49/1980

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

BIERKOWSKI v PEARSON

Fox J

9 December 1971 — (1971) 18 FLR 110

CRIMINAL LAW - EVIDENCE - WEIGHT - POLICE TESTIMONY - GENERAL PRINCIPLES - OBSERVATIONS UPON THE EVALUATION OF POLICE TESTIMONY WHICH CONFLICTS WITH LAY EVIDENCE.

FOX J: This is an appeal against a conviction and sentence in the Children's Court on a charge under s17(c) of the *Police Offences Ordinance* 1930-1970 (ACT) of using insulting words in a public place, namely the foyer of ACT Police Headquarters. The appellant was seventeen years of age at the time, and is now eighteen. Evidence was given in support of the charge by two police officers. Their evidence is to the effect that they were on duty on the evening of Sunday, 14th February at the inquiry desk in the police station when, at about 9.20 pm, the appellant and a friend approached them. The appellant said he was required to produce his driving licence, which he did. The sergeant went to the end of the counter, where the appropriate record book was, and the appellant went to a corresponding position on his side of the counter. The sergeant looked at the licence, told the appellant that in view of its condition he should get another one on the following day, and bring that to the police station, and placed or dropped the licence back on the counter, without making the usual, or any, entry in the book. The appellant, on this evidence, took up the licence, stepped back two or three feet, started to move towards the exit doorway, and said, referring to the licence: "I think I'd better wipe this – I'm not going to lose ten bucks. I think I'd better wipe this clean after you've handled it, you filthy, fat slob." The sergeant started to move along the counter and said, "I beg your pardon". He had cleared the counter, passed through an adjoining typists' room, and reached the public area in which the appellant was, in time to be near the latter when he answered, "You heard". The sergeant thereupon told the appellant that he was under arrest for using insulting words in a public place, and took him by the arm to the charge room.

The evidence of the sergeant and the constable who was on duty with him is not the same in all respects, but they are in agreement as to what was said by the appellant when he used the words charged. The appellant and Oakley (his companion) deny that the appellant used the words "filthy, fat slob". They differ in their accounts in more respects than the police officers do, but in substance they say that when the sergeant directed the appellant to get a new licence the following day, he was told that this would cost the appellant ten dollars (a day's wages), and that the sergeant then said it would cost him more if he did not get one. Upon Oakley saying that he, the sergeant, had no authority to order the appellant to get a fresh licence, the sergeant either threw the licence onto the counter so that it skidded off, onto the floor, or threw the licence over the counter onto the floor. They say that the appellant asked his friend whether he should pick up the licence, then did so, and brushed it on his sleeve or trousers. He got no further before the sergeant seized him and started to take him to the charge room. The appellant did not know the words he was said to have used until he was shown a place of paper on which they were written the following morning, shortly before his case came on.

He told the Magistrate that he had not used the words in question, but after some discussion nevertheless insisted upon pleading guilty. There is therefore a direct conflict as to whether the words in question were spoken. Also, the two accounts are cast in different contexts. The police version is that the appellant was politely told that he should get a fresh licence, the one tendered by him was courteously returned to him, he then commenced to leave, and, without there having been any previous appearance of discord or animosity, he insulted and abused the sergeant. The version of the appellant and Oakley is that the sergeant acted unreasonably and precipitately and in an authoritarian manner, that his authority to order that a fresh licence be obtained was challenged, that he rudely threw the licence back, that the licence had to be picked up from the

floor, and that the only act of the appellant which could be regarded as rude or provocative was the way in which he dusted or cleaned the licence after he had picked it up from the floor.

As I understand that conflicts of evidence, particularly where policemen are witnesses, have recently created problems in the Court of Petty Sessions, it may be of some assistance if I make some observations on the subject. The requirement that a criminal charge must be proved beyond reasonable doubt is not so old, having had its origin, I believe, in the eighteenth century, and the concept of reasonable doubt may not be much older. Many attempts have been made to give precision to the concept, and there have been many discussions on the question of what is rational and irrational, and related matters. When it comes to a charge to a jury, the courts, more particularly so in Australia, have been discouraged from any attempt to explain what is meant. A common, and permissible direction is that reasonable doubt does not include a fanciful doubt. Much farther than that it is not possible to go. When sitting without a jury, the most that I imagine a judge can do, and the same applies, of course, to a Magistrate, is to consider the evidence carefully, taking account of all the material before him, and all the matters which go to "credit", and then to ask himself whether he is satisfied beyond reasonable doubt. Ultimately, what is involved is his own judgment and his own belief. Where evidence is given by police officers, it must be weighed and considered in the same way as any other oral evidence.

Professor Glanville Williams in *The Proof of Guilt*, 3rd ed., p325, expressed his views, which were of course related to English policemen, as follows:

> "A policeman's word should not be taken against that of the citizen merely because the former is in uniform, and on a conflict of evidence it is always necessary to ask whether the case has been brought home beyond reasonable doubt. Although it is doubtless rare for a policeman to give wilfully false evidence against a man whom he believes innocent, it is not unknown for a policeman who believes the defendant guilty (as he generally does) to embroider and strengthen his evidence with the object of procuring a conviction. Also, despite many official denials that promotion in the force depends upon securing convictions, it is probably true to say that some young constables believe that it does. For those reasons an uncritical acceptance of all police testimony, which is sometimes observed in Magistrates' courts, is to be deprecated."

A decision to acquit in a case where evidence by a policemen appears to lead necessarily to a conviction should not in the ordinary case be regarded as a positive decision that the policeman's evidence is unreliable, still less that it was dishonest. The fact is that the tribunal is considering a different question, namely whether, in the light of all the evidence, it is satisfied of the guilt of the accused beyond reasonable doubt. The tribunal may feel that the policeman's evidence is quite possibly correct, and yet have a doubt. This will not happen, but it is important, in appropriate cases, to bear the difference in mind, otherwise there might be a tendency to convict simply in order to avoid the appearance of disbelieving the police evidence.

Under our system the adversary system as it is called, the judge or magistrate does not have any general inquisitorial powers. He may ask some questions, but his impartiality and capacity to judge may come into question if he asks too many, particularly of one witness, or witnesses for one side. He is very much in the hands of counsel. And it has to be recognized that our court processes are complex and technical, as also are our rules of evidence. He certainly should strive to keep complexities and technicalities to a minimum, and to ensure that justice is not denied by reason thereof, but for the most part they became part of the system in an attempt to ensure that justice might be done in every case. The fact is that the conduct of proceedings in court is a highly skilled activity. An unskilled or inexperienced advocate is usually at a disadvantage, and there is little the court can do to redress the balance. When it comes to a process of ascertaining the "truth", it is trite to say that this is not truth in any absolute sense, but "truth" according to the evidence adduced, and, one might add, in the light of the arguments submitted. The failure to ask one question, in chief or in cross-examination, or even the form in which a question is put, can make a big difference. The evaluation of police evidence is not always an easy matter. Policemen are trained to be competent witnesses and they soon get abundant experience in that role. They are trained to take notes methodically. They are not now discouraged from comparing experience when preparing their notes, although this is a matter that should made known to the court, if it can in any way be relevant.

In the present case, the two policemen prepared their notes in concert, and the sergeant said of the constable's that "they'd be the same" as his own. An occupational difficulty to which

policemen are subject is in remembering the relevant events. With many cases current at the one time, and with the delays that unfortunately occur in hearing cases, they must rely heavily on what they have written in their notes. Sensibly, they are now allowed to refresh their memories from this source more readily than used to be the case. Of course, the notes must be in court, and the circumstances in which they were made should be made known.

One of the matters which I imagine concerns most judges and Magistrates is the type of second rate cross-examination, to which police are often subjected, which seeks to insult or ridicule, and to attack indiscriminately at every point. A serious aspect of this is that it has a tendency to provoke protective tactics, and these only worsen the position. A judge or magistrate, sitting alone, will usually hear less of this sort of cross-examination than a judge sitting with a jury, because it is recognized that the former is a more discriminating and experienced audience, and freer to show his dissatisfaction. The person best in a position to protect the police officer from unfair, insulting or unreasonable cross-examination is the advocate who calls him, and, again, much depends on his knowledge, experience and skill. It is to be appreciated, too, that a court does not look at some piece of evidence, however crucial, in isolation. It looks to the whole of the circumstances, the whole case, and judges the part by the whole. In the present case, consideration of the whole, and in particular the context in which the words were said to have been spoken, leaves me in doubt. The appeal is allowed, and the conviction and sentence quashed.
