08/76

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

R v BURGMAN

Jacobs P, Hope and Reynolds JJ A

4 May 1973

CRIMINAL LAW – OFFENSIVE BEHAVIOUR – ENTRY BY DEFENDANT ONTO CRICKET GROUND WHILST FOOTBALL MATCH BEING PLAYED – DEFENDANT CHARGED WITH OFFENSIVE BEHAVIOUR – APPLICATION OF THE EXTERNAL STANDARD – RELEVANCE OF INTENTION AND DEFENDANT'S NOTICE – FINDING BY COURT THAT CHARGE PROVED – WHETHER COURT IN ERROR: *SUMMARY OFFENCES ACT* 1970 (NSW), S50.

This matter came before the above court as a case stated. The appellant a woman was convicted of offensive behaviour and sentenced to two months' imprisonment with hard labour. The actual charge read —
"did within the view from a public place behave in an offensive manner."

The following facts were found or admitted:—

During the course of a football match played at the Sydney Cricket Ground with an attendance of 1700 people, the defendant while play was in progress, ran upon portion of the grassed area which is surrounded by a low picket fence and sat down on the grass near the point of play. Most of the spectators were outside the picket fence. As the appellant was performing these actions a portion of the crowd indicated approval and encouragement of her actions, and at the same time another portion of the crowd indicated disapproval of the appellant's actions.

Upon a Case Stated by the Court of Quarter Sessions of NSW—

HELD: per Hope and Reynolds JJA (Jacobs P, dissenting) it was open to the tribunal of fact to find the conduct offensive. The Stated Case was answered by the Majority in the affirmative.

1. Per Hope JA: The deliberate, i.e. intended, interruption of such a game, or indeed of any public spectacle or performance whether of the same or quite different kind, as, for example, a concert or a play, by physical intrusion upon an area set aside for the game, spectacle or performance, in such a way as to interfere with the action that is proceeding on that area, can amount to offensive behaviour.

2. What had to be decided was whether the intentional acts of the appellant were objectively so offensive that they should attract the sanction of the criminal law; the views of particular citizens including those present at an interrupted football game, did not resolve the question.

3. Having regard to the evidence as to the interruption of the game in the present case there was some evidence upon which a tribunal of fact could have found that the appellant's behaviour was offensive within the meaning of the section.

4. Per Reynolds JA: It cannot be that it is enough if, in a subjective sense, some people or even many people would be offended by the conduct or behaviour complained of. There must surely be some external standard for otherwise strong political or religious opinions or criticisms would generally be regarded as offensive.

5. The behaviour to be offensive within the meaning of the section, 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.
***Worcester v Smith* [1951] VicLawRp 43; (1951) VLR 316, followed.**

6. Adopting this external standard aid and applying it to the facts of the present case, it was open to the tribunal of fact to find that the conduct in question was offensive as a matter of fact.

JACOBS P: I am of the opinion that there is no evidence upon which the appellant could be convicted of behaving in an offensive manner. It is notoriously difficult to define what behaviour is capable of being regarded as criminally offensive. However, it must be a quality of the actual behaviour which is capable of being described as offensive. The behaviour must be offensive *per se*.

This was clearly established as a principle in New South Wales as long ago as 1877 in *Ex parte Collier* (Knox Reports 513). A. was convicted of insulting behaviour towards B. B. was a coroner and was late at an inquest to which A. was summoned as a juryman. A. said: 'It is hard to be summoned for 9 o'clock. B. could not attend because he had not his cows milked and had to supply the stores with butter before he could attend to his business.'

After repeating these words he said: 'I'm not a toady and get no favours.' He afterwards followed B. and said: 'I defy you', and screamed after him. He was convicted but a prohibition was granted by the Full Court.

Hargrave J said at 514 'it is said that the Magistrates were the proper persons to judge of the character of the language used, but the very foundation of their jurisdiction is that the words, *per se*, must be abusive and insulting'. Although this case concerned insulting behaviour it appears to me that the same principle is applicable in respect of offensive behaviour.

The section is not intended to make it a criminal offence to behave in a way which in particular circumstances may offend another or others. It strikes at behaviour which is intrinsically and not extrinsically offensive.

Now it does not seem to me possible to say that it is intrinsically offensive, offensive *per se*, to go onto the area of play while a football match is in progress and to interrupt the play. Before any person could answer the question whether such behaviour was calculated to offend in the circumstances that person would have to ask the question 'what was the purpose for which the person went onto the playing area?' The act has no intrinsic quality of offensiveness.

Many reasons and motives if understood might take away the offensive quality of the act. A person might go onto the area of play in order to stop the game because it has become incongruous and lacking in respect that the game should continue because, for instance, a national tragedy has occurred. But it is conceded that motive is irrelevant.

That being so, if the behaviour is innocent on one motivation and capable of offending some persons on another motivation it is not in my opinion offensive behaviour within the meaning of the *Summary Offences Act* 1970.

I do not mean that all the circumstances and setting of the behaviour cannot be regarded. I do not mean that the behaviour has to be extracted from its setting. It is proper to have regard to the circumstances of the day at the Sydney Cricket Ground but it still remains necessary to ask the question whether the impugned behaviour was offensive irrespective of its motivation.

I do not think that such behaviour *per se* in all the circumstances that existed could be described as *per se* offensive irrespective of its motivation. If the appellant committed an offence by entering the area of play it would be an offence under the laws governing the Sydney Cricket Ground. If her licence to be present did not extend to such behaviour then she would be guilty of an offence under the *Summary Offences Act* 1970, Section 50. I am of the opinion that the question should be answered in the negative.

HOPE JA: The meaning of the word 'offensive' in a context similar to that of s7 of the *Summary Offences Act* 1970, was considered by Kerr J (as he then was) in *Ball v McIntyre* (1966) 9 FLR 237. His Honour discussed a number of reported decisions, and expressed agreement with the conclusion of O'Bryan J in *Worcester v Smith* [1951] VicLawRp 43; (1951) VLR 316 at p318, that in order to be offensive within the meaning of such a section, behaviour must be such as is calculated to wound the feelings, arouse anger, resentment or disgust or outrage in the mind of a reasonable person.

He also pointed out that the mere circumstance that a person or a number of persons are offended by particular behaviour will not make it offensive for the purpose of the section and in particular that behaviour does not become offensive for this purpose merely because it does not conform with accepted standards of behaviour, or is in some sense hurtful, blameworthy or improper.

In general terms, I agree with these observations of the learned Judge, and consider that they

are applicable to s7 of the *Summary Offences Act*. However it must be remembered that the relevant word in the section is 'offensive'; as it seems to me, what O'Bryan J and Kerr J (as he was) were doing was to point out that despite the wide meaning which this word can have in some contexts, even when objective standards are applied, the section was not intended to catch up any behaviour that could be regarded as coming within that wide meaning; the behaviour with which the defendant is charged must be so offensive that it justifies criminal proceedings and the application of the sanctions of the criminal law; and it may do so if it is calculated to have the effect which the learned Judges described.

However, with respect to Kerr J, I do not agree with all the observations His Honour made in *Ball v McIntyre* (*supra*). Thus in my opinion neither the fact that the behaviour was spontaneous and not premeditated, nor the fact that it was part of an attempt to draw wider public attention to a protest which was already in progress, would be relevant to the question whether the behaviour was offensive except insofar as those circumstances were in some way objectively reflected in the behaviour or its context. I will take the example of a man who falls on to a public footpath in front of pedestrians who, as a consequence, trip over him and fall to the ground. If the man's fall was accidental his behaviour would not be offensive, for he would not have the necessary guilty intention.

If, however, he intended to fall and thereby trip pedestrians, I do not think it would matter whether he had decided to do it on the spot, or the day before; nor would it matter whether he did it in order to draw attention to himself, or to draw attention to a demonstration in the adjacent street, or for what he perversely regarded as the fun of it; in all these cases his behaviour could be regarded as offensive.

However, the fact that his fall was intentional and that the Tribunal regarded behaviour of such a kind in such a place as generally capable of being regarded as offensive would not necessarily lead to conviction.

In the example I have given, I have taken the relevant behaviour to be the falling of the man on to the pavement in such a way that pedestrians tripped over him. Now the man may have flung himself on to the pavement intentionally, but only in order to avoid some injury to himself.

In such a case his behaviour would probably not be offensive either because, not intending to trip pedestrians or not realising that he would trip pedestrians, he did not have the necessary guilty intent, or because, if he realised he would trip pedestrians, the circumstances leading to his attempt to avoid injury to himself would be part of the context in which his behaviour occurred, and would be part of the objective circumstances in the context of which the question whether his behaviour was offensive would have to be determined.

This does not mean that it is relevant to determine whether the behaviour of the accused person was subjectively intended to be offensive; a man tripping up pedestrians on a footpath could be found guilty of offensive behaviour, even if, for some reason, he believed that they would merely be amused by his action.

On the other hand, the fact that a man intended his behaviour to offend someone, and that it had that result, would not make him guilty of offensive behaviour unless his conduct was offensive by external, objective standards. As it seems to me, what has to be looked at is the physical action the subject of the complaint in its objective context and the intention of the defendant in relation to that action; his motive is only of relevance insofar as it throws light on his intention.

Going then to the evidence in the present case, I do not think that the facts set out in the stated case, without reference to the transcript of evidence before the Court of Quarter Sessions, of themselves afforded evidence of offensive behaviour. It may be that the appellant's action in climbing the picket fence on to the field constituted a breach of some by-law applicable to the Sydney Cricket Ground, but even if this be so, that would not of itself, without reference to other circumstances, afford evidence of offensive behaviour.

However, there is some evidence in the transcript to support a finding that the appellant's behaviour was offensive. There does not seem to be anything which alters the character of the

act of climbing over the fence, unless it be that it was the necessary preliminary to and part of the behaviour that followed.

It is the evidence of this latter behaviour up to the time of the arrest, and of the effect of this behaviour on the game, which in my opinion can be regarded as supporting the charge against the appellant. Her conduct after she was arrested is irrelevant for this purpose, for the offence with which she was charged had been committed by that time.

As it seems to me, the deliberate, i.e. intended, interruption of such a game, or indeed of any public spectacle or performance whether of the same or quite different kind, as, for example, a concert or a play, by physical intrusion upon an area set aside for the game, spectacle or performance, in such a way as to interfere with the action that is proceeding on that area, can amount to offensive behaviour.

It will not necessarily have this effect; one can imagine many circumstances in which the action of a person obstructing a game of football or any other public spectacle or performance would not amount to offensive behaviour. Thus the action of a referee in stopping play is not offensive; nor is the action of the ambulance man merely because in going to the assistance of an injured player he interrupts the game or some part of it.

This is because the objective circumstances in which the play was interrupted would preclude the acts of the referee and of the ambulance man from being regarded as offensive, even though these acts are looked at objectively.

These cases are of course only given as obvious examples, and are not intended to limit the class of circumstances in which an interruption of a game will not be offensive. I would also add that I have not intended by what I have said to express any view as to whether an intrusion on to a playing field in a way which does not, or does not immediately, interfere with the game, can ever be offensive behaviour; I have only been concerned to consider the evidence in the present case.

Whether in its objective context an act of interruption of the kind I have described does amount to offensive behaviour is a question of fact. The reaction of the spectators who happen to be present seems to me to be generally irrelevant, except to the extent that it throws light on some relevant objective circumstance. Thus the circumstance that in the present case some people cheered and some people booed seems to be of little relevance.

It is not unlikely that some if not a substantial part of this action was related not to the interruption as such, but to the question whether sport should be affected by political and similar consideration; but whatever it related to, what has to be decided is whether the intentional acts of the appellant were objectively so offensive that they should attract the sanction of the criminal law; the views of particular citizens including those present at an interrupted football game, do not resolve the question.

Applying the considerations I have referred to, I think that the rather sparse evidence as to the interruption of the game in the present case is some evidence upon which a tribunal of fact could find that the appellant's behaviour was offensive within the meaning of the section. Accordingly the question in the stated case should be answered in the affirmative, and the matter remitted with this answer to the Court of Quarter Sessions.

REYNOLDS JA: One difficulty is that the word 'offensive' is in the nature of a relative description of conduct. This aspect has been discussed in an article in 14 ALJ 384 by FC Hutley under the title 'Insulting Words'. It cannot be that it is enough if, in a subjective sense, some people or even many people would be offended by the conduct or behaviour complained of.

There must surely be some external standard for otherwise strong political or religious opinions or criticisms would generally be regarded as offensive. That there must be an external standard has been recognised by the authorities in modern times.

Cussen ACJ said so in *Anderson v Kynaston* [1924] VicLawRp 32; (1924) VLR 214, O'Bryan J in *Worcester v Smith* [1951] VicLawRp 43; (1951) VLR 316 was prepared to attempt to define this

external standard in the following terms:-

> 'The behaviour to be offensive within the meaning of that section, must, in my opinion, be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.'

In *Ball v McIntyre & Anor* 9 FLR 237 Kerr J (as he then was) was disposed to agree with O'Bryan J that offensive behaviour is calculated to produce such emotional reactions in the reasonable man, and he pointed out that Mr Justice Pape had adopted a similar view in *Inglis v Fish* [1961] VicRp 97; (1961) VR 607 at 611.

I respectfully am also prepared to adopt this external standard aid, applying it to the facts of the present case. I am of the opinion that it is open to the tribunal of fact to find that the conduct in question was offensive as a matter of fact.

I would propose that the question in the case stated be answered in the affirmative and the matter remitted with the answer to the Court of Quarter Sessions.
