18/87

SUPREME COURT OF SOUTH AUSTRALIA

KHAN v BAZELEY

O'Loughlin J

16 January, 24 April 1986 — [1986] 40 SASR 481

CRIMINAL LAW – SUMMARY OFFENCES – BEHAVING IN OFFENSIVE MANNER – WALKING IN STREET WEARING SHIRT – SLOGAN ON SHIRT INCLUDING FOUR-LETTER WORD – WHETHER OFFENSIVE.

Section 7 of the *Summary Offences Act* 1953 (SA) provides (insofar as relevant):

> "A person who, in a public place or a police station -
> (a) behaves in a disorderly or offensive manner ... shall be guilty of an offence."

On a Friday afternoon, K. was seen walking on a footpath in Commercial Road, Port Augusta. He was wearing a black "Tee-shirt" with the following slogan printed on it in white letters: "FUCK 'EM if they can't take a joke." Subsequently he was charged with having behaved in an offensive manner in a public place and in due course, the Magistrate found the offence proved and imposed a conviction. On appeal against the conviction—

HELD: Appeal dismissed.
(1) When viewed objectively, behaviour can be offensive if it is committed in a public place and is calculated to arouse anger, resentment, disgust or outrage among reasonable people.
***Inglis v Fish* [1961] VicRp 97; [1961] VR 607;**
***Ellis v Fingleton* (1972) 3 SASR 437, applied.**
***Hughes v Samuels*, unrep, SA Sup Ct, 30 October 1979, considered.**

(2) Where a person (wearing a shirt with an offensive slogan emblazoned on it) walked down a main street where people of all ages and of both sexes were present, it was open to the court to conclude that such conduct amounted to behaving in an offensive manner.

O'LOUGHLIN J: *[After setting out the facts, the relevant statutory provision, and the grounds of appeal, His Honour continued]:* ... **[484]** In 1972, Mitchell J, in the course of her judgment in *Ellis v Fingleton* (1972) 3 SASR 437 extensively reviewed the authorities (including those decided before the introduction of the *Police Offences Act* in 1953) for the purposes of determining whether the appellant in that case had behaved in an offensive manner. In the course of her judgment, it would seem to me that the difference in terminology had no effect upon Her Honour's decision and her review of the earlier authorities. She commenced her review by referring to the decision of Napier CJ in *Densley v Mertin* [1943] SASR 144 where the Chief Justice said, at p145, in relation to the offence of offensive behaviour in a public place:

> "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, i.e. it includes any conduct which is calculated to annoy or give offence to other people, even if that result is not actually intended."

Again, in 1979 Mitchell J had cause to consider the gravamen of the charge of behaving in an offensive manner in *Hughes v Samuels*, unreported, 30th October 1979, SA Sup Ct. Once more, she quoted the passage from *Densley v Mertin* set out above and went on to say:

> "I adopted that definition in *Ellis v Fingleton* and at p443 I said that in order to constitute *offensive behaviour* the conduct must be such as to be calculated to arouse anger, resentment, disgust or outrage in the mind of a reasonable person, bearing in mind that the behaviour must be of a type which attracts the sanction of the criminal law"

(italics added).

Her review of the authorities in *Ellis v Fingleton* also included a reference to *Inglis v Fish* [1961] VicRp 97; [1961] VR 607, where Pape J said, at p611, that behaviour can be offensive -

> "... if it is committed in a public place and is such as is calculated to wound the feelings, or arouse anger, resentment, disgust, or outrage in the mind of a reasonable man, notwithstanding that no member of the public is present, or (if there be members of the public present) that nobody is offended, provided such behaviour occurred in a place where the presence of members of the public might reasonably have been anticipated; and in circumstances where such behaviour could be seen by any member of the public who happened to be present if he were looking".

These judicial definitions fit, in my opinion, in harmony with the provisions of sub-s(3) of s7 of the Act which defines the word "offensive" as including "threatening, abusive or insulting". **[485]** In arguing that the words on the Tee-shirt were not offensive, Miss McInnes relied heavily upon a passage in the judgment of Mitchell J in *Hughes v Samuels* where her Honour said:

> "Sergeant Murray said in evidence that the word 'fucker' itself is disgusting and I would certainly find it so but I doubt whether the use of that word alone can be said today to arouse anger, resentment, disgust or outrage in the mind of a reasonable person."

I must confess that I might have come to a contrary conclusion to her Honour for, speaking generally, I am of the view that the use of that word would in many circumstances and among many reasonable people "arouse anger, resentment, disgust or outrage". However, I do not believe that personal opinions determine the issue; rather the test is an objective test to be determined by the court which is invested with the responsibility of determining the facts.

As I understand the law, it is not for me to say whether or not the conduct of the appellant amounted to the offence of behaving in an offensive mariner – it was for the learned Stipendiary Magistrate to come to that decision and I can do no more than say whether or not the conduct was capable of amounting to such an offence (see *Samuels v Hall* [1969] SASR 296, per Zelling AJ (as he then was) at p308). Furthermore, the passage from the judgment of Mitchell J in *Hughes v Samuels* must be read in the context of the entire judgment. In that case the comments of her Honour were effectively *obiter*. In supplying particulars of the alleged act of behaving in an offensive manner, the complainant had said that the appellant had called Sergeant Murray a "mother fucker".

Sergeant Murray had volunteered in his cross-examination that he may have misheard the appellant and that the words that the appellant used may have been "some other fucker". This departure from the particulars supplied was sufficient in the opinion of her Honour to allow the appeal and quash the conviction. Furthermore, the findings of fact made by the learned Stipendiary Magistrate in *Hughes v Samuels* were such that Sergeant Murray alone had heard the words complained of; there was no suggestion that they had been heard by any member of the public or by his fellow officer who was standing only five metres away.

Having regard to those facts, the printed words on the Tee-shirt, which were on view for all to see who passed by the appellant, present an entirely different set of circumstances and are, in themselves, sufficient to distinguish the remarks made by her Honour in *Hughes v Samuels*. In my opinion there was sufficient evidence before the learned Stipendiary Magistrate to justify his conclusion that the printing on the Tee-shirt was offensive. The activity, or lack of activity, constituting the behavioural element of the offence can be quite insignificant. For example, the provocative reversed "V" symbol with the first and second fingers separate (but still holding a cigarette) and slowly placing the cigarette in the mouth **[486]** was behaviour sufficient to bring down a conviction of behaving in an offensive manner in *R v Smith* [1974] 2 NSWLR 586, whilst dropping passively to the footpath was Regarded by the majority in *Samuels v Hall* as offensive.

Miss McInnes sought to argue that "the act of walking down the street wearing a Tee-shirt is an everyday activity". Taken literally, no one could disagree with such a submission but it really begs the question. The learned Stipendiary Magistrate was not concerned with the behaviour of a person "wearing a Tee-shirt": he was concerned with the behaviour of a person who was wearing a Tee-shirt that had emblazoned upon it the slogan that I quoted at the commencement of this judgment.

Hence, in arguing that there was "no behaviour" that could be attacked, she was relying upon the fact that the wearing of an item of apparel was an ordinary event and that it could not be classified as coming with the word "behaviour" as its derivative is used in s7 of the Act. With

this I must join issue; the mere fact that the appellant was wearing the Tee-shirt, that it was part of the appellant's apparel, readily visible and not covered by any form of outer clothing, was quite properly regarded by learned Stipendiary Magistrate as behaviour.

I readily concede that one must allow for the fact that behaviour that would be offensive in some circumstances may not properly be regarded as offensive in different circumstances. But it must not be overlooked that in this particular case the learned Stipendiary Magistrate was concerned with an alleged offender walking down the main street of Port Augusta where there were present – or where one would reasonably expect there might be present – people of all ages and of both sexes. The learned Stipendiary Magistrate is the resident Magistrate for that area and an appeal court is entitled to rely upon the presumption that he would well know and comprehend, through his judicial office and experience, the standards of the community and the reasonable expectations of the community.

In my opinion, there was ample evidence available to the learned Stipendiary Magistrate to enable him to make a finding that the appellant had been guilty of the offence charged and in my opinion the conduct of the appellant was capable of amounting to the commission of that offence. The appeal is dismissed.
