

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.131/95

BETWEEN

C

Appellant

A N D

THE POLICE

The Respondent

Hearing: 19 July, 17, 18, 19 October 1995

Counsel: Appellant in person
LB Cordwell for Respondent

Judgment: 27 October 1995

RESERVED JUDGMENT OF MORRIS J

Solicitors:
Appellant, 3 Caram Place, Birkenhead;
Crown Solicitor, Auckland, for Respondent.

The appellant was charged that on 21st day of February 1995 he behaved in a disorderly manner in a public place namely Westglade Crescent, Birkdale, contrary to the provisions of s 4(1)(a) of the Summary Offences Act 1981. The appellant denied the charge at a hearing in the District Court at North Shore before His Honour Judge J Cadenhead which occupied the 3rd and 4th May this year. In a reserved decision delivered on 5 May Judge Cadenhead convicted the appellant and fined him \$200 plus costs. The appellant now appeals that conviction and fine.

The grounds of appeal as set out in the appellant's Notice of Appeal are as follows:

1. A defence witness changed her story on the stand, and evidence emerged of collusion between her and two prosecution witnesses;
2. A burden of proof on the prosecution required by precedent was not fulfilled and contrary evidence was not considered;
3. Submissions on certain defence evidence were not allowed leaving that evidence unexplained and subsequently misinterpreted;
4. Important submissions were not allowed;
5. Important evidence was ignored;
6. The practical effect of Judge Cadenhead's ruling is to overturn a 1991 High Court Ruling which is an unconstitutional reversal of judicial process;
7. The verdict introduces an unconstitutional uncertainty into the enactment in question;
8. Evidence of Parliament's intent was not taken into account;

The appellant indicated the possibility of his raising further grounds of appeal after consideration of the written judgment.

During the hearing of this appeal (which extended over 3 full days) the appellant filed extensive written submissions (initially 119 pages but subsequently enlarged) and addressed me at length. Ultimately, it appeared to me he advanced his appeal on the following grounds:

1. The human body or any part of it is not to be regarded as a criminal object and accordingly the charge was groundless and should never have been brought;
2. The section of the Summary Proceedings Act under which the charge is brought is so vague as to be unconstitutional;
3. None of the appellant's actions could be described as disorderly and in any event should not have incurred the sanction of the criminal law;
4. Whatever may have been his conduct, it did not cause and was not likely to have caused a disturbance or an annoyance;
5. (Mens rea) on his part had not been established;
6. He was entitled to do whatever it was established he did by virtue of s 14 of the Bill of Rights Act which gave him freedom of expression;
7. The District Court Judge had acted unfairly on a number of matters including cutting short his submissions and refusing him leave to call certain evidence;
8. Police policy was inconsistent in interpreting the section.

The range of issues raised by the appellant in his Notice of Appeal and in his submissions before me require me to detail the facts established by the evidence heard by Judge Cadenhead. Few of these were in issue and can be summarised as follows.

The appellant is a 47 year old He is a naturist. He lives in
 This is a relatively quiet and secluded street.
He owns the property at No and also an adjacent property at No
 I am told there are approximately 34 houses in these two

streets. A number of such homes are down rights-of-way. The properties owned by the appellant are visible from other houses. There is a good deal of bush in and around the area.

On 21 February 1995 the appellant spent the day naked on nearby Fitzpatrick Bay Beach. Sometime after 6 pm he left to walk home. For part of the way he wore clothes but reverted to nakedness when about 100 metres from his house. He carried his clothes and beach towel in a bag slung over his shoulder. The route which he took on 21 February was one he regularly followed. In walking naked on this last stage of his journey he was following what he said was his regular practice.

Mr Fieldson lives at [redacted]. At 6.45 pm on 21 February he was sitting in his lounge. He observed the appellant, his neighbour, walking down Westglade Crescent as I have described i.e. totally naked and carrying a bag. He found such actions offensive. He was concerned for any children playing on the street. He complained to the police.

His partner, Mrs Fraser, also noted the appellant's actions. She was "shocked" he was beyond the confines of his own property. Her young son was playing outdoors. The appellant would have been visible to him. Both Mr Fieldson and Mrs Fraser confirmed there was nothing apart from the appellant's nudity which upset them. In particular there was no suggestion of any obscene actions on the part of the appellant or suggestive comments by him.

Mrs Fraser acknowledged she had seen the appellant naked on his property prior to this occasion and occasionally he has come on to her property naked. Reluctantly she had put up with such behaviour. Likewise Mr Fieldson accepted he had seen the appellant naked about his own property.

The appellant gave evidence. He did not dispute he had walked naked as described. He called as witnesses a neighbour, Mrs Foxell, and a Mrs Poynton. The former testified she objected to the appellant walking in the street naked. She did not see him doing so on 21 February but had noticed him on other occasions. His presence in the street naked offended her.

Mrs Poynton had lived in this road for approximately 9 years. She said the appellant was a man of the highest character. She was aware he was a naturist and she did not feel threatened or offended by his nakedness.

The appellant said he was doing no more than exercising a right which he considered he was entitled to exercise namely to walk naked down this street with no intention of upsetting anyone. He claimed to be doing no more than he had done for many years and such action had never given rise to complaints. He denied his actions were disorderly or that they caused or were likely to have caused disturbance or annoyance to anyone.

The appellant was convicted under s 4(1)(a) of the Summary Proceedings Act 1981 which provides:

"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 section, along with s 3 of the Act, is the successor to s 3D of the Police Offences Act 1927. For the purposes of this appeal nothing turns on the distinction between "offensive" and "disorderly" behaviour under s 4.

The Court of Appeal in *Melser v. Police* [1967] NZLR 437 discussed what had to be proved to justify a conviction on a charge of disorderly behaviour. under s 3D of the Police Offences Act. North P said at p 443:

"I agree that a person may be guilty of disorderly conduct which does not reach the stage that it is calculated to provoke a breach of the peace, but I am of the opinion that not only must the behaviour seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must at least be of a character which is likely to cause annoyance to others who are present."

Turner J went on to say further at p 444:

"Disorderly conduct is conduct which is disorderly; it 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."

These tests have been applied ever since. *Messiter v. Police* [1980] 1 NZLR 586, *Hakiwai v. Police* (1988) 4 CRNZ 188 are but examples.

As has been repeatedly stressed, the judgment of the conduct in question is in every case a matter of degree depending upon the relevant time, place and circumstances; *Wainwright v. Police* [1968] NZLR 101; *Kinney v. Police* [1971] NZLR 924 and *Ceramalus v. Police* (1991) 7 CRNZ 678.

In the present case the District Court Judge directed himself correctly in determining the test to be applied in judging whether or not the appellant's conduct was disorderly by adopting the tests discussed in *Melser* (supra) as discussed in *Hakiwai* (supra).

The appellant has submitted there was no evidence before the District Court Judge of any danger arising from his actions or any likelihood of any danger arising from his actions. He further submitted it was necessary for the prosecution to establish a real likelihood of disorderly behaviour resulting from his actions before a conviction could be entered. Such a submission in my view is not supported by the authorities. It is sufficient if the conduct complained of is disorderly i.e. conduct which is likely to meet with the disapproval of well conducted and reasonable men and women. If evidence is led to establish persons of such a class were in fact annoyed or insulted by it, the Court can, of course, take this into account in coming to its conclusion.

In the present case, Mr Fieldson and Mrs Fraser were annoyed by the appellant's actions on 21 February. The appellant has attacked the genuineness and integrity of these witnesses. He made such allegations before the District Court Judge. Before me he submitted they should not be considered as well conducted and reasonable people. He also submitted before me their claims to have been shocked were not worthy of belief. The short answer to such submissions is Judge Cadenhead had the opportunity to

observe these witnesses and form his own assessment of them. He is a very experienced District Court Judge. He accepted their evidence. He considered them to be reasonable people holding views representative of right-thinking members of the community. Nothing has been put before me on this appeal which would justify me in rejecting his findings. It follows therefore there was evidence before Judge Cadenhead to justify the findings he reached, namely that reasonable right-thinking persons had been annoyed by what they had observed. Having made such findings it was then a question for him to determine whether the appellant's actions on 21 February were sufficiently serious to warrant the interference of the criminal law.

In support of his submissions the appellant relied strongly on *C v. Police* (supra) in which he was the appellant. He had been convicted of behaving in an offensive manner on the same Fitzpatrick Bay Beach. It was established he had walked naked past a group of primary school children and teachers before proceeding to sunbathe naked near to them. It was also established it was not uncommon for persons to sunbathe nude in this area. He appealed against his conviction. The appeal was successful. In allowing the appeal, Tompkins J considered the evidence before the District Court Judge did not justify a finding the appellant's conduct was such as would arouse feelings of anger, disgust or outrage in the average reasonable person, and accordingly the appellant's conduct on that particular occasion did not justify the interference of the criminal law.

Contrary to the appellant's thinking, it does not follow he can now lie naked on Fitzpatrick Bay Beach with total immunity from the law. More specifically it certainly does not follow the decision reached on the particular facts of that case justifies him in walking naked where he chooses. If he does so previous decisions of this Court and the Court of Appeal make it very plain his actions must be judged having regard to the existing circumstances and the reactions which his actions arouse in the particular place and at the particular time with which the Court is concerned.

It was accepted by counsel for the Crown no evidence before the District Court Judge suggested the appellant's nakedness on this occasion would produce disorder in the street on either that day or any other day. The appellant stressed this concession. In my view it avails him not particularly in the light of *Melser* (supra) and in view of the evidence accepted by Judge

Cadenhead that responsible persons were in fact offended on this particular day.

On the basis of the material before him, was Judge Cadenhead entitled to conclude the appellant's behaviour warranted the interference of the criminal law? It was his opinion a naked person walking along the road has a great capacity to produce disorder in the general community. I have no doubt this is correct. In coming to the conclusion he did, the District Court Judge was entitled to take into account his own experience and understanding of the commonly held views of right-thinking persons in the community. He concluded such persons would have feelings of anger, resentment, disgust and outrage in seeing a naked adult male walking down a public street in daylight hours in full view of both adults and younger children. This was the view of at least three of the witnesses who gave evidence before him.

Walking naked down a suburban street is a pasttime rarely indulged in by adult male New Zealanders. Scantily clad, yes. Naked, no. The maxim "*Si fueris Romae, Romano vivito more; si fueris alibi, vivito sicut ibi*" is perhaps apt. Applied to this case it simply means "*when in Auckland suburbia, live in a suburban style. If elsewhere e.g. a beach, live as they live on that beach but take care*". (The underlining is my addition).

Nothing before me indicates the District Court Judge was wrong in his assessment, namely "that society in 1995 is not so permissive that objectively viewed such behaviour should be tolerated". Having reached such a conclusion it was for him to determine, having regard to all the material before him and particularly specific activities of the appellant, whether the sanctions of the criminal law should be brought into effect. In my view, he was correct in reaching the decision he did, and certainly nothing has been put before me to suggest he is wrong in principle in so reaching that conclusion.

The appellant raised a number of grounds upon which he suggested the hearing had been unfair. It was submitted he had not been allowed to make a number of submissions to the District Court Judge. Having read the material put before me and before the District Court Judge I can see no validity in this submission. It seems to me the learned District Court Judge gave great leniency to the appellant to make any submissions he felt appropriate but felt,

as I did during the hearing of this appeal, he had to draw the line at various stages.

It was also submitted the District Court Judge had failed to permit the appellant to call the evidence of a Sergeant in respect of whom a subpoena had been issued. I am unclear exactly as to what evidence the Sergeant could give although I understand the appellant had hoped to establish through the Sergeant the witnesses had not registered annoyance at his behaviour to the same extent to the Sergeant as they did to the Court.

The record of the proceedings makes no reference to any such questions being put to any of these witnesses. I doubt therefore whether the evidence of the Sergeant would have been admissible in this regard. I see no basis for allowing the appeal on this ground.

It was further submitted the Sergeant failed to give to the appellant his rights under the Bill of Rights Act. As the Sergeant was not called as a witness I cannot see the relevance of this submission, particularly as there was no substantive issue as to the actions of the appellant.

Any freedom of expression guaranteed by virtue of the Bill of Rights Act cannot stand against an express prohibition contained in a Statute. The prohibitions contained in the Summary Offences Act 1981 are perfectly plain. There is no basis to suggest they are so vague as to be unconstitutional. The parameters have been determined by a long line of authorities. Likewise, it cannot be suggested the actions of the appellant in walking naked down this street lacked mens rea. Whatever the views of a particular police officer may or may not be as to the meaning or intention of the section of the legislation, they can have no relevance and no bearing in this Court. Furthermore it is the obligation of this Court to determine and rule upon statutes passed by Parliament without becoming involved in philosophical decisions as to the subject matter of such statutes.

I find no ground has been established for setting aside the conviction and the appeal against conviction is accordingly dismissed.

The appellant submitted the fine imposed upon him was excessive. The maximum fine permitted under the section is \$500. It cannot be said the

penalty was manifestly excessive. Accordingly the appeal against penalty is dismissed.

The Crown seeks costs. I am advised the fee payable to the Crown Solicitor in accordance with the Crown Solicitors Regulations will be in the vicinity of \$3300. Furthermore, Court costs covering hearings and incidentals must be substantial. I have been referred to the judgment of Holland J in *McCullogh v. Ministry of Transport* (1960) 6 CRNZ 441.

The appellant, after a two-day hearing, was convicted in the District Court. He chose to pursue his rights of appeal. He filed extensive written submissions. At an early stage of the hearing I indicated to him a number of these submissions were in my view irrelevant and he would be well advised to consider his position, particularly as the costs payable to Crown counsel by the respondent were assessed at a rate of approximately \$550 per half day. I repeated such advice on several occasions. Despite these warnings he elected to continue. He is a man of property. He is in gainful employment. He views this appeal as a matter of principle. He is anxious to avoid the entry of a conviction. I can understand his feelings. Clearly, and I mean no disrespect to him, he is something of a crusader. He is entitled to his beliefs but I do not see why the New Zealand taxpayer should have to pay the costs for one man's unsuccessful crusade particularly when the crusader is well able to pay. In all the circumstances it is just and proper the appellant pay costs.

The appeal against conviction and sentenced is accordingly dismissed with costs of \$2500 to the respondent.

