PARTIES:	ROSS, Amyas William Keith v MUNNS, Michael Erik
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING FEDERAL JURISDICTION
FILE NO:	JA43 of 1997
DELIVERED:	5 January 1998
HEARING DATES:	14 August 1997
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Criminal law and procedure - Appeal and new trial and inquiry after conviction - Appeal against conviction - Offensive behaviour - Evidence of prosecution witnesses preferred over evidence of appellant - Magistrate directed his mind to the proper question of whether Crown had discharged its onus to prove its case - Open to Magistrate to make findings on evidence before him -

Public Order (Protection of Persons and Property) Act 1971 (Cth), s12(2)
Devries & Anor v Australian National Railways Commission & Anor (1993) 177 CLR 472 at 479, applied.

Appeal against conviction - Offensive behaviour - Whether words or expressions found to have been used must be strictly in accordance with particulars - Purpose of particulars - Words specified in particulars not vital to the charge - No unfairness or prejudice demonstrated by appellant - Correct application of an objective test based upon the words he found had been used and the circumstances at the time -

Justices Act 1928 (NT), s22A(1) & (3)

Hughes v Samuels Supreme Court of South Australia, unreported Mitchell J. 15.10.97 No 2447/79, considered.

Appeal against conviction - Offensive behaviour - What constitutes offensive behaviour - Whether must be an intent to provoke a breach of the peace - Court to determine for itself whether behaviour offensive in law - Court to consider circumstances surrounding uttering of words and contemporary standards of the reasonable person - Persons who heard words, and place of speaking, relevant -

Public Order Act 1936 (Imp), s5
Densley v Mertin [1943] SASR 144 at 145 per Napier CJ., discussed.
Worcester v Smith [1951] VLR 316 per O'Bryan J., discussed.
Ball v McIntyre & Anor (1966) 9 FLR 237 at 241 per Kerr J., discussed.
Samuels v Hall [1969] SASR 310 at 328 per Mitchell J., referred to.
R v Smith [1974] 2 NSWLR 586 at 588, referred to.
Saunders v Herold (1991) 105 FLR 1 at 5 per Higgins J., referred to.
Stone v Ford (1992) 65 A Crim R 459 per Bollen J., referred to.
Brutus v Cozens (1972) 2 All ER 1297, distinguished.

Appeal against conviction - Offensive behaviour - Common law rules apply - Intention to be offensive an element of the offence - Open to Magistrate to infer from facts as found that appellant intended to be offensive -

Crimes Act 1914 (Cth), s4.
He Kaw Teh v R (1985) 157 CLR 523 at 528 per Gibbs CJ., referring to *Sherras v De Rutzen* [1895] 1 QB 918 at 921, applied.
Stone v Ford (1992) 65 A Crim R 459, applied.

Appeal against conviction - Ex tempore reasons not to be scrutinised with a fine tooth comb, as if represented careful and considered reasons prepared after reserving judgment - Give fair reading to words used -

R v Davey (1980) 50 FLR 57, applied.
R v Raggett & Ors (1990) 101 FLR 323, applied.

REPRESENTATION:

Counsel:

Appellant:	Mr P Loftus
Respondent:	Mr J Lawrence

Solicitors:

Appellant:	Withnall Cavenagh Maley
Respondent:	Australian Government Solicitor

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA43 of 1997

BETWEEN:

AMYAS WILLIAM KEITH ROSS
Appellant

AND:

MICHAEL ERIK MUNNS
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 5 January 1998)

The appellant was convicted after trial in the Court of Summary Jurisdiction sitting at Darwin on 27 February 1997 for that on 26 April 1996 he did in the international arrivals hall at Darwin airport behave in an offensive manner, contrary to s12(2) of the *Public Order (Protection of Persons and Property) Act* 1971 (Cwth). The particulars were that he said: "Would you like to have a look at my underpants and see my dick and see how long or short it is?" No further particulars of the alleged offensive behaviour nor the circumstances in which it is alleged to have taken place, nor the person or persons to whom or in whose presence the words are alleged to have been

spoken were provided, but no objection was raised or further particulars sought prior to trial.

The facts found by the learned Magistrate were upon contested evidence described as being "a giant divide". The primary division concerned whether one of three prosecution witnesses, Mr Kiers, was present when the incident giving rise to the charge took place. All prosecution witnesses asserted that he was there, and the applicant said he was not. His Worship found that he was. His Worship's reasoning in coming to this decision was criticised in that he raised a speculative basis as to why the prosecution witnesses Ms Soong and Mr Kajetanski could have fabricated the evidence about Mr Kiers presence, but rejected it. His Worship said that he bore in mind the time at which the event occurred (4am in the morning), the period thereafter before the appellant was seriously called upon to recall it, and that the appellant had had a number of complaints about prior conduct of quarantine and customs officers, and found that he was wrong in his recollection:

> "It seems to me plain that Mr Ross plainly, honestly and simply remembers events happening which involved Soong and Kajetanski and not Kiers, and that Kajetanski, Soong and Kiers plainly, simply and honestly remember events that involved all three of them."

and added:

> "I have no doubt at all that he (the appellant) is wrong in his memory, that Kiers was there, and that being a pretty substantial item in his account, I treat with extreme care his recollection about the more central details of this matter, such as who did what and, in particular, what he said, which words he uttered".

A number of grounds of appeal were directed to attacking his Worship's basis for not accepting the evidence of Mr Ross, or at least not finding that it cast doubt upon the evidence of the prosecution witnesses. It is obvious that a trier of fact may reject the evidence of a witness and having done so, look at the remaining evidence and come to a conclusion regarding that witness. His Worship, having seen and heard the witnesses was in the best position to assess their credibility. Preferring the evidence of the prosecution witnesses to that of Mr Ross was open to his Worship, and having done so he did not err in assigning reasons, contrary to the evidence of Mr Ross as to why his recollection of events may not have been as accurate as that of the other witnesses. He did not accept the submission that the other two prosecution witnesses had concocted a story about Mr Kiers being there so as to throw doubt upon any other evidence given by the appellant, and nor did he suggest that the appellant had denied Mr Kiers was present so as to throw doubt on the other evidence of the prosecution witnesses. In so far as his Worship considered whether the prosecution witnesses had reasons to lie, it is not shown that in rejecting submissions in that regard he was thereby led to find the appellant guilty; he directed his mind to the proper question, that is, whether or not the Crown had discharged the onus to prove its case.

Since amongst the 15 grounds of appeal are those alleging that the conviction was contrary to the evidence and weight of evidence and in all the circumstances unsafe and unsatisfactory, I have read it for myself. There is

nothing which raises a doubt in my mind as to the correctness of his Worship's findings about the presence of Mr Kiers, and it follows that he was entitled to treat the other evidence of the appellant with extreme care where it conflicted with that of the prosecution witnesses. I bear in mind what the High Court said in *Devries & Anor v Australian National Railways Commission & Anor* (1993) 177 CLR 472 at p479 concerning the role of an appellate court where there is a challenge to findings of fact involving the tribunal's determination as to the evidence worthy of belief or confidence.

In light of his Worship's findings as to the credibility of Mr Ross, after seeing and hearing him in the witness box, it emerges from the preferred evidence, and his Worship's further findings, that the sequence of events leading to the alleged offending was as follows. Mr Ross had departed from Manila about 20 hours prior to his arrival in Darwin having arisen early in the morning. He travelled via Kota Kinabalu and Kuala Lumpur where he had spent quite a few hours prior to the final leg of the flight to Darwin. It had been, according to Mr Ross, a long day and night but not unusual in terms of his frequent travel patterns. He said he would not say that he was refreshed nor worn down, and given what he related as being his experiences at Darwin airport on previous occasions, he was wondering "what they were going to do this time". He was not expecting unpleasantness, but hoping it would not happen, although mentally prepared for it. It had crossed his mind that there may be some unpleasantness. Upon passing through immigration control, having the usual passenger's declaration examined and marked he went to the baggage area where Mr Kiers, a customs officer, undertaking the duties as a

baggage officer, was handed the declaration. Mr Kiers noted that the marking upon the declaration indicated that the appellant had come from a country with disease, in this case, foot and mouth disease in the Philippines. Mr Kiers asked the appellant where he had been and the appellant told him, whereupon Mr Kiers informed Ms Soong, a quarantine officer, of that and she approached the appellant at the baggage bench. The appellant confirmed that he had been in the Philippines, and when asked if he had any food or if he had been on any farm replied: "Its all written there", indicating the declaration. Ms Soong asked if she could see the shoes that he had worn in the Philippines and he then asked why. Ms Soong replied that she had to look at them and again asked to see them. The appellant became irritated.

The evidence of the prosecution witnesses diverges as to what then occurred and as to the manner in which the appellant removed his shoes and put them on the bench, but those differences matter little. It is alleged that he committed the offence at that time. According to Ms Soong he said: "You always do this to me" and then spoke the words of which complaint is made. Mr Kiers evidence was that he said "Would you like to look at my underpants and see my dick while you're there"; according to Mr Kajetanski, a supervising customs officer whose attention was drawn to the appellant and who approached him and Ms Soong, the appellant said: "You always do this to me. You haven't heard the last of this. Would you like to see my underpants, play with my dick and see how short or long it is". Mr Kajetanski said he intervened, the shoes were inspected and Mr Ross proceeded on his way.

The appellant's evidence was directed to what he regarded as rudeness on the part of some of the prosecution witnesses. In particular, he suggested that Mr Kajetanski had stood over him and "sniffed" as he removed his shoes causing the appellant to enquire as to whether he would like to sniff his underpants. Mr Kajetanski denied that allegation. The reference by the appellant to his underpants was his only concession to the words alleged against him.

Although Mr Ross gave evidence that he had had occasion to make complaints concerning his treatment upon arrival at the Darwin International Airport previously, there was no evidence that any of the prosecution witnesses had been involved, and none of them were shown to have known him prior to that morning. The appellant asked for their identifying numbers as he left on this occasion but there was no foundation for a suggestion that the prosecution witnesses had put their heads together and made up the story so as to get back at Mr Ross for his past complaints or that they were "getting in first", anticipating that he would complain again, nor did it raise doubt in his mind as to their credibility. It was also suggested that the prosecution witnesses were not independent, and his Worship accepted that suggestion, presumably because of their like employment and duties, but did not think that their evidence was affected by that factor.

As to the words allegedly used, his Worship found it a little difficult to accept Ms Soong's evidence as to the exact words because the syntax was such

as he would not expect from a person such as Mr Ross, a person who appeared to be "more eloquent than most Australian speakers". He noted the difference in the versions given by all witnesses, but expressed himself satisfied beyond reasonable doubt that the appellant:

- invited Ms Soong to have a look at his underpants;
- was not then speaking to any other person;
- made a reference to his "dick";
- made a reference to her seeing his "dick" and seeing the length (of it).

The transcript of his Worship's reasons then show that he immediately added: "I am not persuaded exactly what words he used in that respect". Whether that remark was directed to the whole of his findings as to the words spoken and references made, or only the reference to length is unclear, but it matters not.

It was submitted that having found that the appellant did not use the words as precisely set out in the particulars, and noting the discrepancies in the evidence of the other prosecution witnesses, the learned Magistrate could not have been satisfied beyond reasonable doubt what words were used by the appellant. I reject that submission. It was open to his Worship to make the findings upon the evidence before him. Tribunals of fact are constantly faced with conflicting evidence as to what was said on a particular occasion, and just because different versions are given does not mean that all must be rejected. It is legitimate to do what his Worship did, that is, put aside syntactical

problems, allow for errors in recollection and make a finding as to the essence of what words were spoken. If the required standard of proof is applied in making such a finding, then it is available for the tribunal of fact to apply in its further consideration of the issues in the case. It is no less a finding of fact for the purposes of considerations upon appeal.

It was also argued that the words or expressions found to have been used were not strictly in accordance with the particulars and therefore, the prosecution had failed to prove its case. A statement of the matter charged against a person contained in a summons is sufficient if it contains a statement of the specific offence together with such particulars as are necessary for giving reasonable information as to the nature of a charge (*Justices Act* 1928 (NT) s22A(1) and (3)). The particulars are not the statement of the offence and it is the offence which must be proved. The purpose of particulars is to enable the accused to prepare his defence. Here the defence had nothing to do with the particulars, the accused's case being that he did not say the words alleged or anything like them. The words specified in the particulars were not vital to the charge, and the appellant points to no unfairness or prejudice as a consequence of the prosecution witnesses not coming up to proof, or because his Worship proceeded to consider whether the utterance of the words as found could amount to behaving in an offensive manner.

Counsel for the appellant relied upon the unreported decision of Mitchell J. in *Hughes v Samuels*, Supreme Court of South Australia No 2447 of 1979 on 15 October 1979 for the proposition that the prosecution must

prove the words particularised in a complaint. I do not accept that the case was directed to that issue. Her Honour, at p3, was directing her remarks to the fact that the particulars given of the offensive behaviour, as here, were words alone, and accordingly it was not open to look at other circumstances as constituting part of that behaviour. At p4 her Honour said: "The prosecution had to rely solely on the words alleged to have been spoken", meaning that it could not also rely on other alleged offensive acts of the accused, not that it could only rely on the precise words alleged to have been spoken. Indeed, her Honour, having held the Magistrate to have erred in his findings of fact as to the words that were used, went on to consider whether different words admittedly used could have constituted the offence. That is what happened here.

When considering whether Mr Ross had behaved in an offensive manner his Worship restricted his consideration to the words which he found had been spoken to Ms Soong. He did not review the authorities in detail or expressly pose for himself the test for determining whether the uttering of the words amounted to behaving in an offensive manner. He did advert to the proposition that social usage of words changes from age to age and related his perception of change in the law and public perception regarding "sexual reference made by men towards women" with particular reference to the work place. He concluded that:

> "a female officer in the position of Ms Soong is entitled to be offended by one of her customers, as it were, making a reference to his dick and inviting her to have a look at it and see how long or short it may be, or whatever exact phrase was used by Mr Ross. Ms Soong says she felt belittled, insulted and I am not surprised. I think most women would so

> addressed by most men ... In my view these remarks by a man to a women these days in public are offensive. That is, there're objectively offensive."

His Worship correctly applied an objective test based upon the words he found had been used and the circumstances at the time.

Counsel for the appellant referred in submissions to a significant number of cases dealing with the question of what amounted to offensive behaviour. I will not go into them all as many are often referred to in discussion in later authorities. A convenient starting point is *Densley v Mertin,* a decision of Napier CJ. in the Supreme Court of South Australia [1943] SASR 144 where at 145 his Honour said:

> "I think that the meaning of offensive, in this context, is "giving, or of a nature to give offence; displeasing; annoying; insulting," and it seems to me that the word is used objectively, ie. it includes any conduct which is calculated to annoy or give offence to other people, even if that result is not actually intended. But, however that may be, it is a salutary rule in the administration of justice that everyone should be presumed to intend the natural and probable consequences of his acts, and the justices were entitled to find that the appellant intended to cause the annoyance that must, almost necessarily, have been caused."

The words in the quotation marks seem to me to have come from a dictionary definition and are to be found scattered in the dictionaries now commonly in use. To like effect see the references to the meaning of "offensive" by Street CJ. in *R v Smith* [1974] 2 NSWLR 586 at 588. Both the learned Chief Justice and McClemens CJ. at CL referred to what fell from Kerr

J. in *Ball v McIntyre & Anor* (1966) 9 FLR 237. The passage was particularly relied upon by counsel for the appellant here, commencing at p241:

> "What has to be considered in the particular case is whether the conduct in question, even if in some sense hurtful or blameworthy, or improper, is also offensive within the meaning of the section. It is important, I think, for this point to be made because it is sometimes thought that it is sufficient to constitute offensive behaviour if it can be said that conduct is hurtful, blameworthy or improper, and thus may offend."

At p243 his Honour indicated his agreement with O'Bryan J. in *Worcester v Smith* [1951] VLR 316 that offensive behaviour would normally be calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the minds of a reasonable man. In that case O'Bryan J. agreed with counsel's submission that words may be uttered in such a way and in such circumstances as to be offensive, and such circumstances, including the manner and place in which the words were uttered, may turn words into offensive behaviour. In *Saunders v Herold* (1991) 105 FLR 1 at p5 Higgins J. in the Supreme Court of the Australian Capital Territory also adopted what had been said by Kerr J. to support the proposition that what constitutes behaving in an offensive manner depends very much on the circumstances. In *Samuels v Hall* [1969] SASR 310 at p328 Mitchell J. applied what was said in *Worcester v Smith* and *Ball v McIntyre* in her consideration of what behaviour amounted to being offensive. See also *Ellis v Fingleton* (1972) 3 SASR 437 at 441; *Grivelis v Horsnell* (1974) 8 SASR 43 at 45. These and other cases were referred to and applied by Bollen J. in *Stone v Ford* (1992) 65 A Crim R 459.

Counsel directed attention as well to authorities which it was submitted led to the view that conduct worthy of intervention by the criminal law as offensive behaviour must be accompanied by an intent to provoke a breach of the peace. However, those cases, for example, *Brutus v Cozens* (1972) 2 All ER 1297 turned on s5 of the *Public Order Act* 1936 (Imp) which specifically requires such an intention. There is no such element in the Commonwealth statutory formulation of the offence and there is no justification for finding it is required in the Australian context.

The evidence of Ms Soong that she was insulted, and some evidence which fell from the other two prosecution witnesses, was admissible as to their reaction to the words which they heard, but not conclusive as to whether the words were in law offensive. A review of the cases shows that evidence was received in many of them as to the reactions of those who heard the words or viewed the conduct complained of, but it is necessary for the Court to make up its own mind. In so doing, the Court considers the circumstances surrounding the uttering of the words and applies the contemporary standards of the reasonable person. It is relevant to bear in mind the persons who heard the words and the place in which they were spoken.

The principles of common law apply with respect to this offence (*Crimes Act* 1914 (Cwth) s4). In *He Kaw Teh v The Queen* (1985) 157 CLR 523 at

p528 Gibbs CJ. stated the relevant principle as being that set forth in *Sherras v De Rutzen* [1895] 1 QB 918 at 921:

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered."

Mason J. agreed with the reasons of the Chief Justice, and Brennan J. at p566 said that the statement had not been doubted. See also *Jeffs v Graham* (1987) 28 A Crim R 211. In *Stone v Ford* Bollen J. considered the question of intent in the context of an offence such as this and at p464 held that an intention to be offensive was an element of the offence. I agree.

It can not be doubted that the appellant intended to utter the words, but did he intend thereby to behave in an offensive manner, that is, did he intend in the prevailing circumstances to be displeasing, annoying or insulting not just hurtful, blameworthy or improper? His Worship held the words amounted to an insult, and included in the ordinary meaning of such word is to subject a person to an indignity, or offend against modesty. Since the appellant denied using the words, there is no evidence as to his state of mind at the time, but at the conclusion of his reasons (after a brief pause) his Worship said: "I am satisfied beyond a reasonable doubt that anyone uttering those words would be getting a bit of his own back at the Customs". He dismissed the suggestion that the words were uttered as a joke, "... that is, without an intention to

offend ...". In my opinion it was open to his Worship to infer from the facts as found that the appellant intended to be offensive when he uttered the words. I can perceive of no other rational reason.

As indicated earlier, there were a large number of grounds of appeal and the written submissions ranged widely over the evidence and his Worship's reasons, which were delivered ex tempore at the conclusion of the evidence and addresses. Such reasons should not be scrutinised with a fine tooth comb. The correct approach is to give a fair reading to the words used by the Magistrate, and in this case there is nothing to shake my confidence in his findings because of any slip which may appear on the face of the reasons. It is quite inappropriate to subject ex tempore reasons to close scrutiny and analysis as if they represented careful and considered reasons prepared after reserving judgment and a lengthy and leisurely review. No doubt there are some less than felicitous expressions or summations contained in the reasons, but what is important for present purposes is the essential substance of the reasoning and the findings made (*R v Davey* (1980) 50 FLR 57; *R v Raggett & Ors* (1990) 101 FLR 323).

As indicated earlier, I have read and considered the evidence as it appears from the transcript and I am not satisfied that his Worship has been shown to be wrong in his findings of fact nor his conclusions as to the law.

The appeal is dismissed.
