

**IN THE COURT OF APPEAL
OF QUEENSLAND**

C.A. No. 145 of 2001

JEANNIE ANNE DEL VECCHIO

- against -

**MELISSA JANE COUCHY
(Applicant)**

OUTLINE OF SUBMISSIONS ON BEHALF OF THE RESPONDENT

1. BACKGROUND

- 1.1 The applicant was convicted after a summary trial in the Brisbane Magistrates Court on 7 December 2000 for an offence of using insulting words contrary to section 7(1)(d) Vagrants, Gaming and Other Offences Act 1931 and was sentenced to 3 weeks imprisonment.
- 1.2 The applicant, who was legally represented, did not call or give evidence at her trial.
- 1.3 The applicant then appealed to the District Court and, on 16 August, 2001, the appeal against conviction was dismissed. The appeal against sentence was allowed and the sentence was reduced to 7 days imprisonment - the applicant had served 7 days prior to being released on bail pending the hearing of the appeal.
- 1.4 The applicant now seeks leave to appeal to this Honourable Court against the decision dismissing the appeal in the District Court.

2. GROUNDS OF APPEAL

- 2.1 The primary court judge erred in his determination of the appeal;
 - 1 His Honour erred in not satisfactorily determining the contention that the Magistrate had not properly determined the words actually used by the appellant;
 - 2 His Honour erred in not finding that the Magistrate erred in concluding that the word 'cunt' had an objective inherent, gender-specific capacity for insult;

- 3 His Honour erred in determining that it was open to the Magistrate to find in all the circumstances, that the words used were insulting and intended to be insulting within the meaning of s.7(l)(d) of the *Vagrants Gaming and Other Offences Act*.
- 4 His Honour erred in finding that the appellant's use of the words in all the circumstances, was, beyond *reasonable* doubt, insulting and intended to be insulting.

3. SUBMISSIONS ON BEHALF OF THE RESPONDENT

1 *His Honour erred in not satisfactorily determining the contention that the*

Magistrate had not properly determined the words actually used by the appellant;

- 3.1 The insulting words used were particularised as *"you fucking cunt -*
- 3.2 Constable Del Vecchio swore (at pages R7, R8) that the actual words said were as recorded in her notebook. The words recorded were *"you fucking cunt -*. It is conceded that at R2 her evidence was that the words were *-fuck you cunt"* and that the QP9 read *"The defendant turned and looked at Constable Del Vecchio and called her a "fucking cunt" "*.
- Sergeant McGahey swore (at R 15) that the actual words used were *"you fucking cunt* He had previously adopted the notes made by Del Vecchio. He denied using those notes however to compile his statement. It was not put to Sergeant McGahey that any different form of words was used.
- 3.3 During submissions at trial, the appellant's solicitor said (at R26):
"Your Worship, as would be obvious from my cross-examination, my client accepts that she uttered those words or words similar to these at the time
- 3.4 In his reasons the Magistrate said (at R28):
"...and there is no dispute on the evidence that the words in the charge were used by the defendant "

3.5 The evidence of both witnesses was that the words used were "*you fucking cunt*". There was evidence that a QP9 form had been prepared with an ambiguity as to the extent of the words used. Even without the concession by the appellant's solicitor there was clear evidence that the particularised words had been used. The Magistrate effectively ruled on the issue that the words used were those particularised.

3.6 It is submitted that there is no merit in any contention that the actual words used was not properly determined in this case.

2 *His Honour erred in not finding that the Magistrate erred in concluding that the word 'cunt' had an objective, inherent, gender-specific capacity for insult*

3.7 It is submitted that the finding by the learned Magistrate was that the word 'cunt', used in the context in which it was used in this case, was insulting within the terms of s.791(d) of the Vagrants Gaming and Other Offences Act. The learned Magistrate correctly apprehended the appropriate test as an objective one. The correct application of the test also involved an examination of the circumstances in which the words were used, in order to determine the context and whether they then have the character of being insulting.

3.8 It is submitted that the context in this case includes that the words were used to a female police officer in the course of her duty. The words used were apparent on their face, to be scornful of that female police officer.

3.9 The learned Magistrate applied the correct test and had regard to the circumstances surrounding the utterance complained of in coming to his finding. In doing so, there has been no error on his part. There is no merit in this ground of appeal.

3 *His Honour erred in determining that it was open to rite Magistrate to find in all the circumstances, that the words used were insulting and intended to be insulting within the meaning of s. 7(1) (d) of the Vagrants Gaming and Other Offences Act.*

4 *His Honour erred in finding that the appellant's use of the words in all the circumstances, was, beyond reasonable doubt, insulting and intended to be insulting.*

3.10 It is submitted that a reasoned and rational assessment of the uncontradicted evidence in this case, might lead to a finding that the words used were, in the circumstances, insulting, and that the intention of the appellant was that they be insulting. There is nothing in this case compelling a reasonable view to the contrary.

3.11 It is submitted that the words in the statute are clear and do not need interpretation by this court. The test is clear and well established. (see the recent decision of His Honour Judge Samios in *Poulton v. Daher D1289* of 2001, judgement delivered 15 October, 2001) The facts in this case are capable of satisfying the clear words of s.7(1)(d) of the Vagrants *Gaming and Other Offences Act*.

3.11 The learned Magistrate applied the correct test and found, as a finding of fact, that the words used in the circumstances were, objectively, insulting. There is no error on the part of the magistrate in the method employed or the finding made that requires the intervention of this court.

4. APPLICATION FOR FURTHER EVIDENCE

4.1 The applicant seeks to place further evidence in the form of an affidavit by *Christopher James CALLAGHAN*, before the Court pursuant to Rule 766(1)(c) of the Uniform *Criminal Practice Rules*

4.2 The Respondent accepts-that the appropriate test is that set out in paragraph 4 of the Applicant's further submissions.

- 4.3 It is submitted that the material sought to be led does not satisfy the test for admissibility of further evidence in that;
- (a) it was evidence which was clearly available to be used, should the applicant have wished it, at the trial, and,
 - (b) it is submitted that the evidence could not have an important influence on the result of the case.
- 4.4 It is evidence merely from one person, who knows the applicant very well as a result of years of contact with her, as to what he thinks of the applicant's general behaviour. Nowhere does he suggest that he was subjected to the type of abuse that Constable DEL VECCHIO was subjected to. In any event, it is not relevant to the question for determination in this hearing. The test is an objective one. The learned Magistrate found the subject words to be objectively insulting and therefore satisfying the clear words of the statute. Such a finding was, in the circumstances of this case, reasonably open to the learned Magistrate, as a finding of fact.

**Carl Heaton
Counsel**