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The Queen v White [2007] NZCA 64 (13 March 2007)

Last Updated: 20 March 2007

IN THE COURT OF APPEAL OF NEW ZEALAND

CA433/06
[\[2007\] NZCA 64](#)

THE QUEEN

v

GRAEME WHITE

Hearing: 19 February 2007

Court: Hammond, Chambers and Arnold JJ

Counsel: Applicant in person
M F Laracy for Crown

Judgment: 13 March 2007 at 11 am

JUDGMENT OF THE COURT

Leave to appeal is declined.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

- [1] The applicant was convicted by Judge Erber on 3 July 2006 of three charges of behaving in an offensive manner contrary to [s 4\(1\)\(a\)](#) of the [Summary Offences Act 1981](#) and was also found to be in contempt of court. On the offensive behaviour charges, he was ordered to come up for sentence within 12 months if called upon to do so. On the contempt charge he was sentenced to 14 days imprisonment.
- [2] The applicant appealed to the High Court against his convictions for offensive behaviour and against the contempt finding. John Hansen J dismissed the appeals: *White v Police* HC CHCH [CRI-2006-409-000119](#) 3 October 2006. The applicant sought leave from the High Court to appeal to this Court. John Hansen J dismissed that application: HC CHCH [CRI-2006-409-000119](#) 9 November 2006. The applicant now seeks special leave under [s 114\(3\)](#) of the [Summary Proceedings Act 1957](#) to appeal to this Court.

Background

- [3] The applicant was seen cycling on several occasions wearing only a bicycle helmet and a vest made of sackcloth. He had nothing on his bottom half, so that the lower half of his body was exposed. On one occasion he was seen naked, except perhaps for a small leather bag in the nature of a sporran around his waist.
- [4] The applicant was charged with offensive behaviour. In his defence he said that he dressed in this way in order to express solidarity with unborn children and concern about the sex industry.
- [5] The applicant was tried summarily before Judge Erber and convicted. In relation to the ingredients of the offence the Judge said:

[2] The prosecution must prove beyond reasonable doubt that [the applicant] did an act, next that he did it intentionally and, thirdly, that its effect was offensive. Whether [the applicant] intended offence is not the test. The test is whether, objectively viewed, what [the applicant] was doing was offensive. In that connection, of course, I can have regard to the views of people who saw him and I can also have regard to his own views, but they are not determinative of the issue.

- [6] Considering the facts in light of the legal test the Judge said:

[12] The question is, firstly, did [the applicant] on any of these occasions ride a bicycle while the lower half of his body exposed his genitals or buttocks? I do not think there can be much doubt about that. The answer is yes. Secondly, did he do that intentionally, in other words, was it a deliberate act or was it an accident? Well, it certainly was not the latter because what [the applicant] has told me is that this is his form of comment on social issues. Thirdly, was the conduct in which he engaged such as would wound the feelings, arouse anger or resentment or disgust or outrage in the mind of reasonable people? It seems to me that [the witnesses] are reasonable people who have a reasonable degree of tolerance of other persons' perhaps unusual behaviour. They were offended. On the other hand, [the applicant] is not offended himself by that sort of conduct.

[13] I think that there cannot be much doubt about it that [the applicant] was doing this to make a point. He is entitled to make a point but if he makes a point which offends other people, then he commits an offence and I think he has committed offences on these three occasions.

- [7] In the course of sentencing the applicant on the offensive behaviour charges later in the day, Judge Erber was advised by a Police Sergeant that two witnesses had seen the applicant's buttocks during the course of the trial. The Judge stated that conduct of this

type offended the decorum of the Court and was a serious matter. He advised the applicant that he was charged with contempt of Court and would be dealt with later that afternoon. The Judge stood the applicant down in custody so that he could see the duty solicitor.

[8] When the hearing resumed, the duty solicitor advised that he had spoken to the applicant and that the applicant wished to apologise to the Court. The applicant did apologise and made it clear in his remarks that he accepted that the way he had appeared in court might be taken as an insult.

[9] The Judge then said:

[4] Mr White, this morning you answered your bail and you came to the Court to defend three charges of behaving in an offensive manner. The offensive manner contended for was that you displayed your buttocks, and genitals, in a way which offended members of the public and came within the definition of offensive, as that term is defined by the cases.

[5] At the commencement of the hearing today, Mr White, the Sergeant advised me of his suspicions that you were in a similar situation and that you were wearing so little that your genitals or backside would be able to be seen. From where I was sitting I was not able to confirm or deny that observation because you were wearing a top, which came down to a point just at the bottom of where I imagine your penis would be. I asked you whether what the Sergeant said was true, and you were evasive, and I regarded your replies with some suspicion. I warned you that if what the Sergeant said turned out to be true, I would regard that very seriously.

[6] The case was heard and I delivered judgment. I imposed a sentence that you were to be convicted, and to come up for sentence within 12 months if called on. The Sergeant then told me that during the adjournment the witnesses, the lay witnesses who had given evidence in the cases, complained that they could see your backside which is to say that the Sergeant's original suspicions were true.

[7] I know that standards of behaviour vary and that the Bill of Rights gives the right of freedom of speech and expression. However, coming to Court in this way, when the charges relate to similar behaviour, is in my view a serious assault on the decorum of the Court, as I said to you when I remanded you in custody. No person present in the Court should have to accept that sort of behaviour as a legitimate expression of your views. What is more, and I should have mentioned this in my decision, you know that people are offended and angered by this sort of behaviour because you told the police so.

[8] In the end, standards of decorum have got to be maintained. I do not ignore the need to allow latitude for eccentricity or the need to preserve a sense of humour, and a sense of proportion, but you have gone too far. You have courted deliberately the reaction of the Court which is, and would have been had you made no apology, 28 days imprisonment. As it is, you are sentenced to 14 days imprisonment for contempt of Court.

[10] Judge Erber made no mention of a warning given to the applicant by Judge MacAskill on 30 June 2006, when he appeared on another charge of behaving in an offensive manner arising out of his lack of clothing. On that occasion also the applicant was partially clothed in court. Judge MacAskill said in a note appended to an interim decision calling for further submissions on the offensive behaviour charge:

Note

[12] After the hearing had concluded, I was informed that the [applicant] had not merely been dressed unusually in court, as I had observed, but had not been wearing any enclosing covering over his genitals and buttocks and that his genitals were visible from the public seating. If that is so, then his dress did not meet the minimum standard expected of persons appearing before the court.

[13] With respect [to] all future appearances, the [applicant] is directed to dress to the standard ordinarily expected of persons appearing before this court, which is nothing more or less than reasonably conventional clothing. Should that standard not be met, the [applicant] will be at risk of being held in contempt of court.

[14] This note is not directed to the issue of any criminal liability the [applicant] may have

with respect to his appearance before the court on 30 June 2006, nor to any criminal liability he may accrue in the future, which are matters for the Police.

Basis of application

[11] The applicant has already exercised his only right of general appeal. In terms of [s 114\(3\)](#), this Court will grant special leave only if there is a question of law that is of general or public importance or which for some other reason ought to be submitted to this Court: *R v Slater* [\[1996\] NZCA 268](#); [\[1997\] 1 NZLR 211](#) at 214-5 (CA).

Offensive behaviour convictions

[12] In relation to the offensive behaviour convictions the applicant posed two alternative questions of law. Essentially they came down to the following issue:

Whether, in order to obtain a conviction for offensive behaviour under [s 4\(1\)\(a\)](#) of the [Summary Offences Act](#), it is necessary to prove not only that the behaviour at issue was offensive to a reasonable person but also that the defendant intended to cause offence to reasonable persons.

[13] As Mr Powell for the Crown said, this is a question of law which may have raised issues of general public importance had it not been for the decision of this Court in *R v Rowe* [\[2005\] 2 NZLR 833](#). In that case this Court comprehensively analysed the requirements of the offence of offensive behaviour. The Court said:

[22] Self-evidently, the offence is committed by behaving in an offensive manner in a public place. Offensive is a plain English word and bears its ordinary meaning in the present context. Threatening, injurious and hurtful may frequently be apt synonyms. Because the offence is one against public order and must occur in, or within view of, a public place the notion that the conduct must infringe the rights of a user, or users, of that public place is conveyed. Rights in this context are not necessarily recognisable common law rights. More commonly the right which is infringed is simply the freedom to use and enjoy the public place in question. Hence whether behaviour is to be stigmatised as offensive is very much a question of fact and degree. The time, place and circumstances in which the behaviour occurred are invariably of central importance.

[23] The Court must make an evaluative assessment of all the circumstances of the case under consideration. In doing so the relevant behaviour is to be assessed objectively. The test is whether the behaviour was "such as (to be) calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person", a formulation taken from Australian cases and endorsed as helpful by Tompkins J in *Ceramalus v Police* [\[1991\] NZHC 1569](#); [\(1991\) 7 CRNZ 678](#) at p 683. Conduct which constitutes an affront to good manners or good taste may not be offensive. The standard to be applied is not one of undue sensitivity, nor high tolerance, but rather the resilience of a reasonable person is to be applied.

[24] The existence of an objective test does not require that the prosecution must call a witness, or witnesses, who suffered offence, although it is commonplace to do so. Rather it is the tendency of the conduct, its likely impact upon hypothetical reasonable members of the community, which the Judge must assess. Finally, and importantly, the New Zealand authorities have long recognised the existence of the safeguard that the behaviour in question must be sufficiently serious to warrant the intervention of the criminal law.

[14] The Supreme Court declined Mr Rowe's application for leave to appeal: [\[2005\] NZSC 40](#); [\[2005\] 2 NZLR 844](#).

[15] Accordingly there is no basis for further examination of the requirements of the offence. Leave to appeal on this ground is declined.

The contempt

- [16] The question posed by the applicant is whether intent is necessary for conviction on a charge of contempt of court.
- [17] However, as Mr Powell noted, [s 206](#) of the [Summary Proceedings Act](#) addresses the issue of intent. That section provides:

Contempt of Court

If any person –

- (a) Wilfully insults a District Court Judge ... during his sitting or attendance in Court or in going to or returning from the Court; or
- (b) Wilfully interrupts the proceedings of a Court or otherwise misbehaves in Court; or
- (c) Wilfully and without lawful excuse disobeys any order or direction of the Court in the course of the hearing of any proceedings –

any constable or officer of the Court ... may, by order of the District Court Judge ..., take the offender into custody and detain him until the rising of the Court and the District Court Judge ... may, if he thinks fit, by warrant under his hand, order that the offender be committed to prison for any period not exceeding 3 months, or order the offender to pay a fine not exceeding \$1,000 for each offence.

- [18] Further, Mr Powell submitted that there was no issue as to intent on the facts. He referred to Judge MacAskill's warning and said that the applicant had appeared partially clothed in the face of this warning. This indicated that the necessary intent was present.
- [19] The applicant disputed that he had received notice of Judge MacAskill's warning prior to his appearance in court on 3 July 2006. He advised us in his oral submissions that he did not receive a transcript of the interim judgment attaching the note until 12 July 2006. The applicant wrote to the District Court at Christchurch on 14 February 2007 seeking confirmation that this was the position. A Deputy Registrar responded as follows:

[The applicant] attended the District Court office on 14/2/07 with this letter. I confirmed with Judge MacAskill that the interim decision given on 30/6/06 was given in open Court up till para 11. As is noted in para 12 the remaining three paras were not given in open Court but in chambers. [The applicant] was given a copy of this decision shortly afterwards.

- [20] The applicant said that he had not offended wilfully, and had attended court dressed as he had been on earlier occasions. He said that the Judge did not see his buttocks or genitals himself but relied on hearsay evidence. The applicant said he intended no insult towards the Court and said that he had indicated to the Court that he would modify his dress for future Court appearances.
- [21] None of this raises a question of law of the type for which special leave would be granted under [s 114\(3\)](#). Rather, it raises the type of issue that could be dealt with on a general appeal. Accordingly, leave is refused on this ground also.
- [22] However, we should say that while there may be some doubt as to whether the applicant did receive Judge MacAskill's warning before his court appearance on 3 July, Judge Erber did not rely on the giving of that warning in making his finding of contempt.
- [23] More importantly, even without the warning, we consider that the applicant's conduct in appearing in court with his buttocks and genitals exposed, when he was on trial for that very behaviour, supports an inference that he had the necessary intention. Judge MacAskill made it clear in his interim decision on 30 June 2006 (the part delivered in open court) that the applicant's state of undress breached community standards (at [8]). As John Hansen J noted (at [22]), the applicant carried a pair of trousers with him, to put on if people were upset by his lack of clothing. He had a spare pair of trousers with

him in Court on 3 July. All this indicates that the applicant was well aware when he went to Court on 3 July that his state of undress would be regarded by many as offensive.

Decision

[24] Leave to appeal is declined.

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