WHITE V NEW ZEALAND POLICE HC CHCH CRI-2006-409-000119 [2006] NZHC 1167 (3 October 2006)

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI-2006-409-000119

GRAEME RICHARD WHITE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 14 September 2006

Appearances: Appellant Appears In Person
C E Butchard for Respondent

Judgment: 3 October 2006

JUDGMENT OF HON. JUSTICE JOHN HANSEN

The Appeal is dismissed.

REASONS

[1] On 3 July last, Judge Erber convicted the appellant of three charges of behaving in an offensive manner. The first of these occurred on 9 December 2005 in Boundary Road, and the other two on 5 January 2006, once in Ellesmere Junction Road, and once on Leeston Road. He was convicted and ordered to come up for sentence within 12 months if called upon to do so, and ordered to pay costs of $130, and witnesses' expenses of $75.

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[2] Because it was alleged that witnesses in Court had seen the defendant's buttocks during the proceedings, Judge Erber stood the matter down to allow Mr White to see the Duty Solicitor. He was charged with contempt of Court. The judge found him guilty of contempt and sentenced him to 14 days' imprisonment.

[3] The appellant appeals both the contempt of Court and his conviction for offensive behaviour.

Background

[4] Three lay witnesses and two police officers gave evidence for the prosecution. The appellant gave evidence in his own defence.

[5] Constable Craythorne gave evidence that on 5 January he found the appellant riding a bicycle, wearing a top made of a sack, and nothing on his bottom half. He put to the appellant that a person could find his behaviour offensive, to which the appellant agreed.

[6] A Mrs Sheffield was driving home at about 5.50 on 5 January when she observed the appellant's buttocks as he was cycling. She said it was inappropriate, that she did not want children to see that sort of thing.

[7] A Mr Morrish gave evidence of seeing the appellant cycling naked, apart fro m a helmet, on 9 December 2005 at about 6.45 a.m. He said he was shocked by this behaviour.

[8] On 5 January 2006, a Mr Cullen was helping Mr Morrish and observed the appellant cycling without any pants on at about 1 p.m. that day. He was concerned about the behaviour for his daughter, young female horseriders and children who may be waiting for a bus in the area. He said he was disgusted and thought it was obscene.

[9] Constable Williamson, the officer in charge, said that at 1.40 on 5 January he found the appellant riding his bike, wearing a sack shirt and a helmet. He was not wearing any pants, but was wearing a small leather bag around his waist, which gaped to reveal his genitals on a side view. The appellant was arrested, and admitted he often rode his bike without wearing pants. He said he carried pants because some people asked him to cover himself up, and for those people who might be offended by his dress.

[10] The appellant said on 9 December he would have been wearing what he

described as a `sporran'. It appears in the photographs to be a leather bag on a strap, similar to those once used by bus conductors. He stated that if the witnesses had requested, he would have put clothes on in relation to all of the incidents. He explained his choice of dress was to express solidarity with unborn children and his concern about the sex industry. He produced character evidence in his support. At paragraph 10 of the decision, the Judge characterised the tenor of the appellant's evidence that "he was not doing any harm by what he was doing, and that he was ent it led to make his protest in this way".

The District Court Decision

[11] Judge Erber adopted the definition of "offensive" endorsed by the Court of Appeal in R v Rowe [2005] 2 NZLR 833 as being conduct which wounds the feelings, arouses anger or resentment or disgust or outrage in the mind of a reasonable person.

[12] Judge Erber accepted the evidence that the appellant rode a bicycle with the lower half of his body exposed and that his acts were deliberate. The only issue was whether such actions were offensive. The Judge accepted that the three lay witnesses were reasonable people who had a reasonable degree of tolerance of others' behaviour. He accepted that they were offended, although the appellant himself did not find such conduct offensive. Consequently, the Judge found the appellant guilty on all three counts.

The Contempt of Court

[13] During the sentencing process, the Judge was informed by the sergeant prosecuting the case that two witnesses had seen the defendant's buttocks during the evidence hearing. Apparently he was dressed in a similar manner to when he was observed riding his bicycle on the three discrete occasions. The Judge stood the appellant down in custody to see the duty solicitor, and charged him with contempt of Court. It appears there had been some discussion about the appellant's clothing at the beginning of the evidence hearing.

[14] When the sentencing recommenced at 2.15, the appellant was represented by Mr McMenamin, the duty solicitor. He apologised to the Court, then Judge Erber laid out the background to the charge. At the beginning of the hearing, the sergeant advised the Judge of his suspicions that the appellant's genitals or backside could be seen. The Judge could not confirm that observation from his position at the bench, but warned the appellant that he would regard it seriously if this was the case. Given this warning, the Judge considered that this was a serious assault on the decorum of the Court, and sentenced the appellant to 14 days' imprisonment.

Submissions

[15] The appellant appeals the offensive behaviour on the grounds that the photographs admitted as an exhibit by Sergeant Williamson were not actually taken by the Sergeant, and that the offensive behaviour was not proved. He appeals the contempt of Court on the grounds that the charge was not proved, and that he was not able to question the witnesses who complained about his dress in Court. He further states that Judge Erber himself was not offended with his dress, and did not allow him any chance to change his dress before convicting him. He further submitted that he did not consider the behaviour offensive, and had no intention to offend. He said if he did offend anybody, he always had clothing available to cover the lower part of his body.

[16] The Crown submitted that the Judge had correctly identified the three elements required to secure a conviction, being the appellant did an act that was intent ional and its effect was offensive. Ms Butchard submitted that it was irrelevant to the proof of charges whether or not the police officer who produced the photos in fact took them. She further submitted that the evidence satisfied the necessary elements beyond reasonable doubt.

[17] In relation to the contempt of Court, Ms Butchard submitted the Judge fo llo wed the steps seen as desirable in R v Hill (1986) CLR 457 and made a finding that there had been a contempt of Court. She submitted that Judge Erber immediately detained the appellant and through discussion it was clear the appellant would have been left in no doubt as to what the contempt was stated to have been. The Judge advised the appellant that he may wish to see a duty solicitor and granted an adjournment, and then entertained counsel's submissions, which indicated the appellant wished to apologise. At 2:15 pm the appellant apologised and counsel made submissions. Judge Erber found the appellant in contempt and sentenced him to 14 days imprisonment. Ms Butchard submitted it was implicit in the sentencing notes of Judge Erber on the contempt that the appellant chose not to defend the offence of contempt of Court. In Court, the appellant had stated to the Court that he realised now that due to his dress there was the possibility that some of the Judges would take it seriously as an insult, thereby effectively admitting his offence.

[18] Ms Butchard further submitted imprisonment was the correct response given that the appellant had been warned at the commencement of the hearing by Judge Erber. It is also apparent on an earlier occasion Judge MacAskill had warned the appellant to dress to the standard ordinarily expected of persons appearing before the Court, which was nothing more or less than reasonable conventional clothing. Judge MacAskill stated to the appellant that if he did not, the defendant would risk being held in contempt of Court.

Discussion

[19] The learned District Court Judge correctly identified the elements of the charge as set out in Rowe. In that decision, the Court of Appeal applied Melser v Police [1967] NZLR 437 (SC and CA), and approved Messiter v Police [1980] 1 NZLR 586, and Ceramalus v Police (1991) 7 CRNZ 678. The Court found that the

test for the offence of offensive behaviour in public was 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. The standard to be applied was not one of undue sensibility, nor high tolerance, but rather the resilience of a reasonable person, and the behaviour had to be sufficiently serious to warrant the intervention of the criminal law.

[20] In this case it is clear that the appellant intentionally dressed in this manner and rode his cycle while so dressed. The only question is whether the test above has been met.

[21] The appellant seems to think because he did not intend to offend, he cannot be guilty. That is to misunderstand the test. In this case, the Judge had evidence fro m three lay persons who he clearly found to be reasonable persons. He applied the correct test from Rowe and was satisfied on the evidence that the appellant's behaviour was such that it met the requisite test.

[22] I concur. Indeed, it appears the appellant was well aware his behaviour could offend, because on the basis of his own evidence and submissions he carried trousers so as to dress properly if persons were upset. There is nothing to suggest that the three lay witnesses were other than reasonable members of society, without undue sensibilit y. There is nothing to suggest they did not have the resilience of a reasonable person. Furthermore, I agree with the learned District Court Judge that the behaviour was sufficiently serious to warrant the intervention of the criminal law.

[23] In relation to the contempt of Court, as the Crown submitted it is clear that the learned District Court Judge approached the matter as required by Hill. It is also apparent from the sentencing notes that the appellant chose not to defend the offence of contempt of Court, but rather apologised to the Court for his behaviour.

[24] Given the offences for which the appellant was before the Court, the warning given at the commencement of the proceedings, and the earlier warning given by Judge MacAskill, no issue can be taken by the imposition of the short term of imprisonment. The appellant intentionally chose to appear in Court in that way, and I am satisfied he was well aware of the possible consequences of so acting.

[25] It follows that the appeal in relation to the charges of both offensive behaviour and contempt of Court are dismissed.

Solicitors:
G R White,
Christchurch, Appellant

Crown Solicitor, Christchurch
