10/08; [2008] VSC 7

SUPREME COURT OF VICTORIA

FERGUSON v WALKLEY & ANOR

Harper J

4 October 2007; 31 January 2008 — (2008) 17 VR 647; (2008) 180 A Crim R 294

CRIMINAL LAW – SUMMARY OFFENCES – USING INSULTING WORDS IN A PUBLIC PLACE – BEHAVING IN AN INSULTING MANNER – TEST TO BE APPLIED WHETHER WORDS ARE INSULTING WITHIN THE MEANING OF THE ACT – PERSON LAUNCHED INTO A PUBLIC TIRADE OF INSULTS TO POLICE OFFICER – WHETHER SUCH CONDUCT WARRANTED THE INTERFERENCE OF THE CRIMINAL LAW – CHARGES FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *SUMMARY OFFENCES ACT* 1966, S17(1)(c), (d).

F., shortly after 10pm, refused to leave a hotel when asked to do so by the licensee. When the police arrived, F. left the hotel and when about 20m away launched into a public tirade of insults on the police using expressions such as 'fucking weak dog cunts' and 'you weak dog gutted cunt'. F. was later charged with using insulting words in a public place contrary to s17(1)(c) of the *Summary Offences Act* 1966 ('Act'). Two months later, as a result of a complaint, police were called to an address from which loud music was emanating at about 11.30pm. F. appeared on the front porch and on a number of occasions began using expressions such as 'fuck off you dog cunts'. F. was later charged with behaving in an insulting manner in a public place in breach of s17(1)(d) of the Act. When the charges came on for hearing, the Magistrate, in noting the importance of context, found the charges proved adding that F. intended to and did insult the police involved in the incidents from the way in which F. said the words, the context and place in which he said them and the people to whom he said them. Upon appeal—

HELD: Appeal dismissed.

1. The Magistrate was right to note the importance of context. Many, if not all of these cases are fact-specific and ultimately turn on questions of fact and degree. Insulting behaviour occurs in circumstances that are significantly variable. The context is important, perhaps crucial.

2. The test is whether the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of public good order, so as to warrant the interference of the criminal law.

***Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1; (2004) 209 ALR 182; (2004) 78 ALJR 1166, considered.**

3. The particular context in which F.s insults were delivered included in each case, the police were responding to a call, properly made and to intervene for the maintenance of public order. In the first instance, a hotel licensee had asked in vain that F., being drunk, leave the hotel. The second incident followed a call by someone who, it seems, was entitled to complain that F. was continuing to play loud music late in the evening. The police thereafter had a duty to respond appropriately to each approach. They were entitled to execute that duty free of the mindless barrage of insults, raising no issue of freedom of speech, to which they were subjected. Accordingly, F.s behaviour warranted the interference of the criminal law and the Magistrate's decision to convict in each case was correct.

HARPER J:

1. The principles of democratic governance have had difficulty in accommodating laws designed to deal with offensive behaviour – with which I include offensive language. This has been reflected in the difficulties experienced by agencies such as the police in the fair and impartial execution of those laws, and by the courts in resolving the disputes to which their execution has given rise. Government of the people, by the people, and for the people is government by majority will. It is also (indeed, it must also by definition be) government that recognises that all, including minorities, have rights. These rights must be respected. According to John Stuart Mill, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection [and] the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[1] One may accept the criticism that this statement is too wide[2] while also accepting that it has sufficient validity to support the proposition that a state which seeks to impose upon its subjects an all-embracing moral code is the antithesis of a democracy.

2. This means, among other things, that the majority should be diffident about imposing its view of morality on others. Behaviour, deemed unacceptably offensive by some, may not trouble others at all. The danger therefore is that legislation which turns offensive conduct into a crime, and punishable accordingly, will be employed as a heavy-handed instrument for the imposition, by one segment of society on another, of the former's moral precepts. This is a prospect about which those concerned with the practicalities of democratic governance – including the police and the courts – must always and of necessity be seriously concerned.

3. The importance of the issue may be illustrated by reference to the controversy about "political correctness". Each side of the broad political divide has for decades now accused the other of imposing its view of such correctness on those who do not share that view. Each side has also tended to dismiss the complaints of the other as being without substance. And yet the discomfort of those who perceive themselves as the victims has inspired the creation of new political parties, as well as active attempts by a newly elected government to redress what in its eyes is the inappropriate bias of its predecessor. Each side perceives bias, both real and imagined, in the other; neither recognises the bias which is its own.

4. Many of those who have suffered, or who believe that they have suffered, under the yoke of imposed "political correctness" have had the means to do something about it. Others, members of uninfluential minority groups, have not. Their sense of oppression is doubtless the more acute for that very reason. Again, those whose duty it is to give practical effect to the principles of democratic governance must be conscious of such sources of grievance. To the extent that the law properly allows, the courts, the police and other relevant authorities must in applying the law have regard to them. They should never be unnecessarily exacerbated.

5. According to Professors Bronitt and McSherry, "[c]riminalising offensive language or conduct has the potential to interfere with the freedom of expression, assembly and association protected by articles 19, 21 and 22 of the *International Covenant on Civil and Political Rights*"[3] – and, more relevantly for present purposes – those rights protected by ss15 and 16 of the *Charter of Human Rights and Responsibilities*. While in theory the law should apply indifferently to all, in practice "offensive conduct crimes have tended to entrench rather than redress discrimination against minorities", despite the theoretical possibility that they might be used by members of minority groups offended by the conduct of those representing, or purporting to represent, majority opinion.[4] In this respect, the law as it has been enforced in practice has over-emphasised the seriousness of insults against those who are seen as members of the majority – and, in particular, enforcement agencies such as the police – while it has undervalued insults against minorities. Thus, "empirical data in New South Wales reveals that offensive conduct crimes have a disproportionate impact on indigenous communities, being used primarily to deal with young people who swear at the police or otherwise demonstrate disrespect to authority."[5]

6. I do not know the age of the appellant, Mr Norman Ferguson. But he generally fits the description of those upon whom, as Professors Bronitt and McSherry contend, offensive conduct laws have a disproportionate impact. He is a koori; and, on 8 February 2007, he was convicted by the Hamilton Magistrates' Court of two charges that arose out of incidents in which, according to the police, he swore at them and thus demonstrated disrespect for their authority. In one of these two cases, Mr Ferguson pleaded not guilty to one charge of using insulting words in a public place contrary to s17(1)(c) of the *Summary Offences Act* 1966. In the other, he pleaded not guilty to a charge that he behaved in an insulting manner in a public place contrary to s17(1)(d) of the same Act. Following his convictions, he now appeals to this Court against each. He does not, and did not before the Magistrates' Court, challenge the prosecution's evidence in either case.

7. The *Summary Offences Act* is the principal repository of the Victorian parliament's attempts to deal with offensive behaviour that, while not necessarily resulting in physical injury to the person or the loss of or damage to property, ought in parliament's view to be the subject of the criminal law. So far as is presently relevant, s17(c) provides that any person who in or near a public place uses threatening abusive or insulting words shall be guilty of an offence. Section 17(d) is to the same effect, but applies not to words but to behaviour that is riotous indecent offensive or insulting.

8. Leading Senior Constable David Walkley was on 3 August 2006 performing divisional van duties in the Hamilton area. With him was Constable John Sheriff. Shortly after 10 pm they received a call to attend at the Commercial Hotel. Someone was refusing to leave the hotel after being asked to do so. It was Mr Ferguson. He seemed to think that it was the police, not Norman Ferguson, who

should leave. He told Mr Walkley to "fuck off." This, however, was not what the licensee, Mr Paul Kempton, had in mind. In the presence of the police, he asked Mr Ferguson to go. After finishing his drink, the appellant walked out of the front of the hotel and so into Thompson Street. After he had moved about 20 metres towards Gray Street, he turned. According to the evidence of Mr Walkley as given to the magistrate, "he started bellowing at the top of his voice back towards us which caused people from the nearby Mojo Bar and the people from in the Commercial [Hotel] bar to come out." Mr Walkley's evidence continued:

> Ferguson yelled at me 'you weak dog gutted cunt', 'you weak cunts' and other intelligent phrases with the words 'fuck' 'cunts' etc. He did this for approximately a minute and I kept trying to walk towards him and approach him. He kept maintaining a distance of about 20 to 50 metres between us. He kept yelling 'fucking weak dog cunts', 'fuck off weak dogs' continually the whole time. It continued all the way up to Gray Street. When I tried to keep talking to the defendant and I said to him 'come on Norm calm down, just talk to me' he said 'fuck off'. I said 'come on Norm stop swearing, just calm down'. He said 'fuck you' or 'get fucked' or something similar and I said 'oh, just go home Norm and we'll talk about it tomorrow' and he said 'get fucked'. He continued swearing from approximately 50 metres away so I started to run towards him and at that stage he turned around and he ran off and I said to him that we would speak to him the next day. We attended his house next day and he did not answer the door.

9. When asked in cross-examination to estimate the duration of "the whole set of facts you have described", Mr Walkley replied "[a]pproximately five minutes." He also told the Magistrates' Court that there were both females and males in each of the Commercial Hotel and the Mojo Bar. He had never before been subjected to the vitriol directed to him by the appellant on this occasion, and was insulted by it. While it was not the first time that Mr Ferguson had told him to "fuck off", on no previous occasion had Mr Walkley laid any charges against the appellant under the *Summary Offences Act*.

10. Mr Sheriff was also "a bit insulted" by what he heard from Mr Ferguson. In his evidence, he told the Magistrates' Court that after the appellant left the hotel and was about 20 metres into Thompson Street, he "turned and then started to yell fairly loudly causing people to come out of the Mojo Bar and the Commercial Hotel to see what was going on." Mr Sheriff continued:

> The defendant [Mr Ferguson] was yelling at us, to police to 'fuck off you dog cunts, youse are weak, come on have a fucking go', just words like that ... . Each time we tried to approach the defendant to talk to him he ran away up the street and continued the same barrage of insults your Honour.

11. When the "barrage" began, Messrs Walkley and Sheriff were standing outside the hotel with two other police members. They were joined in the street by a mix of males and females, 20 or more in number, who "were all standing around watching what was going on because it was fairly loud." According to the evidence of Mr Sheriff, a number told the police that Mr Ferguson "was really drunk" and that we should "go easy on him".

12. As a result of this incident, Mr Ferguson was charged with using insulting words in a public place, contrary to s17(1)(c) of the *Summary Offences Act*.

13. The second relevant charge faced by Mr Ferguson in the Hamilton Magistrates' Court on 8 February last year arose out of an incident which occurred two months after the first. At about 11.30 pm on 3 October 2006, Senior Constable Mark Keenan and Constable Anthony Pearson attended at 29 Strachan Street Hamilton. The police had earlier received a complaint about loud music which, it was alleged, continued from that address after the complainant had asked Mr Ferguson, who was in occupation, to turn the volume down.

14. Upon arrival, the police themselves heard loud music. They knocked on the door of the residence from which it came. Mr Ferguson answered. He was told to turn the volume down. He did, although (according to the evidence of Constable Pearson) he garnished his compliance by "swearing a lot" and (according to Senior Constable Keenan) the volume of music was soon turned up again. Another police vehicle arrived. No-one else was in the street. It was, however, a residential area, and the time was not far short of midnight. It is reasonable to infer that the original complainant, at least, was still awake.

15. As Messrs Pearson and Keenan were talking to their newly-arrived police colleague, Mr Ferguson appeared on the front porch. He began to speak "quite loudly" to the police, who were about

20 metres away, "using words like 'fuck off you dog cunts'." He used this expression on "a number of occasions", but the tirade lasted less than a minute. As Constable Pearson put it, "We were out in front and he just let fly with a whole heap of abuse and then we left." Asked in his evidence in chief about his reaction to it, Mr Pearson said: "I was fairly disgusted in what he said, insulted, and yes, I wasn't very happy with what he said at all." Mr Keenan gave evidence to the same effect. Mr Ferguson was later charged on summons with behaving in an insulting manner in a public place in breach of s17(1)(d) of the *Summary Offences Act*.

16. In giving an *ex tempore* judgment, the learned magistrate noted the importance of context. He was right to do so: many, if not all, of these cases are fact-specific and ultimately turn on questions of fact and degree. His Honour also referred at some length to the most recent High Court pronouncements on offensive behaviour. These are to be found in the six judgments delivered by the seven justices who heard the final appeal in the case of *Coleman v Power*.[6] The magistrate said, in effect, that sitting as he did in rural Victoria and, having therefore a part to play in the maintenance of public order within a number of small communities, he would be concerned were language to attract the sanctions of the criminal law as being insulting or offensive only if it were intended or reasonably likely to provoke unlawful physical retaliation. I can understand that concern. But his Honour also held, in my opinion correctly, that this was not the law as expounded by the majority of the seven-member bench in Coleman.

17. In his Honour's opinion, Mr Ferguson intended to, and did, insult the police involved in the subject incidents. This, his Honour added, was apparent:

> ... from the way in which he said these words, the context in which he said them, the place in which he said them and the people to whom he said them. ... He could not have used those sorts of words in that sort of way if that was not so.

18. A notice of appeal was filed on 9 March 2007. The ground of appeal in each case is simply that the learned magistrate erred in law in convicting the appellant. The submission that his Honour did so err was, initially, based primarily on the proposition that, contrary to the magistrate's view, words are not "insulting" within the meaning of that expression as used in the *Summary Offences Act* unless they are intended, or are likely, to provoke unlawful physical retaliation.

19. The authorities on this area of the law must be read with caution. The result of any litigation will depend upon the particular legislation under which the charge or charges in question is or are laid, and upon the individual circumstances of the case. And here, at least as much as elsewhere, one must be conscious of the fact that the language of the judgments may reflect those circumstances to the point where, however apt that language may be when read in the light of the particular facts then before the court, it may quite inapt in its application to different circumstances.

20. *Coleman v Power* is illustrative. It arose out of the arrest of Patrick Coleman in the Flinders Street Mall, Townsville. He had been distributing leaflets in which he named police officers who, according to him, were corrupt. One of them, Constable Brendan Power, asked for a copy. Mr Coleman not only refused the request, but loudly identified Mr Power by name as a "corrupt police officer". He was charged with, and later convicted of (among other things) using insulting words to a person in a public place. His conviction was, on appeal to the High Court, set aside.

21. The legislative provision under which Mr Coleman was thus charged and initially convicted was s7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Qld) ("the Vagrants Act"). It has since been repealed; but, at the time, it provided (in effect) that any person who used any threatening, abusive or insulting words to any person in or so near to any public place that any person who might be there could hear what was said, would be liable to a fine or imprisonment. It differed materially from s17(1)(c) of the *Summary Offences Act* only in that it included the words "to any person", whereas the Victorian provision does not.

22. The Queensland litigation gave rise to two principal issues. The first was the proper construction of s7(1)(d). The second was whether, properly construed, the application of the legislation to Mr Coleman's conduct would infringe that Constitutionally-protected freedom of communication concerning political or government matters which enables the people to exercise a free and informed choice as electors.[7]

23. The second issue is of no present concern. By a majority of six (Gleeson CJ and Gummow,

Kirby, Hayne, Callinan and Heydon JJ) to one (McHugh J), the High Court held that s7(1)(d) of the Queensland legislation was valid: it was, so the majority held, reasonably appropriate and adapted to achieving a legitimate end in a manner consistent with the system of representative government enshrined in the Commonwealth Constitution. It doubtless follows that the equivalent provision in the *Summary Offences Act* can, in the words of s7(2) of the *Charter of Human Rights and Responsibilities*, "be demonstrably justified in a free and democratic society based on human dignity, equality and freedom … taking into account all relevant factors".

24. Mr Ferguson has not argued that s17 of the *Summary Offences Act* should receive different treatment to that accorded by the High Court to s7 of the *Vagrants Act*. In his initial submissions before me, however, his counsel argued that his convictions were wrongful because the magistrate was, on the first issue, mistaken. According to this submission, the prosecution failed to prove what, as the High Court held in *Coleman*, is an essential element in both the charge of using insulting words, and the charge of behaving in an insulting manner, in a public place. Neither offence is made out, counsel for Mr Ferguson submitted, unless the prosecution first proves that the impugned words were, in the circumstances in which they were used, so hurtful as either to be intended, or reasonably likely, to provoke unlawful retaliation.[8] Counsel argued that there was no such proof in Mr Ferguson's case, either in relation to the hotel incident or in relation to the incident in Strachan Street. Nor could there be proof of a reasonable likelihood of unlawful retaliation since, in both instances, the words were directed at the police; and it must be assumed that the police would not retaliate unlawfully, no matter what the provocation.

25. The difficulty with this submission is that it was rejected by a majority of the justices (Gleeson CJ and McHugh, Callinan and Heydon JJ) in *Coleman's case*. Only three (Gummow, Kirby and Hayne JJ) held that nobody could be convicted under s7(1)(d) of the *Vagrants Act* of using any insulting words to a person unless, in the circumstances in which they were used, the words were so hurtful that they must either have been intended, or were reasonably likely, to provoke unlawful physical retaliation. The others rejected the proposition that that intention, or that likely consequence, was an element in the offence. Mr Coleman's appeal therefore did not succeed on the construction point. It succeeded only because Gummow, Kirby and Hayne JJ were joined in the ultimate result by the sole justice (McHugh J) who held that s7(1)(d) was unconstitutional.

26. The problem of construction confronted by the Court in *Coleman*, and over which it split four-three, was that, while the legislation proscribed the use in a public place of any insulting words to any person, the Queensland Parliament could not have intended to impose criminal sanctions upon the use of all language that fell within the dictionary definition of "insulting". But how should the courts solve "the problem of confining the operation of the legislation within reasonable bounds"?[9]

27. The difficulty is compounded by the fact that insulting behaviour occurs in circumstances that are significantly variable. The context is therefore important, perhaps crucial. So, for example, freedom of communication may be an issue. It was not in the case of Mr Ferguson; it was in *Coleman's case*. As in the present case, insulting conduct, whether by words or otherwise, may be entirely free of any intellectual content, let alone value. It might therefore be argued that such conduct deserves no protection, because the only right involved is the right of those who are the victims of it to protection against it. One such might be a woman with young children, whose enjoyment of time spent with them in a park is ruined by the gratuitous insults of a group of youths who are complete strangers to her. In such a case, JS Mill's criteria for the rightful exercise of power over another (the group of youths) would be met.

28. As I have noted, Kirby, Gummow and Hayne JJ thought that the operation of s7(1)(d) of the *Vagrants Act* should be so restricted as to confer criminality only upon words which were, in the circumstances in which they were used, so hurtful as either to be intended, or reasonably likely, to provoke unlawful retaliation. This would ensure that the sanctions of the criminal law would only be applied to activities readily characterised as criminal; and would, as Gummow and Hayne JJ thought, mark with clarity the boundary of the restriction imposed by the legislation on freedom of speech.[10]

29. There is, with respect, much to be said for an approach which, consistently with the will of parliament, declines to impose the sanctions of the criminal law on behaviour that is not properly categorised as criminal, and which seeks to avoid unnecessary limits on the right to freedom of speech. It nevertheless seems to me that the criminal law might appropriately proscribe the conduct which, as described above, was directed at the woman in the park. As construed by Gummow,

Kirby and Hayne JJ, however, s7(1)(d) would provide no protection to her if the conduct is merely insulting, no matter that, objectively and in fact, it is also distressing in the extreme. Because she has neither the means nor the will to retaliate, racial and other taunts may be showered upon her with impunity. Her enjoyment of a previously favoured public place may be removed, perhaps for ever.

30. This example may be contrasted with another. If the insults are directed not to someone incapable of physical retaliation but to a rival gang, it would not matter that the words employed are at the core of the vocabulary of all concerned and are therefore completely devoid of any power to shock or distress. That is not their object. They are uttered merely as an excuse for a fight. But, because that is so, the legislation could be invoked. If Gummow, Kirby and Hayne JJ are correct, there is a danger that it could also be invoked, especially in times of high political agitation, against a member of a minority group merely because that person makes a public speech expressing legitimate views that a majority of listeners take as being abusive, insulting or offensive; and for that reason are made angry to the point of unlawful violence.

31. It might also be respectfully observed that the clarity sought by Gummow, Kirby and Hayne JJ may evaporate when the court is required to decide whether, in the particular circumstances of the individual case, unlawful physical retaliation is likely. Experts in the behavioural sciences are very diffident when asked to predict dangerousness. What evidence will be available to a magistrate asked to decide whether a barrage of insults is likely to result in physical retaliation where, for example, the several middle-aged males who are the victims do not in fact react with physical violence? In order to assess whether the insults in question are likely to provoke unlawful physical retaliation, invidious distinctions, based largely on guesswork, might have to be made between one set of victims (real) and another (perhaps, of necessity, merely postulated).

32. The problem, however, remains: how should the operation of the legislation be confined within reasonable bounds? Gleeson CJ referred with approbation to the judgment of Turner J in the New Zealand case of *Melser v Police*.[11] The Chief Justice said:

> Turner J pointed out that ... the insulting behaviour prohibited by the section had to be such as would tend to annoy or insult people sufficiently deeply or seriously to warrant the interference of the criminal law. It was not sufficient that the conduct be indecorous, ill-mannered or in bad taste. The question, he said, was a matter of degree.[12]

33. Later in his judgment, the Chief Justice added:

> Section 7(1)(d) covers insulting words intended or likely to provoke a forceful response, whether lawful or unlawful; but it is not limited to that. However, the language in question must be not merely derogatory of the person to whom it is addressed; it must be of such a nature that the use of the language, in the place where it is spoken, to a person of that kind, is contrary to contemporary standards of public good order, and goes beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues.
>
> It is impossible to state comprehensively and precisely the circumstances in which the use of defamatory language in a public place will involve such a disturbance of public order, or such an affront to contemporary standards of behaviour, as to constitute the offence of using insulting words to a person. An intention, or likelihood, of provoking violence may be one such circumstance. The deliberate inflicting of serious and public offence or humiliation may be another. Intimidation and bullying may constitute further forms of disorder just as serious as the provocation of physical violence. But where there is no threat to the peace, and no victimisation, then the use of personally offensive language in the course of a public statement of opinions on political and governmental issues would not of itself contravene the statute. However, the degree of personal affront involved in the language, and the circumstances, may be significant.
>
> The fact that the person to whom the words in question were used is a police officer may also be relevant although not necessarily decisive. It may eliminate, for practical purposes, any likelihood of a breach of the peace. It may also negate a context of victimisation ... But police officers are not required to be completely impervious to insult.[13]

34. I respectfully agree. I would add a word about the particular context in which Mr Ferguson's insults were delivered. In each case, the police were responding to a call, properly made, to intervene for the maintenance of public order. In the first instance, a hotel licensee had asked in vain that Mr Ferguson, being drunk, leave the hotel. The second incident followed a call by someone who,

it seems, was entitled to complain that Mr Ferguson was continuing to play loud music late in the evening. The police thereafter had a duty to respond appropriately to each approach. They were entitled to execute that duty free of the mindless barrage of insults, raising no issue of freedom of speech, to which they were subjected.

35. At the same time, it is sometimes wise for the police to officially ignore taunts of the kind directed at them by Mr Ferguson. I agree, with respect, with the comment of Gummow and Hayne JJ in Coleman that "[b]y their training and temperament police officers must be expected to resist the sting of insults directed to them."[14] So, while conscious of the demands that society and the courts place upon the police, I nevertheless am also of the opinion that, if members of the public are not present when a Ferguson-type outburst occurs, a degree of – or perhaps total – official deafness might be not merely appropriate, but – as a matter of good policing, even if not of law – required. [15] Indeed, the law itself regards as relevant the context in which insulting behaviour occurs; and although, as Gleeson CJ pointed out in the passage quoted above, "police officers are not required to be completely impervious to insult"[16], if (for example) the words in question are spoken in the sight and hearing only of the police, an offence under s17(1)(c) may not be committed where, were others present, the outcome would be otherwise because the context was otherwise.

36. It is no offence simply to be angry with the authorities (including, of course, judicial authority). Some people can articulate their anger in measured language that clearly explains their reasons for feeling as they do. Others, especially when their anger is combined with high emotional stress, or alcohol, or other debilitating factors, cannot. In such instances, the words employed may be similar to those used on the occasions in question by Mr Ferguson. They may be used when only the authorities involved (in this example, the police) are privy to them. Charges based on the *Summary Offences Act* may follow, even though, as the police frankly and properly told the magistrate when giving evidence in the Ferguson matters, police officers routinely use language of this kind, albeit in a different context, among themselves. In doing so, they may cause each other no shock or distress. Depending always on all the relevant evidence, it would probably be quite wrong to charge someone with an offence simply because such language was used in anger. The arrest of the speaker in the hope that this would provoke that person into committing other offences would of course be absolutely wrong.

37. As Professors Bronitt and McSherry point out,[17] the *Summary Offences Act* has the potential to be used as an instrument of oppression – whereas, properly employed, it should protect minorities as well as members of the majority; and in the former instance afford that protection to those who, because of their vulnerability, need it more than others. It is the duty of the police and the courts to ensure that the Act is given its proper role.

38. I return, following these general comments, to the instances involving Mr Ferguson. Neither gave rise to any evidence of inappropriate police behaviour. In each case, the police were responding to a call from a member of the public. In one of those instances, other members of the public were present when the police sought to discharge their responsibilities. In the other, the context included both the nature of the surroundings (a residential area) and the time of night. The police were in these circumstances entitled, in my opinion, to act upon the inference that others would be aware of the insults to which Mr Ferguson was subjecting them.

39. If, with members of the public watching and listening, the police have no choice but simply to tolerate misbehaviour such as that of Mr Ferguson's, their authority might be impaired, perhaps gravely. If, as is the community's entitlement, it asks and expects its police members to act with as much sensitivity and restraint as the circumstances allow, so the police are entitled to the community's support when they do. And in each of the two instances in question, the police first took no action save to ask Mr Ferguson to do what in the circumstances was reasonably required. Shortly afterwards he, without any evidence of provocation save that which he might have invented for himself, launched into a public tirade of insults against them.

40. Professors Bronitt and McSherry maintain that "[t]he conceptions of good order and decency created and applied by both police officers and magistrates have the potential to operate unfairly against minorities who are perceived to be a threat to social order and/or police authority." This is true. Hence the need for judicial and police restraint and sensitivity. Unfairness must be avoided. But that is not to devalue the importance of social order or police authority. Where no unfairness is involved, there is nothing in the scales against which (as in this case) police authority is to be balanced.

41. In the course of his submissions, counsel for the appellant accepted (in effect) that his primary argument, as based on *Coleman v Power*, was untenable. He thereafter modified his position so as to argue that, while the construction favoured by the Chief Justice was not as restrictive as that of Kirby, Gummow and Hayne JJ, nevertheless it was more restrictive than the approach taken by McHugh, Callinan and Heydon JJ; and it was thus sufficiently restrictive for counsel's purposes. It would, if applied (as counsel submitted it should be) to the circumstances of Mr Ferguson's case, result in the quashing of each of the two convictions the subject of this appeal.

42. I do not agree. The test, as I understand the judgment of the Chief Justice, is whether the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of public good order, as to warrant the interference of the criminal law. In my opinion, Mr Ferguson's behaviour in each instance met those criteria and was thus contrary to the relevant provisions of the *Summary Offences Act*. It follows that the magistrate's decision to convict was in each case correct. The appeals must be dismissed.

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[1] John Stuart Mill *Utilitarianism, Liberty and Representative Government* (1910) JMDent & Sons Ltd (1960 reprint) pp72-73.
[2] See, for example, *Two Concepts of Liberty* in *The Proper Study of Mankind: An Anthology of Essays by Isaiah Berlin* (Pimlico) 1998 pp199-201.
[3] Bronitt & McSherry *Principles of Criminal Law* (Law Book Co. 2005) at p756.
[4] Op cit.
[5] Op cit.
[6] [2004] HCA 39; (2004) 220 CLR 1.
[7] *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 560; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2; *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at [146]; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
[8] This is the effect of paragraph 5 of the written outline of the appellant's submissions.
[9] [2004] HCA 39; (2004) 22 CLR 1 at [11] per Gleeson CJ; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
[10] [2004] HCA 39; (2004) 220 CLR 1 at [185]; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
[11] [1967] NZLR 437 at 444.
[12] [2004] HCA 39; (2004) 220 CLR 1 at [11]; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
[13] Ibid at [14]-[16].
[14] [2004] HCA 39; (2004) 220 CLR 1 at [200]; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
[15] It is said that, after handing down a decision in a civil case, Mr Justice Thomas Smith was subjected to an outburst from the losing party. Counsel for that party apologised on the client's behalf. His Honour responded: "That's all right. I didn't hear a thing." This approach, in the right circumstances, has much to commend it. The exercise of power is often at its most appropriate when most restrained.
[16] [2004] HCA 39; (2004) 220 CLR 1 at [16] per Gleeson CJ; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
[17] Bronitt & McSherry *Principles of Criminal Law* (Law Book Co. 2005) at p764.

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