**26/03; [2003] VSC 451**

**SUPREME COURT OF VICTORIA**

# *NELSON v MATHIESON*

**Nathan J**

**31 October, 27 November 2003 — (2003) 143 A Crim R 148**

**CRIMINAL LAW – OFFENSIVE BEHAVIOUR – DEFENDANT FOUND TO BE INHALING PAINT (CHROMING) IN A PUBLIC PLACE – DEFENDANT ARRESTED AND CHARGED WITH OFFENSIVE BEHAVIOUR – CHARGE FOUND PROVED – MEANING OF "CHROMING" – WHETHER MAGISTRATE IN ERROR – WHETHER CHROMING IN PUBLIC COULD BE REGARDED AS OFFENSIVE BEHAVIOUR: *CHILDREN AND YOUNG PERSONS ACT* 1989, S200.**

N. was found in a public place by a police officer in possession of two cans of spray paint and a plastic bag containing paint. It appeared that N., in company with others had been inhaling the paint (known as chroming). N. was later charged with offensive behaviour and subsequently found guilty by a magistrate. Upon appeal—

**HELD: Appeal allowed. Order of magistrate set aside.**
**1. Chroming is the inhalation of volatile substances, generally paint and solvents, for the purposes of producing a state of euphoria, unconsciousness or alcohol-like intoxication effect.**

**2. For behaviour to be offensive it must be such as is calculated to wound the feelings, arouse anger or resentment or outrage in the mind of a reasonable person. It is not necessary to prove that a reasonable person was in fact present at the time of the offensive behaviour provided that it was open to find that if the reasonable person had been there he/she would have been offended. Also, it is not necessary for the prosecution to prove that the behaviour was intended by the offender to actually offend the reasonable passerby. Whether behaviour of any kind can be said to be offensive must depend upon circumstances, including time and place.**
***Worcester v Smith* [1951] VicLawRp 43; [1951] VLR 316; [1951] ALR 660;**
***Spence v Loguch* unrep, NSW Sup Ct, 12 November 1991, Sully J; and**
***Prowse v Bartlett* (1972) 3 SASR 472, applied.**

**3. Whilst a reasonable person would be saddened, pitiful and concerned by paint sniffing, and N's activity roused in the minds of the magistrate and the investigating police officer feelings of anguish, despair and exasperation, the reasonable person would not have been angered, wounded, outraged or disgusted by the activity and therefore not offended. Accordingly, it was not open to the magistrate to have found the charge proved.**

**NATHAN J:**
1. Could "chroming" in public be regarded as offensive behaviour within the terms of the *Children and Young Persons Act* 1989?

2. Chroming is the inhalation of volatile substances, generally paint and solvents, for the purposes of producing a state of euphoria, unconsciousness or alcohol-like intoxication effect. That is the question raised by this appeal from a magistrate's decision which convicted and then dismissed the appellant on a charge under s200 of the *Children and Young Persons Act* 1989 which is also reflected in the *Summary Offences Act*, which criminalises offensive behaviour. Counsel for the appellant argued one point before me, namely, that no reasonable magistrate, on the given facts, could have found the conduct complained of constituted offensive behaviour within the meaning of the Act.

3. I turn to those facts now. They were not extensively canvassed, as the transcript of proceedings before the magistrate reveals, nor in what appears as his decision. They were admitted and were constituted by a sworn statement tendered by the respondent. Paraphrasing that statement accurately, he said that at about 3.00 pm on 21 July 2002 he went, in the police divisional van, to a car park behind the Latrobe Tourist Information Centre on the Princes Highway at Traralgon. He did so in response to information received. He then saw four youths, amongst whom was the defendant whom he already knew. They were all standing at the rear of the tourist

centre, approximately five metres from a railway pedestrian bridge. He said this area is within view of the westbound train platform, the pedestrian bridge and other areas of the railway station car park. He noticed cans of spray paint on the ground and that all of the youths, including the appellant, had remnants of paint around their mouths and clothes. He approached the defendant and said, "I've warned you about this before, Lemuelle (Nelson)". He replied, "Yeah". Nelson then removed two cans of spray paint from his front pockets and a plastic bag containing paint from another pocket in his jacket. Mathieson then said, "Do you have a parent or guardian around or close by, Lemuelle?" The respondent replied, "Nah, nobody near here". Mathieson then asked, "Why are you chroming out here?" The appellant replied, "Nothing else to do". Mathieson said, "I've told you people find this offensive and we get complaints". The respondent replied, "Ah, well". Later Mathieson asked, "What is your reason for offensive behaviour in a public place?" Nelson replied, in what I may describe as a desperately pathetic response, "Yeah, just nothing else to do".

4. In dealing with the matter this passage appears in the transcript:

> Magistrate: Well, the evidence I take it is - I mean, really it comes down to whether in my opinion as to whether chroming itself is offensive - - - Basically speaking I do find it offensive but it's a matter for which I wouldn't - as in the case of drunkenness, I wouldn't proceed to conviction and not probably to penalty unless it was shown that this was a long course of conduct that was seriously effecting his health in which case I might be considering some supervision. But basically speaking I'd be saying, well it's not a matter that should go on to his criminal record and not a matter perhaps (for) the imposition of penalty."

5. *Prowse v Bartlett*[1] was referred to the magistrate and of that and other matters he said this:

> "But what I would say is that it's offensive if it's carried out in a public place for a number of reasons. I don't think I need elaborate those. If I took the line of Chief Justice Bray, unless I wanted to make severe admonishments which I don't. But really - it's a matter really for the Department of Human Services, isn't it."

6. It is here that I consider the anguish and compassion of the magistrate has led him into legal error. For reasons which I will go on to elaborate, and for reasons which the magistrate did not state, I do not consider that chroming in public can of itself be offensive within the meaning of the Act. However, should there be surrounding circumstances which exacerbate that antisocial behaviour into something more than just concern for the welfare of the offender, then it may be offensive. Here there was no supporting evidence from any members of the public who could have or might have seen the chroming to say that they were offended rather than anguished by it. Although that is not a predicate for correction. From other parts of the transcript, which I shall not rehearse, it is plain there had been prior complaints about the behaviour of youths in the area. This had attracted public agitation. However, there is no evidence as to whether it was the mere presence of youths congregating in groups, or as is often referred to in the more sensationalist press, in "packs" which caused some alarm to the citizens, or whether it was other aspects of their behaviour – skylarking, loud arguments or the like – which irritated them. There is certainly no evidence that it was chroming per se which activated the citizenry, but it is clear from the investigating police statement that Mathieson was concerned about the individual welfare and wellbeing of the appellant. Constable Mathieson wanted Lemuelle to stop the self-destructing behaviour which almost certainly would have lifelong consequences to him. The police response was humanitarian, born out of exasperation, as indeed was that of the magistrate.

7. I now turn to the relevant legal principles.

8. In dealing with the decision I must find legal error and not merely substitute my own decision on the facts for those of the magistrate. *Roads Corporation v Dacakis*,[2] a decision of Batt J as he then was, gathered together the relevant authorities dealing with the distinction between questions of fact and law. Although the case dealt with an appeal from the Land Valuation Board, it is authority for the foregoing proposition and also this:

> "A finding of fact would only be open to challenge as erroneous in law if there was no probative evidence to support it (and not also if it was not reasonably open on the evidence), whilst an inference would only be open to challenge as being erroneous in law if it was not reasonably open on the facts."

See also the authorities referred to in the judgments section "Questions or error of law – nature p571-523".

9. In this case there is no contest as to the facts. They are as rehearsed. So far as this appellant is concerned it is chroming in a public place and that alone which founded her conviction. There is, as I have noted, no other evidence of offence, anger, disgust or anguish being recorded by any other person. However, the car park is a public place close to the centre of the town and behind a public facility, so much is also uncontested.

10. The law relating to offensive behaviour is tolerably clear. It will never be pellucid because offensiveness depends upon time, place, social context and to some extent, although not exclusively, upon the intent of the offender. Its categories are never closed and that which may be offensive to one generation may be regarded as a matter of hilarity by the next.

11. I come to the authorities. *Worcester v Smith,*[3] a case which concerned a protestor holding a banner reciting rather quaintly – and one would now expect rather shamefacedly by the protestor – read: "Stop Yank intervention in Korea". That behaviour attracted a charge of offensive behaviour. O'Bryan J in defining that conduct said:

> "It must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person."

This definition has been repeatedly referred to with approval.

12. This case and many others were discussed by Sully J in *Spence v Loguch.*[4] His Honour there isolated three propositions relating to offensive behaviour. Firstly, he adopted the O'Bryan formula; secondly, he considered it was not necessary to prove that a reasonable person was in fact present at the time of the offensive behaviour provided it was open to find that if the reasonable man had have been there he would have been offended; thirdly, whether behaviour of any kind can said to be offensive must depend upon circumstances, including time and place.

13. It is now clear that it is not necessary for the prosecution to prove that the behaviour was intended by the offender to actually offend the reasonable passer-by. For that proposition I rely on the cited decision of Chief Justice Bray in *Prowse v Bartlett.*[5] The Chief Justice considered that motive was irrelevant provided the conduct was conscious and voluntary and would be regarded as offensive to the average contemporary citizen or reasonable person. Similarly, in *Saunders v Herold*,[6] a police/patrons brawl outside the Canberra Working Men's Club, Higgins J considered that whatever may constitute behaving in an offensive manner was dependent upon the circumstances, the time and place of the impugned conduct being of importance. He said that relying on the court's knowledge of the standards of the community and the reasonable expectations of the community, it was quite unlikely that the reasonable person, postulated at being present in the circumstances, would have been offended by the language, of the shuffling and posturing used in the brawl. He also considered it was relevant in that case that the defendant was an Aborigine, as is the case before me. However, I consider the racial identity of the appellant to be utterly irrelevant.

14. More recently and pertinently, Harper J in *Pell v Council of the Trustees of the National Gallery*,[7] considered a blasphemy case depicting the Christ associated with human urine. He had to consider what were the currently recognised standards of propriety. He considered that such a question was one for the tribunal of fact itself as indeed that has been the judicial authority for a century or more. However, he said that that task should be undertaken having regard to society as "multicultural, partly secular and largely tolerant if not permissive". Similarly, in this case concerning offensiveness, prevailing community standards should be assessed.

15. I come now to the statutory provision. Chroming as a social phenomenon received the attention of the Parliamentary Drugs and Crime Prevention Committee 2002, in its report inquiring into "The Inhalation of Volatile Substances", (Victorian Government Printer), gave a definition of inhalation, therein slightly more truncated than the one I have proposed. The history of the legislation reflects current community standards relating to chroming. The Principal Act, of the *Drugs Poisons and Controlled Substances Act* 1981 (No. 9719) created offences relating to volatile

solvents. Part IV as it then was, concerned chroming and made it an offence to inhale paint. In 1983 an amending Act (No. 10002) deleted this offence but maintained the criminality of selling paint "if a person knows or reasonably ought to have known, or has reasonable cause to believe that another intends to use (the paint for inhalation)". In 2003 Parliament passed further amendments, not yet proclaimed, empowering the police to impound paint thought to be for inhalation and detain youths so as to prevent them from breathing it in.

16. Civilised society has always attempted to prevent self-harm. The Noahhide laws, the commencing points for most legal systems, have been interpreted to prohibit self-injury and suicide based upon the phrase "for your own life blood I will require a reckoning". A reading of the committee's report confirms this philosophy as its central thrust. The Act attempts to devise legislation which limits self-harm. It supports the proposition, that it is best to address the supply side of the chroming phenomenon in an attempt to reduce demand. Should it appear from the magistrate's comments, although not specifically stated, that he believed the mere inhalation of paint was offensive, whether illegal or not, he would have been in error. It must be noted that the consequences of the magistrate finding the offence proved by dismissing the charge could have lifelong consequences for the appellant. The fact of the charge being proved will remain on his criminal record forever, despite it being a Children's Court offence. Although the dismissal of the charge, as it appears on the Register, appears to have been a humanitarian response, it does not negate the adverse lifetime consequences of finding the charge proved. So far as Nelson is concerned, this appeal is a matter of real moment.

17. I return to the relevant case law. It is no longer necessary for the Crown to prove that the offender intended to be offensive, but it is still a requirement that the conduct has the effect of wounding the feelings, arousing anger, resentment, disgust or outrage in the mind of the reasonable person who may have or could have viewed, or been the object of that conduct. In my view, the words should be interpreted *ejusdem generis*. Wounded feelings, anger, resentment, disgust, outrage, all denote, immediate and strong emotions or reactions. A reaction to conduct which is merely indifferent or at its highest anguished, is not the same as being offended. Merely being put out, or affronted by conduct, does not warrant the imposition of a criminal penalty upon the actor. A person may be appalled by conduct and yet his or her own personal feelings not be wounded by it. For example, spitting or urinating in a public place but attempting to conceal may appal the reasonable passer-by, but that person would not expect the perpetrator be visited with a criminal sanction. It could however be offensive if there was no effort to conceal it. The behavioural offence of being offensive is dependent upon time, circumstance, motive and place. A vulgar gesture at a wedding may well be offensive but the same digital activity at a football match merely jocular.

18. I return to the central issue in this case: could a reasonable magistrate, as opposed to one anguished, exasperated or concerned for a child's future, conclude beyond any reasonable doubt that the act of chroming in these circumstances amounted to offensive behaviour within the meaning of the Act? I think not. The activity roused in the minds of both the investigating police and the magistrate, feelings of anguish, despair and exasperation. A reasonable person would be saddened, pitiful and concerned by paint sniffing, but not angered, wounded, outraged or disgusted and therefore not offended. What could the magistrate have done to have helped this unfortunate defendant overcome his desperately sad and dispiriting condition, exemplified by the phrase, "I've got nothing better to do". The answer may be uncertain but to have found him guilty of a criminal offence was not open. The appeal will be allowed.

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[1] (1972) 3 SASR 472.
[2] [1995] VicRp 70; (1995) 2 VR 508.
[3] [1951] VicLawRp 43; [1951] VLR 316; [1951] ALR 660.
[4] Unreported, SCNSW 12 November 1991.
[5] (1972) 3 SASR 472 at 480.
[6] (1991) 105 FLR at 1.
[7] (1998) 2 VR 391; (1997) 96 A Crim R 575.

**APPEARANCES:** For the appellant Nelson: Mr S Ginsbourg, counsel. Victorian Aboriginal Legal Service. For the respondent Mathieson: Mr BM Dennis, counsel. Victorian Government Solicitor.

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