocked and I was insulted and I couldn’t believe that she said it.”*  
[r.10, 1.30] *“Well, I’d suggest to you that you probably would’ve heard worse the last time you were at the pub?—Than that being called to me? I’ve never been called that in my life.”*

*contemporary community standards accepted by ordinary decent minded citizens.*<sup>37</sup> Although it has to be accepted that a police officer is capable of being personally affronted by the behaviour of others: see *DPP v. Orum* [1988] Crim LR 848 and *Burns v. Seagrove & Anor* [2000] NSWSC 77 (23 February 2000), it is worth noting the approach of the English Divisional Court on this aspect:<sup>38</sup>

*“words and behaviour”<sup>39</sup>[of this kind] would be wearily familiar to police and have little emotional impact save that of boredom”.*

28. Whether the conduct offends community standards is to be assessed in light of the Court's view of community standards, *not* the view of a particular witness: See *E (A Child)* (supra) at 347. The proper basis by which a court is to assess “*contemporary community standards*” has not been precisely curtailed by judicial examination. In *Crowe v. Graham* (1969) 121 CLR 375, a case considering indecent/obscene publications, Windeyer J stated at 395-396:
- “The question still is – Does the publication, by reason of the extent to which and the manner in which it deals with sexual matters, transgress the generally accepted bounds of decency? That is a question to be decided by the tribunal of fact. It is to be answered by reading the publication. Common sense and a sense of decency must supply the answer.*
- (...)
- Evidence of what has been published in other books or writings is not admissible. The Court has to determine whether the publication before it is obscene having regard to the persons, classes of persons and age groups to whom the matter was published. The answer to that question is not to be had by a process of literary comparison. Nor is it to be had by calling witnesses – whether writers, publishers or psychologists – and asking them to give their opinion on the matter.”*
29. In *Regina v. Stringer* [2000] NSWCCA 293 (10 August 2000), Adams J stated:
- “In R v Suckling [1999] NSWCCA 36, this Court considered the application of R v Swaffield and Pavic (1997-98) 151 ALR 98 where the High Court of Australia applied a community standards test to the admissibility of evidence obtained by subterfuge. The Court pointed out -*
- “that the reference by the High Court, as by this Court, to community standards in this respect is not to any notion of populist public opinion. Rather, this refers to community standards concerning the maintenance of the rule of law in a liberal democracy, the elements of the proper administration of justice and the due requirements of law enforcement.”*
- The meaning of community standards, in any particular legal context, is a question of law; whether the application to the circumstances of a particular case produces a particular result may be regarded as a matter of fact. Community standards in this context are not the same as popular opinion or vulgar prejudice: they are the expression of standards that reflect the fundamental values of our society so far as the application of the criminal law is concerned, including, as particularly relevant here, the principle of equality before the law or equal justice.”*
30. The task of determining “*contemporary community standards*” is pivotal in determining this case. It also bears on any prosecution under section 7 of the *Vagrants Gaming & Other Offences Act*. The assessment of ‘*insulting*’ sufficient to justify a criminal prosecution is an assessment of fact to be made by the Court according to the judicial officer's assessment of what is acceptable to the community. The latter consideration being a question of law.
31. It is not too indulgent to trace the legislative history of section 7 and the Act to see that much has changed in our community. Page 1790 of *Hansard* of the second reading

<sup>37</sup> *Donnelly v. McDonald* (1990) 12 Qld Lawyer Reps 111 at 119.

<sup>38</sup> *DPP v. Orum* (supra) at 849

<sup>39</sup> The Accused had said: “*You fuck off. This is a domestic and you can't do nothing. You can't fucking arrest me. I know my rights. If you don't go away, I'm going to hit you*”

speech bears some examination as to the issue of community standards in 1931 that the parliament purported to protect at that time:<sup>40</sup>

**Mr Bedford** (*Warrego*) [7.12]: The clause is to be read in conjunction with clause 4 dealing with vagrants. One can thoroughly understand the desire of the Government to prevent Comboism as far as possible. Clause 11 must be read in conjunction with clause 4(l)(ii) which provides that any person who, not being an aboriginal native or the child of an aboriginal native, wanders in company with an aboriginal native and does not give satisfaction that he has a lawful fixed place of residence, shall be deemed to be a vagrant. The sex of the native referred to should have been mentioned in order to prevent Comboism. As the Bill stands, a prospector travelling with an aboriginal offsider may be charged before the court as a vagrant; and there is the possibility of his being dragged out of the bush to the nearest court of petty sessions to establish his bona fides. Apparently the failure to mention the sex of the aboriginal native is an oversight. Clause 11 may be brought into operation against prospectors camping in the bush. A person may be known to associate with reputed thieves; he may have certain black marks or even a conviction against him; and the mere fact that he is camped in a tent or a prospecting camp is sufficient ground for his being taken to the nearest court of petty sessions where his case may be inquired into. It seems to me that this clause goes far beyond the intention of the Government. I consider that clause 4 should be recommitted with a view to stating the sex of the aboriginal native with whom it will be an offence to consort. That would make the clause much clearer, and it would prevent any injustice being done to quite decent people prospecting under the circumstances I have mentioned.

**Mr W Forgan Smith** (*Mackay*) [7.14]: The Minister should give some consideration to the question raised by the hon. Member for Warrego. Apparently it is the intention of the hon. Member for Warrego to prevent what he euphemistically refers to as Comboism.

**Mr Bedford:** That is carnal knowledge of a gin by a white man.

**Mr W Forgan Smith:** A prospector in the bush might find himself in serious difficulty because of this clause. I should like the Minister to express an opinion on the matter.

**The Home Secretary** (Hon JC Peterson, *Normanby*) [7.16]: This clause merely re-enacts "The Vagrant Act of 1851". The definition of "vagrant" in this Bill is a very wide one.

**Mr Bedford:** The Bill should specify the sex in the case to which I have alluded. A great number of prospectors have "abo" offiders.

**The Home Secretary:** I repeat that this Bill merely re-enacts "The Vagrant Act of 1951". Up to the present there have been no known cases in which this law has been flagrantly flouted and we do not expect that it will be flagrantly flouted in the future.

**Mr Bedford:** It is only unnecessary verbiage to have it here.

**The Home Secretary:** In dealing with aboriginals we must take into consideration the protection of aboriginals as provided for in the Aboriginal Protection and Restriction of the Sale of Opium Act. It has been found in the past that, unfortunately, there is a class of white men who are prepared to live in aboriginal style with black gins. I do not care whether that man be a prospector or whatever one may call him, he has not lived up to the principles of white manhood.

**Mr Bedford:** I say you should put down Comboism all the time, but you should specify the sex of the native. There are plenty of male "abos" who are out with prospectors. They are well treated, and would not leave the job for anything."

32. It is also worth noting some observations by Wylie DCJ in two cases in which his Honour as the resident judge in Townsville sought to "educate" the constabulary and magistracy in respect to these charges: *Lehmann v. Conway*<sup>41</sup> and *Bryant v. Stone*.<sup>42</sup>

<sup>40</sup> The parliamentary discussion is not referring specifically to section 7, rather parts of section 4 of the Act. However the sentiment and language is still sharply offensive, according to contemporary sensibilities.

<sup>41</sup> *Lehmann v. Conway* (unreported) Appeal No. 8 of 1991:

*"Much may be gained if police officers were to resist the temptation to arrest and take time to reflect upon the matter before determining whether to prosecute or not. If, on reflection, the decision is still to prosecute, proceedings by way of summons can be instituted. Such delay affords the opportunity to recover from any initial feelings of outrage or surprise or annoyance"* and

*"When I have allowed the appeals in the past I have taken time and trouble in some instances to prepare particularly detailed judgements; in others, to deliver extempore statements such as this. In either event, my intention has been to provide some assistance to the individual respondent by exposing the law to him. At the same time the reasons are available for the purpose of exposing the law to the Magistracy because, at the end of the day the magistrates are responsible for determining whether the charge will result in a conviction or not. It is rather strange that I continue to experience appeals allowed virtually by consent in the manner I have outlined. I simply record my opinion that there ought to be some system within the police department but more particularly the Townsville District Police Force which will make known to all the members of the force here what is being decided in the courts in order that the officers may learn something relevant to the discharge of their duties."*

**Conclusion**

33. In conducting this appeal as a rehearing or alternatively by considering the matter having regard to *Rule 766*, the approach identified in *Zuvela v Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29 should be taken.<sup>43</sup>
34. The prosecution have a substantial onus to discharge in a criminal prosecution under this section.<sup>44</sup>
35. It can be assumed that police officers in Australia deal more regularly with indigenous Australians, than the average community member. Most often this interaction occurs with the citizen being intoxicated. It is perhaps understandable that some police are more intolerant than others and this explains, in part, why arrests are made. However, viewing conduct of the kind being considered here as sufficient to warrant arrest and charge with a criminal offence, rather than diversion to an organisation such as “*Murri Watch*” or to a hospital or at least home, bears some examination. Police often protest: “*what else could I do?*” It need hardly be said that it is not for a court to entertain social and political responsibility for the complex social ‘problem’ of dispossessed indigenous Australians, chronically alcoholic and poor.<sup>45</sup> See in this context *Dooley v. Polzin*.<sup>46</sup>
36. The defendant is an itinerant seasoned Aboriginal drunkard, and well known to police in the local area as such. She did not exhibit any actions towards others, she was lost and intoxicated. It is obvious that Ms Couchy is struggling to integrate “*appropriately*” into non-indigenous society - in fact some might say that she has already failed – and her behaviour that is the subject of this charge is merely a manifestation of these complex factors. It is not such that warrants a criminal sanction as it does not, as held in *Dillon v. Byrne* (supra), “*tend to annoy or insult such persons as are faced with it – and sufficiently deeply or seriously to warrant the interference of the criminal law.*”
37. Surely “*well-conducted and reasonable men and women*”<sup>47</sup> are more likely to feel pity, compassion and even a sense of collective guilt for the realities of the applicant’s existence which attracts policing of the kind here that prompted the charge under question. There could not reasonably be any expectation or desire in the community that she be arrested, gaoled overnight and criminally prosecuted.
38. In these circumstances, this Court can safely infer that it could not have been found beyond reasonable doubt that the words uttered, uncouth as they were, were calculated to insult anyone in the eyes of a reasoned and objective person.

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<sup>42</sup> *Bryant v. Stone* (unreported) Appeal No. 28 of 1990:

“*In determining whether an offence has been committed one should bear in mind that in many respects the offender is being punished for his illiteracy or deficient vocabulary when those who possess greater skill with words can deliver a studied insult in language whereby the barb does not strike home until long after the utterance.*”

<sup>43</sup> At 31 per Brennan CJ, Toohey, McHugh, Gummow & Kirby JJ.

“*Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.*”

<sup>44</sup> It is an onus that is not often tested as most people plead guilty.

<sup>45</sup> Justice Fitzgerald is presently undertaking the Cape York Justice Study whose terms of reference include identifying the causes, nature and extent of breaches of the law and of alcohol and substance abuse in Cape York communities. Also on 19 December 2000 the *Queensland Aboriginal & Torres Strait Islander Justice Agreement* was signed. Its stated primary commitment is to reduce “*by 50% the rate of Aboriginal and Torres strait Islander peoples incarcerated in the Queensland criminal justice system.*”

<sup>46</sup> (1991) 57 A Crim R 420 citing *Clarke* (1975) 61 Cr App R 320: “*Her Majesty’s courts are not dustbins into which the social services can sweep the difficult members of the public*”

<sup>47</sup> *Dillon v. Byrne* (supra) at 133.

### Appeal against sentence

39. The maximum penalty is \$100.00 fine, 6 months' imprisonment or in addition or alternatively a recognisance for good behaviour for up to 12 months. The applicant's criminal history is lengthy and littered with similar convictions. This offence will trigger a suspended term of imprisonment.
40. The antecedents of the applicant reveal an unfortunate life [r.29-30]<sup>48</sup>
41. Reviewing a summary sentence is objectively difficult. The summary nature of the determination makes it difficult to demand detailed identification of sentencing principles. There is rarely any recourse to comparable sentences. Appellate criticism involves a more leisurely consideration of a matter that took minutes to finalise in a summary sentence. However, expediency does not relieve a sentencer of the obligation to sentence according to law. The magistrate here gave no explanation for imposing a 3 week gaol term other than saying "*I think the end of the road has arrived for this type of offence*". This merely reflected the police prosecutor's submission that the applicant had previously been given fines for similar conduct over a long period of time and posing the rhetorical question "*at this point in time, I have to say, where do you draw the line? She is continually re-offending*".<sup>49</sup>
42. This approach embraces a frustration that fines have not provided any specific deterrence in the past. However, the conduct has to be put into proper context. The applicant is a person with a woeful personal history who has been an alcoholic for half her life. She lives her life with bouts of itinerancy. Different magistrates over the course of many years have imposed fines for similar conduct. Such a consistent sentencing pattern is rare in that jurisdiction. Gaol is outside the permissible range.
43. The sentence imposed by the magistrate was manifestly excessive. Howell DCJ accepted the force of these submissions but ordered that the applicant be sentenced to 7 days imprisonment, as it was time already served under the original sentence. His Honour erred in imposing a sentence that he himself recognised as being manifestly excessive. Merely because a person has served the time does not mean that such a sentence is not manifestly excessive. If the conviction is maintained, in light of the 7 days already served, the applicant should be released under section 19(1)(a) of the *Penalties & Sentences Act*.

Andrew Boe  
 Boe Callaghan  
 Solicitors for the Applicant  
 24 October 2001

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<sup>48</sup> The applicant has been addicted to alcohol for 15 years or more; she is now 30 years old; her parents died when she was a child and she was raised by foster parents; she is the youngest of many siblings; one of her siblings died in police custody; she has 6 children; and she has 2 more children in foster care.

<sup>49</sup> If this approach, of drawing the line in the sand, was to have any validity, she ought to be told on this occasion that the system of fining will no longer be applied to her. The approach of "upping the Ante" as it were, should have been more structured and had proper regard to section 9(2)(a) of the *Penalties & Sentences Act*:

"(2) In sentencing an offender, a court must have regard to:

(a) (i) a sentence of imprisonment should only be imposed as a last resort  
 (ii) a sentence that allows the offender to stay in the community is preferable;"