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R v ← Ceramalus → CA14/96 [1996] NZCA 117; [2012] 2 NZLR 46 (17 July 1996)

Last Updated: 12 December 2012

IN THE COURT OF APPEAL OF NEW ZEALAND CA 14/96

THE QUEEN

v.

NOBILANGELO CHARISON ← CERAMALUS →

Coram: Eichelbaum CJ Thomas J Tompkins J

Hearing: 17 June 1996 at Auckland

Counsel: Appellant in person

J C Pike for the Crown

Judgment: 17 July 1996

JUDGMENT OF THE COURT DELIVERED BY THOMAS J

Mr ← Ceramalus → conviction

Mr  **Ceramalus**  was convicted in the North Shore District Court under [s 4\(1\)\(a\)](#) of the [Summary Offences Act 1981](#) of behaving in a disorderly manner on 21 February 1995 in a public place, namely, Eastglade Crescent, Birkdale. The defendant represented himself and, after a hearing which occupied two days, Cadenhead DCJ found Mr  **Ceramalus**  guilty.

Mr  **Ceramalus**  lodged an appeal against his conviction to the High Court. The appeal was heard by Morris J. After a hearing lasting four days the appeal was dismissed.

The case in the District Court

The facts of the case, as initially found by Cadenhead DCJ, may be briefly reiterated in an abridged form.

Mr  **Ceramalus**  is a 47 year old journalist and a committed naturist. He lives in Westglade Crescent, Birkdale. Westglade Crescent is a relatively quiet and secluded suburban street. On 21 February 1995 Mr  **Ceramalus**  spent the day naked at the nearby Fitzpatrick Bay beach. Some time after 6 p.m. he left the beach to walk home. For part of the way he wore clothing but he reverted to nakedness when about 100 metres from his house. He carried his clothes and beach towel in a bag slung over his shoulder.

A Mr Fieldson, who was sitting in his lounge at 24 Westglade Crescent, observed Mr  **Ceramalus**  walking down the street totally naked. He found this offensive and was concerned for the welfare of children playing on the street. He complained to the police. His partner, a Mrs Fraser, also saw Mr  **Ceramalus** . Her young son was playing outdoors. She was “shocked” that Mr  **Ceramalus**  was parading his nakedness beyond the confines of his own property. She had seen him naked on his own property before and occasionally he had come on to her property while still naked. This was behaviour which she had reluctantly tolerated. But she felt differently about him appearing naked on the street.

Nothing, apart from Mr  **Ceramalus** 's nudity upset either Mr Fieldson or Mrs Fraser. In particular, there was no suggestion of any obscene actions or gestures on his part.

Mr  **Ceramalus**  did not dispute that he had walked down the street naked. He called two witnesses, one a neighbour, a Mrs Foxell, and the other, a Mrs Pointon. Although she had not seen him on 21 February, Mrs Foxell testified that she had previously objected to Mr  **Ceramalus**  walking in the street naked. She claimed that his presence in the street in this state had offended her. Mrs Pointon, who had lived in the street for approximately nine years, testified that she was aware that Mr  **Ceramalus**  was a naturist. She said that she did not feel threatened or offended by his nakedness. It was Mr  **Ceramalus**  case that he was doing no more than exercising a right which he considered he was entitled to exercise, namely, a right to walk down the street with no intention of upsetting any other person.

Mr  **Ceramalus**  relied upon the decision of Tompkins J in  **Ceramalus**  v *Police* (1991) 7

CRNZ 678. On that occasion Mr  **Ceramalus**  was charged with behaving in an offensive manner in a public place, namely, Fitzpatrick Bay. He had walked past and then sunbathed in front of a group of school children and their teachers. Fitzpatrick Bay is a beach commonly used by nudists. The learned Judge concluded that the average reasonable person would regard the conduct in much the same way as did the children's teachers, that is, as being inappropriate, unnecessary and in bad taste, but not as arousing feelings of anger, disgust or outrage. In the circumstances, he held, the prosecution had not proved beyond reasonable doubt that the conduct amounted to offensive behaviour sufficient to justify the interference of the criminal law.

Cadenhead DCJ pointed out that the learned Judge's decision did not "sanction or applaud" the behaviour of Mr  **Ceramalus**  on the beach. The Judge observed that, knowing how the average reasonable person would react to his nudity, it amazed him that a person of sensitivity would have continued this conduct. Cadenhead DCJ then distinguished  **Ceramalus**  *v Police* on the basis that a public road is an entirely different place from a beach where nudity is not uncommon. He observed that it is not only neighbours who may be affected, but persons who use the road and have no choice but

to do so. The Judge referred to Mr  **Ceramalus** ' own evidence to the effect that parading his nakedness over the years had caused concern to other people. It had even caused fear in some "active young men". Mr  **Ceramalus**  estimated in evidence that there had been at least 24 complaints about him over the years relating to his nudity at the beach.

The Judge concluded that a naked person walking along a public road has the capacity to produce disorder in the general community and would arouse feelings of anger, disgust and outrage in the minds of average reasonable persons using the road. He observed that, although Mr  **Ceramalus**  submitted that his behaviour should be viewed with tolerance, he had himself demonstrated by his statements and actions that he is quite impervious and intolerant of the feelings and concerns of his neighbours. The Judge accepted that the Court is not a court of morals and that it is not for the Court to decree the acceptable bounds of civilised behaviour. Its task is to deal only in criminality. But the Judge concluded that Mr  **Ceramalus**  had crossed the line between behaviour which could be described as merely inappropriate, unnecessary and in bad taste to behaviour that, in an average reasonable person, would arouse feelings of anger, resentment, outrage and disgust.

We add this comment. [Section 4\(1\)\(a\)](#) provides that it is an offence to behave in either an offensive or disorderly manner. Mr  **Ceramalus**  was charged with behaving in a disorderly manner and not of behaving in an offensive manner. No point was taken in relation to the wording of the charge, however, and we accept Cadenhead DCJ's decision that the charge as worded was proven. Mr  **Ceramalus** ' conduct had the capacity to produce disorder in the community. But it would seem to us that on the facts of this case a charge of behaving in an offensive manner might have been the more appropriate charge. Possibly the charge was laid as one of disorderly behaviour because of Tompkins J's earlier decision in  **Ceramalus**  *v Police*. It may be necessary to stress, therefore, that each case is to be decided as a matter of fact and degree having

regard to the time, place and circumstances of the particular case. Thus,  **Ceramalus**  *v Police* related to the particular facts of that case as disclosed in the evidence adduced at the trial. It is not authority for any wider proposition.

The case in the High Court

In a similarly thorough judgment Morris J rejected Mr  **Ceramalus** ' appeal. He considered Mr  **Ceramalus** ' grounds of appeal and lengthy submissions with considerable patience.

The learned Judge began by referring to [s 4\(1\)\(a\)](#), the section in issue. It reads:

“4. Offensive behaviour or language - (1) Every person is liable to a fine not exceeding \$500 who, -

(a) In or within view of any public place, behaves in an offensive or disorderly manner...”

The Judge then referred to a number of decisions in which the Courts have discussed the requirements of this subsection or its precursor, s 3D of the Police Offences Act

1927. *Melser v Police* [1967] NZLR 437, *Messiter v Police* [1980] 1 NZLR 586, and *Hakiwai v Police* [1988] NZHC 283; (1988) 4 CRNZ 188 were adverted to. For present purposes, it will suffice to quote the dictum of Turner J in *Melser v Police* (at 444):

“Disorderly conduct... 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 - and sufficiently deeply or seriously to warrant the interference of the criminal law.”

Morris J correctly observed, as has been repeatedly stressed, that the judgement of the conduct in question is in every case a matter of degree depending upon the relevant time, place and circumstances. In this connection, he referred to *Wainwright v Police*

(1968) NZLR 101, *Kinney v Police* [1971] NZLR 924, and  **Ceramalus**  v *Police*, supra.

The learned Judge found that Cadenhead DCJ had directed himself correctly in determining that the test to be applied in judging whether or not Mr  **Ceramalus** ' conduct was disorderly was the test in *Melser v Police* (supra). He further held that there was sufficient evidence to justify the Judge's decision. Evidence had been led to establish that persons were in fact annoyed or insulted and the Court could take their reaction into account in reaching its conclusion. He too concluded that Mr  **Ceramalus** ' conduct was such as would arouse feelings of anger, disgust or outrage in the average reasonable person. Accordingly, he held that Mr  **Ceramalus** ' conduct on the occasion in question justified the interference of the criminal law.

Mr  **Ceramalus**  seeks leave to appeal to this Court on a question of law

Not content with the extensive hearings which he had been accorded in both the District Court and the High Court, Mr  **Ceramalus**  then sought leave to appeal to this Court on a question of law pursuant to [s 144](#) of the [Summary Proceedings Act 1957](#). He declined to accept that [s 4\(1\)\(a\)](#) could apply to the exposure of the human body on a quiet suburban street having regard to ss 13 to 15 of the New Zealand Bill of Rights Act 1990 (relating to the right to freedom of thought conscience and religion, the right to freedom of expression, and the manifestation of religion and beliefs), and to ss 42 and 134 of the Human Rights Act (relating to access by the public to places, vehicles and facilities used by members of the public). Morris J said:

“The questions posed by the appellant are not in my view questions of law. They are, at the very best from his point of view, questions of mixed law and fact. I therefore have misgivings as to whether the questions posed satisfy the first test... In any event, whether an offence is made out on any particular day must depend on the facts established at a subsequent prosecution as indeed was the issue before the District Court Judge in the appellant’s case and before myself on appeal. The

question then was simply whether the District Court Judge was entitled to conclude on the basis of the material before him that the appellant’s behaviour warranted the interference of the criminal law.”

Satisfied that there was no question which should exercise the Court of Appeal, Morris

J refused leave in an oral judgment delivered on 19 December 1995. Mr  **Ceramalus**  seeks special leave to appeal

Where such leave is refused this Court may grant “special leave” to appeal and Mr  **Ceramalus**  now seeks that special leave. The Court may grant such leave if it is of the opinion that the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

In his application, Mr  **Ceramalus**  restated the questions of law which he contends should be submitted to this Court. The four questions of law which he posed read as follows:

“(i) Whether walking unclothed to one’s house in a relatively quiet and secluded suburban street without any accompanying obscene gestures or expressions is capable of constituting the criminal offence of behaving in a disorderly manner contrary to [Section 4\(1\)\(a\)](#) of the [Summary Offences Act 1981](#).

(ii) If that is so whether it is capable of constituting the offence where: (a) No other person was in the street;

(b) No person was required physically to take avoiding action;

(c) In the case of an adult male as opposed to an adult female, having regard to the provisions of [Section 21\(1\)\(a\)](#) of the [Human Rights Act 1993](#).

(iii) Whether the intended appellant was entitled by [Sections 13-15](#) of the Bill of Rights Act 1990 and [Sections 21\(1\)\(c\)](#), [42](#), and [134](#) of the [Human Rights Act 1993](#) to practise his Christian beliefs in a public place by acting as he did.

(iv) Whether a person who has no reasonable ground to believe that his or her conduct would produce disorder can have the necessary *mens rea* under [Section 4\(1\)\(a\)](#) of the [Summary Offences Act 1981](#).”

Is there a question of law?

We do not consider that, as they are framed, Mr  **Ceramalus** ’ first three questions give rise to a question of law for the purposes of s 144. During the course of argument it became plain that these first three questions tended to overlap. Argument certainly did so. But each question may be addressed in turn.

The first question does not raise a legal issue. Rather, it seeks to challenge the application of the accepted test of disorderly behaviour to the facts of this case, that is, walking naked down a relatively quiet and secluded suburban street without indulging in obscene gestures or expressions. We are not at all minded to interfere with the District Court Judge’s original finding, upheld on appeal, that on the particular facts of this case Mr  **Ceramalus** ’ behaviour can be properly described as sufficiently disorderly to warrant the intervention of the criminal law.

The second question, in effect, repeats the same factual circumstances. In respect of this question, however, Mr  **Ceramalus**  stressed that, as a matter of fact, “no person was required physically to take avoiding action”. He sought to incorporate this factor into the terms of [s 4\(1\)\(c\)](#) as a requirement on the basis of an analysis of the factual situations which have arisen in cases involving charges of offensive and disorderly conduct under the earlier s 3D of the Police Offences Act and the observations of the Courts in those cases. We are not prepared to accept that such a gloss should be put on s 4(1)(a). We do not consider that the point is sufficiently tenable to give rise to a question of law which should be submitted to this Court for decision. The established test for offensive or disorderly behaviour involves no such requirement and we do not

doubt that conduct may be offensive or disorderly without giving rise to the need on anybody’s part to physically take evasive action.

Mr  **Ceramalus**  also referred to [s 27](#) of the [Summary Offences Act](#) which provides that it is an offence for any person within view of a public place to intentionally and obscenely expose his or her genitals. He contended that Parliament’s express enactment of a provision relating to indecent exposure took such conduct outside the scope of offensive or disorderly behaviour in [s 4\(1\)\(c\)](#). Again, the argument is not sufficiently tenable to merit this Court’s attention. [Section 27](#) provides for a more serious offence; an offence involving intentional and obscene exposure. Conviction for an offence under that section renders the offender liable for a term of imprisonment of three months or a fine not exceeding \$1,000 as compared with liability for a maximum fine of

\$500 under [s 4\(1\)\(a\)](#) and no liability for imprisonment. Quite clearly the two sections can operate independently.

In his third question Mr  **Ceramalus**  claims the right to practise his “Christian beliefs” by virtue of the provisions already referred to in the Bill of Rights Act and the [Human Rights Act](#). As worded, this

question also involves the application of the terms of s

4(1)(a), as judicially defined, to the facts of this case. Put shortly, if Mr  **Ceramalus**  behaviour, notwithstanding that he may describe it as the practice of his “Christian beliefs”, involves disorderly behaviour in terms of that provision an offence will have been committed.

A question emerged in discussion with the Court, however, which may be accepted as a valid question of law. It is whether the accepted test requires reconsideration having regard to the enactment of the New Zealand Bill of Rights Act. We will shortly examine whether special leave should be granted in respect of that question.

The fourth question advanced by Mr  **Ceramalus**  relating to mens rea certainly raises a question of law. It is whether a person who does not have the intention to be disorderly has the necessary mens rea to be held liable under s 4(1)(a). We will also consider, therefore, whether special leave should be granted in respect of that question.

The advent of the New Zealand Bill of Rights Act

The suggestion that the enactment of the New Zealand Bill of Rights Act necessitates a re-examination of the accepted test for offensive or disorderly behaviour with a view to modifying its terms is an appropriate question. Indeed, an examination of the impact of the Bill of Rights Act may be seen as essential to the interpretation of any statutory provision which may impinge upon the rights and freedoms of others. But we do not consider that such an examination is required in this case. The rights and freedoms referred to by Mr  **Ceramalus**  have always been to the forefront of the Courts’ consideration of what is or is not offensive or disorderly conduct. Such factors have informed the hypothetical opinion of the average reasonable person which ultimately constitutes the test of what is or is not prohibited conduct under the section.

The Bill of Rights Act has served to affirm these established values. But their pertinence prior to the enactment of the Bill of Rights Act is particularly demonstrated in the judgment of McCarthy J in *Melser v Police*, supra, at 445. The learned Judge described as unquestionable the acceptance of freedom of opinion as a “fundamental human right in any modern society which deserves to be called democratic”. “Its general acceptance,” he said, “is one of the most precious of our individual freedoms”. He continued; “It needed no charter of the United Nations to make it acceptable to us; it has long been part of our way of life”. The learned Judge concluded; “All this, of course, is rather elementary.”

We agree that it is. The considerations to which Mr  **Ceramalus**  alludes are already inherent in the established test. It does not, for the purposes of this case, require any amendment or modification to its terms or to the way in which it is applied.

We do not preclude the possibility that a case may occur in which, on the particular facts of the case, the formulation of the test may require some refinement, or the way in which the test is applied to the facts necessitate some reappraisal, having regard to the enactment of the Bill of Rights Act. Such a possibility is inevitable when the question whether behaviour is offensive or disorderly is essentially a question of

fact and degree. But we do not consider that this is such a case. As a matter of fact and degree the question is not put squarely in issue and does not call for special leave in terms of s

144.

Section 4(1)(a) and mens rea

There is no authoritative judicial pronouncement in New Zealand as to whether mens rea is a necessary ingredient of s 4(1)(a) and, if it is, what the content of that element is. In contrast to s 4(1)(b) where the words in issue must be intended to threaten, alarm, insult or offend and s 4(1)(a)(i) which requires recklessness before the offence is complete, s 4(1)(a) contains no explicit requirement as to mens rea. It would seem that while the behaviour in question must be deliberate and not accidental or involuntary it is uncertain what further intent, if any, might be required. See the cases collected in [Brooker Summary Proceedings, 5-24 \(31/1/96\) SO 4.11](#). One view would seem to be that the relevant conduct must have been “calculated” to be offensive or disorderly. See, for example, *Price v Police* [1964] NZHC 41; [1965] NZLR 1086, and *Derbyshire v Police* [1966] NZHC 109; [1967] NZLR 391. But calculated in this context has often been construed to mean “likely” and thus become an objective requirement. See, for example, *Melser v Police* [1967] NZLR 437, and *O’Brien v Police* (High Court, Auckland, AP 219/92, 12 October

1992, Blanchard J). Yet again, there is much to be said for the approach adopted by

Henry J in *Police v Christie* [1962] NZLR 1109 where the learned Judge reverted to the wording of the statute itself. He said (at 1112):

“The simple question for determination on this appeal is whether or not the respondent behaved in a disorderly manner. Those are plain English words which do not call for the inclusion of a specific intent to provoke a breach of the peace or to act so that, in the circumstances, such a breach of the peace may be occasioned. It is sufficient if the conduct can properly be termed “disorderly” and that it occurred in a public place as defined.”

This dictum may gain added force from the fact that, although s 4(1)(a) still attracts the sanction of the criminal law, an offender is not liable to imprisonment under this section as was the case in respect of s 3D. Nor is an offender liable to the same monetary penalty.

But we do not need to determine this question in this case as it would be academic on the facts as found by the District Court Judge. Under the heading, “Mens rea,” in his judgment, Cadenhead DCJ refers to Mr  **Ceramalus** ’ argument that he did not intentionally set out to defy the law and that he had as his mandate the ruling of Justice Tompkins in  *Ceramalus*  v *Police*. The Judge then said that Mr  **Ceramalus**  knew what he was doing, and that he could not use  *Ceramalus*  v *Police* as a defence. The decision of Tompkins J, he said, did not sanction or applaud the behaviour of Mr  **Ceramalus**  on the beach. His conduct on that occasion had been described as inappropriate, unnecessary and in bad taste. Cadenhead DCJ then pointed out that, knowing that this was how the average reasonable person would react, Mr  **Ceramalus**  had paraded his nakedness on a public road. The Judge concluded that the extension of his behaviour to a public road meant that Mr  **Ceramalus**  assumed the responsibility of going beyond the law’s limit.

We can readily understand how the learned Judge reached this finding of fact. It is supported in the evidence and is a sensible response. Mr  **Ceramalus**  was partly clothed until 100 metres from his property. He then deliberately removed his clothing. He

knew from past experience, and from Tompkins J's observations in the earlier case, that his action would annoy his neighbours or others using the road. It is impossible not to conclude that Mr  **Ceramalus**  intended to test the limits of the law and for that purpose to act in a disorderly manner. Consequently, it does not matter whether a subjective or objective test is adopted on this occasion. The trial Judge's finding of fact demonstrates that Mr  **Ceramalus**  had the necessary mental element whatever construction of s 4(1)(a) is preferred.

While we accept, therefore, that the issue of mens rea raises a question of general and public importance, we do not consider that we should determine a question which would have no application in the instance case. Should the point arise for determination the Court will need a great deal more assistance in undertaking an evaluation of the relevant decisions both here and in overseas jurisdiction than was available to it in this case.

Special leave to appeal is therefore declined.

Costs are awarded to the respondent in the sum of \$3,500.

Solicitors

Crown Solicitors, Auckland

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