22/10; [2010] VSC 185

SUPREME COURT OF VICTORIA

GUL v CREED & ANOR

Beach J

11, 12 May 2010

CRIMINAL LAW – INDECENT LANGUAGE – DEFENDANT CHARGED WITH THEFT OF A CHOCOLATE EGG AND USING INDECENT LANGUAGE – THEFT CHARGE DISMISSED BY JUDGE – INDECENT LANGUAGE CHARGE FOUND PROVED – CIRCUMSTANCES OF THE STATEMENT MUST BE CONSIDERED – CONTEMPORARY STANDARDS TO BE APPLIED – MEANING OF "INDECENCY" – WHETHER IT WAS OPEN TO THE JUDGE TO FIND THE USE OF THE EXPRESSION "FUCKING BITCH" INDECENT IN THE CIRCUMSTANCES: *SUMMARY OFFENCES ACT* 1966, S17(1)(c).

HELD: Appeal against finding charge proved dismissed.
1. The principles in relation to determining whether language is indecent are well known. It is sufficient to say that indecency conveys a failure to meet recognised standards of propriety. Such a failure at the lower end of the scale amounts to an indecency; and at the upper end of the scale amounts to an obscenity. Further, in determining whether something is indecent, it is contemporary standards which must be applied. Additionally, the words complained of must be looked at in the context of the circumstances in which they were said. It is for the trier of fact to decide for himself or herself what current standards are, and it is inevitable that a subjective element must enter into the decision.

2. In this case, the witness gave evidence that upon confronting the defendant with the allegation that she was stealing and should leave the store, Ms Gul called her a "fucking bitch" and continued to use abusive language. It was open on this evidence for the Judge to conclude that, in the circumstances, the defendant used indecent language in contravention of s17(1)(c) of the *Summary Offences Act*.

BEACH J:
Introduction
1. The plaintiff, Ms Lyudmila Gul, was charged with:

(a) stealing a chocolate egg[1] belonging to Big W, Southland and valued at $1.98; and

(b) using indecent language[2].

2. The charges related to an occasion on 5 April 2007 when Ms Gul was observed eating part of an Easter egg in Big W, Southland. Upon being confronted by a store employee (Ms Vanderlijn), Ms Gul denied stealing the egg. In the course of this denial, Ms Vanderlijn alleges that Ms Gul called her a "fucking bitch".

3. The charges came on for hearing at the Frankston Magistrates' Court before Mr Crisp M. In respect of each charge, his Honour, without conviction, adjourned the matter for six months and released Ms Gul upon an undertaking to appear on the adjourned date and to be of good behaviour during the period of adjournment.

4. Ms Gul appealed to the County Court against the orders made in the Magistrates' Court. On 11 September 2008, Ms Gul's appeal came on for hearing before Judge Gaynor. The appeal was successful in part. Her Honour set aside the orders of the Magistrates' Court; dismissed the charge of theft; and, without conviction, ordered Ms Gul to pay a fine in the sum of $20 in relation to the indecent language charge.

5. In this proceeding, the plaintiff seeks to have the order and fine in relation to the indecent language charge quashed. The first defendant is the informant, and was the respondent to the plaintiff's appeal in the County Court. The first defendant resists the plaintiff's application. While the second defendant filed an appearance, it did not take any active role in the proceeding and

was content to merely abide the decision of the Court, save as to costs.[3] For the reasons given below, the proceeding will be dismissed.

The prosecution case below

6. In essence, the prosecution case below was that Ms Gul was observed on 5 April 2007 in one of the confectionery aisles selecting some chocolate that had come out of a wrapper and placing it in her mouth. Ms Gul was confronted by Ms Vanderlijn and told that what she had done was not appropriate, was stealing and that Ms Gul should leave the store. At this point, according to Ms Vanderlijn, Ms Gul called Ms Vanderlijn a "fucking bitch". Matters progressed from there. However, it is not necessary for the purposes of this proceeding to set out those matters further (save that Ms Gul continued to refuse to leave the store and continued to use abusive language).

7. So far as the indecent language charge was concerned, in cross-examination in the County Court, Ms Gul asked Ms Vanderlijn to repeat exactly what "bad words"[4] were used. In answer, Ms Vanderlijn said "fucking bitch".

Ms Gul's case below

8. Ms Gul's case below on the theft charge was that the chocolate she was eating at the relevant time was part of a small broken chocolate egg which she had picked up from the floor. Her case was that what she did was not dishonest. In the end, Judge Gaynor found that the prosecution had not proved dishonesty beyond reasonable doubt. On this basis, her Honour dismissed the charge of theft.[5]

9. Ms Gul's case on the indecent language charge is summarised in the following passage of her affidavit sworn 7 November 2008 in this proceeding, namely:

> "I don't remember whether I said these alleged words or not, but, in circumstances of extreme provocation with physical violence against me by unknown person and under emotional stress would be mild reaction."

10. The reference to extreme provocation and physical violence appears to be a reference to an allegation that Ms Vanderlijn shouted at Ms Gul, did not identify herself and twice pushed Ms Gul with all her power.[6] While much of Ms Gul's argument in this Court was predicated on the proposition that she had been the subject of provocation and violence, these allegations were disputed in the evidence below.

11. In submissions below, Ms Gul contended that in any event, the words "fucking bitch" were not indecent. It was said that these were words used by everybody and were inherently subjective.

The proceeding and decision below

12. The prosecution called Ms Vanderlijn, another employee of the store (Mr Munday) and the informant, Senior Constable Creed. Ms Gul gave evidence on her own behalf. During the course of the hearing, her Honour indicated a preparedness to dismiss the charges as trifling.[7] However, Ms Gul was not prepared to accept this and so the proceeding continued.

13. After hearing the evidence and submissions, her Honour found the charge of indecent language proved. Her Honour said that she was satisfied beyond reasonable doubt that Ms Gul did say "fucking bitch" and that in the circumstances of the case, that was indecent language.[8] Her Honour then fined the plaintiff $20 without conviction.

The grounds upon which judicial review is sought

14. The grounds upon which the plaintiff seeks to quash the orders made in relation to the indecent language charge are set out in the plaintiff's originating motion as follows:

> "Grounds
> Should not be charged with this offence in the 1st place. Impugned use of f-word by me not contrary to contemporary standard and didn't warrant interference of legal system.
> There was aggregate of errors of the law from the judge.
> Judge failed:
> – To address and to evaluate disputed evidence of uttered 'f...ing bitch' words –
> To take into relevant consideration into disputed f-word use was done in circumstance of unprovoked

violence towards me and it expressed my opinion under high emotional stress.
– To accord procedural fairness – decision made on finding of fact (f-word) and burden of proof which was not supported by testimony or any material.
– Prosecution failed to prove beyond reasonable doubt fact in dispute and essential element of charge.
– Decision was legally inconsistent, neither logic nor reasonableness applied; decision cannot be supported having regard to evidence.
– Decision disclosed error of principles. The matter was not established beyond reasonable doubts. It was not shown beyond reasonable doubt that the offence was committed. It was inexpedient to inflict any punishment. Result was plainly unjust.
– Judgment of the court should be set aside on the ground of a wrong decision of the law. There was disregard for elementary principles which every court should obey. Principle of natural justice was ignored, there was contravention of natural justice. Court was clearly wrong and it was miscarriage of justice."

Analysis

15. The principles in relation to determining whether language is indecent are well known, and it is not necessary to set them out here.[9] It is sufficient to say that indecency conveys a failure to meet recognised standards of propriety.[10] Such a failure at the lower end of the scale amounts to an indecency; and at the upper end of the scale amounts to an obscenity.[11] Further, in determining whether something is indecent, it is contemporary standards which must be applied. Additionally, the words complained of must be looked at in the context of the circumstances in which they were said. It is for the trier of fact to decide for himself or herself what current standards are, and it is inevitable that a subjective element must enter into the decision.

16. There are undoubtedly many occasions when a person might say the words "fucking bitch" in a public place or within the hearing of a person in a public place without committing any offence.[12] Authorities in this area abound.[13] However, in my view, it was open to her Honour to conclude that if Ms Gul called Ms Vanderlijn a fucking bitch in the circumstances described by Ms Vanderlijn, then this was a use of indecent language contrary to s17(1)(c) of the *Summary Offences Act*. More specifically, the plaintiff has not persuaded me that it was not open for her Honour to so conclude. The fact that the words "fucking bitch"[14] might be capable of being used in a public place without those words being held to be indecent does not tell against a finding that the use of such words is indecent in particular circumstances.[15]

17. In this case, Ms Vanderlijn gave evidence that upon confronting Ms Gul with the allegation that she was stealing and should leave the store, Ms Gul called her a "fucking bitch". This went on.[16] It was open on this evidence for her Honour to conclude that, in the circumstances, Ms Gul used indecent language in contravention of s17(1)(c) of the *Summary Offences Act*. No error of law is shown by the making of this conclusion in the circumstances of this case.

18. In her grounds, Ms Gul contends that there was an "aggregate of errors of law from the judge". The short point is that, having examined the record of the hearing below (including the transcript[17]), I can find no error committed by her Honour. The assertion that her Honour failed to address and evaluate evidence is without merit. Her Honour's conduct of the appeal before her demonstrates that considerable care was given in evaluating the issues that were presented to her Honour. Thus, her Honour accepted that the prosecution had failed to prove dishonesty beyond reasonable doubt. So far as the assertion that there was disputed evidence concerning the uttering of the phrase "fucking bitch" is concerned, it is to be noted that Ms Vanderlijn gave clear evidence that this occurred, whereas Ms Gul's evidence was to the effect that she did not remember whether she said the alleged words. In her submissions, Ms Gul contended that it was not open for her Honour to accept the evidence of Ms Vanderlijn because Ms Vanderlijn was without credit - having assaulted Ms Gul. As I have said above, Ms Gul's evidence on this point was disputed. Further, there is nothing in the material to suggest that it was not open to her Honour to accept Ms Vanderlijn's evidence that there was no assault.

19. A number of Ms Gul's complaints are predicated upon an acceptance of disputed evidence given by her. These grounds cannot succeed because there is no basis for contending that her Honour was bound to accept the evidence upon which they are premised. Other grounds contain high level assertions that the decision was "clearly wrong", "a miscarriage of justice", "legally inconsistent", disclosed neither logic nor reasonableness or was made in "disregard for elementary principles". The use of such high level generalities does not assist the plaintiff. It is clear that her

Honour gave the plaintiff a fair trial of her appeal, before coming to a decision that was open on the evidence.

20. The plaintiff asserts that she was denied procedural fairness, principles of natural justice were ignored, the decision cannot be supported on the evidence and the prosecution failed to prove its case beyond reasonable doubt. However, the plaintiff has made good none of these propositions. The decision was clearly open on the evidence, if not well supported by the evidence of Ms Vanderlijn.[18] Procedural fairness was accorded to the plaintiff at all times and no principle of natural justice was infringed. Her Honour held that she was satisfied beyond reasonable doubt that the words "fucking bitch" had been used. In the circumstances, it was open to her Honour to conclude that the indecent language charge had been proved.

21. In her affidavit sworn 7 November 2008, the plaintiff deposes:

> "Ten min before end of hearing heard very tactless personal remark against me made by judge. Didn't understand why what in my behaviour caused such outburst which clearly showed she became personally biased and prejudiced."

22. I do not accept that her Honour made any remark that could be characterised as a tactless personal remark. Other than the plaintiff's affidavit, there is no evidence of any such remark being made by her Honour. Further, the transcript reveals that her Honour gave the plaintiff a very patient and courteous hearing of her appeal. Additionally, no application was made to her Honour that she should disqualify herself for bias. The short point so far as any allegation of bias is concerned is that the material does not provide any support for an allegation of actual or ostensible bias.

23. So far as the imposition of a $20 fine is concerned, the transcript reveals that, having found the charge proved, her Honour asked the prosecutor whether anything was alleged. Nothing was alleged and her Honour proceeded to fine the plaintiff $20. Whilst the transcript does not show her Honour asking the plaintiff whether she wished to say anything on the question of penalty, the plaintiff neither sought to make, nor made, any such submissions. Further, no complaint was made following her Honour's statement that she would fine the plaintiff $20 without conviction. Additionally, the transcript reveals that Ms Gul was not slow to make submissions to her Honour at any time during the hearing when Ms Gul thought it was in her interests to do so. If it was necessary, I would infer that the failure by the plaintiff to say anything in relation to the issue of penalty arose not because of any denial of procedural fairness, but because Ms Gul had nothing to say about the imposition of a $20 fine without conviction (with the fine being stayed for one month). However, it is sufficient to say that Ms Gul has not satisfied me that there was a denial of natural justice, much less one justifying the grant of judicial review. In any event, no specific complaint was made in the plaintiff's originating motion or affidavits filed in this proceeding or submissions concerning any denial of an opportunity to make submissions on the question of penalty.[19]

24. Finally, Ms Gul contends that it "was inexpedient to inflict any punishment". Her Honour took a different view, fining Ms Gul $20 without conviction[20] (and staying the payment of the fine for one month). There is no merit in this complaint. Specifically, Ms Gul has not demonstrated any jurisdictional error, error of law on the face of the record, denial of procedural fairness, breach of natural justice, bias or any other ground which might found an order quashing the decision below.

Conclusion

25. For the above reasons, this proceeding must be dismissed. In his written submissions,[21] counsel for the first defendant indicated that in the event the plaintiff was unsuccessful, the first defendant would not seek costs. Accordingly, there will be no order as to costs.

---

[1] Contrary to s74 of the *Crimes Act* 1958.
[2] Contrary to s17(1)(c) of the *Summary Offences Act* 1966.
[3] See the letter from the Victorian Government Solicitors Office to the Prothonotary dated 14 November 2008. Cf *R v Australian Broadcasting Tribunal; ex parte Hardiman & Ors* [1980] HCA 13; (1980) 144 CLR 13, 35; 29 ALR 289; (1980) 54 ALJR 314.
[4] T35.9 below.

[5] T87.1 - .6.
[6] See plaintiff's affidavit sworn 7 November 2008.
[7] T21-22 below.
[8] T89 below.
[9] See generally *Crowe v Graham* [1968] HCA 6; (1968) 121 CLR 375; [1968] ALR 524; (1968) 41 ALJR 402; *Romeyko v Samuels* (1972) 2 SASR 529, 560 and 562-3; (1972) 19 FLR 322 and *Hortin v Rowbottom* (1993) 61 SASR 313; (1993) 68 A Crim R 381. See further *Pell v The Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391; (1997) 96 A Crim R 575; *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1; (2004) 209 ALR 182; (2004) 78 ALJR 1166 and *Heans v Herangi* [2007] WASC 175; (2007) 175 A Crim R 175.
[10] See *Pell v The Council of the Trustees of the National Gallery of Victoria*, *supra* at p394-395 wherein Harper J referred to the often cited statement of Lord Parker CJ in *R v Stanley* [1965] 2 QB 327 at 333 and the Butterworths *Australian Legal Dictionary* definition of indecent as:
"(1) Unbecoming or offensive to common propriety.
(2) An affront to modesty. An act is indecent if it would offend the ordinary modesty of the average person."
[11] See *R v Stanley* [1965] 2 QB 327 at 333; *Phillips v Police* [1994] SASC 4848; (1994) 75 A Crim R 480 and *Pell v The Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391 at 394; (1997) 96 A Crim R 575.
[12] Cf *Summary Offences Act* 1966, s17(1)(c).
[13] See for example *E (a child) v Staats* (1994) 13 WAR 1; (1994) 76 A Crim R 343 where it was held that the use of the word "fuck" in the circumstances of that case was not obscene.
[14] Or the word "fuck".
[15] As was said in *Hortin v Rowbottom* (1993) 61 SASR 313; (1993) 68 A Crim R 381 at 385:
"... [I]t is equally erroneous to hold that the common four letter words are necessarily indecent in every context, and to hold that they can never be indecent in any context at all."
[16] See T4-5 below.
[17] And noting Ms Gul's complaints about the transcript as set out in her affidavit of 16 March 2009.
[18] At least as to the saying of the relevant words.
[19] When I asked the plaintiff in submissions to identify the breaches of natural justice and procedural fairness, her response was limited to the fact that her Honour had found the charge proved beyond reasonable doubt and had failed to apply contemporary standards. As I understood the plaintiff's submissions, she made no complaint about any denial of an opportunity to make submissions concerning the appropriate disposition once the charge of indecent language was found proved.
[20] Section 17(1) of the *Summary Offences Act* provides that the penalty for a first offence is 10 penalty units ($1,074.30 as at 5 April 2007) or imprisonment for two months.
[21] Dated 10 May 2010.

APPEARANCES: The plaintiff Gul appeared in person. For the first defendant Senior Constable Creed: Mr B Sonnet, counsel. Office of Public Prosecutions.
