06/69

SUPREME COURT OF VICTORIA

FARRELLY v LITTLE

Little J

18-19, 22, 29 September 1969 — [1970] VicRp 2; [1970] VR 18

SUMMARY OFFENCES – USING OBSCENE LANGUAGE IN A PUBLIC PLACE – WORDS UTTERED BY ACTORS IN A PLAY PUBLICLY PERFORMED – LARGE NUMBER OF PERSONS PRESENT – PLAY PRESENTED ON A NUMBER OF OCCASIONS – CHARGES FOUND PROVED BY MAGISTRATE – MAGISTRATE TOOK THE VIEW THAT THE OFFENCES WERE TRIFLING AND WITHOUT PROCEEDING TO CONVICTION DISMISSED ALL THE INFORMATIONS – MATTERS REFERRED TO BY THE MAGISTRATE IN DECIDING THAT THE MATTERS WERE TRIFLING – WHETHER SOME OR ALL OF THE MATTERS WERE IRRELEVANT – WHETHER MAGISTRATE IN ERROR: *SUMMARY OFFENCES ACT* 1966, S17(1); *JUSTICES ACT* 1958, S75.

HELD: Order absolute. Dismissals set aside. Informations remitted to the Magistrates' Court for imposition of penalty.

1. Section 75 of the *Justices Act* 1958 plainly conferred a wide discretion on the Magistrates' Court, but it was a discretion to be judicially and not capriciously exercised. It could be exercised only when the Court had found the charge proved, and before an order could be made under either paragraph (a) or paragraph (b) thereof, the Court had to think that the offence was in the particular case of so trifling a nature that it was inexpedient to inflict any punishment or any other than a nominal punishment. The language of s75 required that attention be directed to the nature of the offence charged and the circumstances of the particular case attaching to or surrounding its commission.

2. In the category of offences "punishable on summary conviction under" the *Justices Act* "or any other Act", the offence of using obscene language in a public place could not be regarded as one of a minor or trivial character. In that category Parliament apparently treated it as in its nature, and, speaking relatively, a serious offence. That being so, it would seem necessary to find some special circumstances, something marked about the circumstances, accompanying or surrounding the use of the obscene language to enable a court properly to conclude that in the particular case the offence was trifling within s75.

3. It is to be noted in applying s75 that the question was not whether the obscenity was trifling but whether the offence was trifling. The offence was using obscene language in a public place. The public place in the present case was a theatre with a capacity to seat approximately 300 persons, and on each occasion of a visit by police officers, the accommodation was substantially if not fully occupied. There was evidence that as to two of the defendants, one particular word—which it was accepted at the Bar table was the most objectionable of the words used—was employed by them on more than one occasion at each performance. The case was not one of an isolated or unrehearsed use of obscene language. The play was staged nightly and the language was intentionally used by the defendants on each occasion as part of a play, albeit a "serious" and well-acted play, they were as professional actors engaged to perform.

4. All of the matters referred to by the Magistrate represented his reasons for thinking that the offence was in the particular case trifling, and the proper conclusion was that the decision that the offence was trifling was arrived at by taking into account matters irrelevant thereto.

5. Accordingly, there was a miscarriage of the discretion given by s75 to the Magistrates' Court and the order in each case dismissing the information was set aside.

LITTLE J: This is the return of nine orders nisi to review decisions of a Court of Petty Sessions constituted by a Stipendiary Magistrate dismissing informations against three defendants charging them with using obscene language in a public place, an offence under s17(1)(c) of the *Summary Offences Act* 1966.

Section 17(1) of that Act provides, so far as presently relevant, that any person who in or near a public place or within the hearing of any person being or passing therein or thereon, uses

profane, indecent or obscene language shall be guilty of an offence. Penalty $100 or imprisonment for two months. By virtue of s26A of the *Acts Interpretation Act* 1958 the penalty so provided is a maximum one.

The words attributed to the defendants as constituting obscene language as alleged were uttered by them as actors in a play called "The Boys in the Band" which was staged at the Playbox Theatre in Exhibition Street. As against the defendants Krummel and Little, four informations were laid alleging that they had so used obscene language on 19 June, 21 June, 3 July and 8 July 1969, respectively. As against the defendant, Norman, the allegation was confined to one occasion, namely, 8 July 1969. The information in each case resulted from attendance of police officers at the theatre. Evidence was given by them before the Stipendiary Magistrate as to the words they heard used on the occasions specified in the informations and, save as to one word, the Stipendiary Magistrate expressed himself satisfied that the language alleged had in fact been used.

The defendants were represented in the Court of Petty Sessions by Mr Woodward QC, and Mr Brusey of counsel, and it appears from the transcript of the proceedings and the reasons for judgment that elaborate argument took place and many authorities were cited on the question whether the language used was in the circumstances obscene. In a reserved judgment the magistrate held that the words used were, with one exception, obscene and that the charges laid were proved. He said, however, he thought in the particular cases before him that the offence of using obscene language in a public place was trifling and without proceeding to conviction he dismissed all the informations. In so doing he exercised the discretionary power conferred on the Court of Petty Sessions by s75 of the *Justices Act* 1958.

Omitting immaterial language, s75 provides:

> "Except where otherwise expressly enacted when upon the hearing of a charge for an offence punishable on summary conviction under this Act or under any other Act now or hereafter in force...the Court of Petty Sessions thinks that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment—
> (a) the court without proceeding to conviction may dismiss the information and... or
> (b) the court upon convicting the person charged may discharge him conditionally on his giving security...".

The section concludes with the language:

> "This section shall not apply where a person has pleaded guilty to a charge in relation to an offence of which he could not if he had not pleaded guilty be convicted summarily."

It is against the orders dismissing the informations that the informant now appeals by way of order to review to this Court.

The order nisi in each case was granted on several grounds. I need refer to the third, fourth and fifth grounds only. The third ground reads:

> "That in exercising his discretion under s75 of the *Justices Act* 1958, the Stipendiary Magistrate erred in taking into account matters,
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> (1) which were irrelevant in that they did not concern the nature of the offence committed by the defendant,
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> (2) which it was not open for him to consider in determining whether the offence committed was of a trifling nature,
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> (3) which related solely to the severity of the penalty to be inflicted after a conviction had been recorded and not to the question whether a conviction ought to have been recorded."

The fourth ground reads:

> "That in the exercise of his discretion under s75 of the *Justices Act* 1958, the Stipendiary Magistrate failed to take into account all the relevant circumstances in determining to dismiss the said information without proceeding to conviction."

And the fifth ground reads:

> "That in the circumstances of this case it was not open to the Stipendiary Magistrate to determine that the offence proved was of so trifling a nature that it was inexpedient to inflict any punishment."

Section 75 plainly confers a wide discretion on the Court of Petty Sessions, but, of course, it is a discretion to be judicially and not capriciously exercised. It can be exercised only when the justices have found the charge proved, and before an order can be made under either paragraph (a) or paragraph (b) thereof, they must think that the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment. The legislation provides no guide as to what is meant by an offence of a trifling character and as was said by Hood J in *Williams v May* [1908] VicLawRp 85; [1908] VLR 605, at p608; 14 ALR 504, at p505: "it is probably impossible, and certainly unwise, for this Court to lay down any hard and fast rule". The language, however, requires that attention be directed to the nature of the offence charged and the circumstances of the particular case attaching to or surrounding its commission.

In *Williams v May*, *supra*, Hood J at (VLR) p608; (ALR) p505, said:

> "An offence may be of a trifling nature in itself, or when serious the facts of the particular case may reduce the gravity of it, but in the latter event the mitigating circumstances ought to be very marked in order to bring this section into operation."

In *Re Stubbs* (1947) 47 SR (NSW) 329; 64 WN (NSW) 53, the Full Court of New South Wales was concerned with legislation which included language similar to that in s75 of the *Justices Act* 1958. At p340, Street J cited a passage from the judgment of Hewart LCJ, in *Thomas v Hughes* [1929] 1 KB 226, at p232, and his Honour continued:

> "If, when the offence has been proved, the evidence also establishes the existence of some one or more mitigating circumstances which make the conduct of the offender, in relation to the commission of the offence, comparatively venial, then the Court may, if it is satisfied that the circumstances of the case so warrant, treat the offence as being of a trivial nature."

At p341, his Honour said:

> "The discretion conferred upon the Court is a wide one, but the section is not intended to operate so as to permit offenders to break the law with impunity unless facts are established which, while not amounting to a defence, provide extenuating circumstances in relation to the commission of the particular offence charged. There must be good and substantial ground for absolving an offender from the punishment prescribed by law for this offence."

I refer also to the judgment of Jordan CJ, in the same case, at p333, and the judgment of Davidson J at pp336, 337, and I refer also to cases mentioned in argument by counsel: *Phillips v Evans* [1896] 1 QB 305; *Barnard v Barton* [1906] 1 KB 357; *Ellis v Hartley* [1902] VicLawRp 7; (1901) 27 VLR 31; 7 ALR 125; *McCarthy v Codd* [1959] VicRp 16; [1959] VR 88; [1959] ALR 318; *Gray v Dean* (unreported), a decision of O'Bryan J excerpts of which are recorded in 18 ALJ 164.

I turn now to the reasons given by the Stipendiary Magistrate for dismissing the informations. Having found that each of the offences was proved, his written judgment proceeds as follows:

> "I have to consider the question of penalty and take into account the following matters. Firstly, nothing is alleged against these three young men. Secondly, they have been subject to police interrogation and brought before the Court as defendants in a criminal prosecution. Thirdly, they were performing in a play which has been playing in Australia for some months without any official action being taken. Fourthly, it would appear that no similar prosecution has been launched in Victoria or in fact until very recently in Australia. Fifthly, the stage play is performed before persons who wish to be present after being warned that the play is for adults only. And finally, I think, that on the question of penalty, I can take into account the fact that the Chief Secretary, despite his very wide powers under the *Theatres Act* 1958, has taken no action. In all these circumstances I have decided to exercise my discretion under s75 of the *Justices Act* 1958, and in each information I find that the charge is proved but the offence is of so trifling a nature that it is inexpedient to inflict any punishment and without proceeding to conviction the information is dismissed. In arriving at this decision, I have

> taken into account the words of Hood J in *Williams v May* [1908] VicLawRp 85; [1908] VLR 605, at p608; 14 ALR 504, 'an offence may be of a trifling nature in itself, or when serious the facts of the particular case may reduce the gravity of it, but in the latter event the mitigating circumstances ought to be very marked in order to bring this section into operation'."

Mr Charles, who appeared for the informant to move the order absolute in each case, submitted that the reasons which I have quoted disclosed error which, on the application of established principles, warranted and required the setting aside of the orders dismissing the informations.

It is necessary to keep clearly in mind that the order of the Court of Petty Sessions being one involving a discretionary judgment, an appellate court is not entitled to disturb it unless it is made to appear that error producing the result has been made in exercising the discretion. It is not enough that on appeal the Court is of opinion that if it had been in the position of the tribunal of first instance, it would have made a different order. The principles applicable have been frequently stated: *vide Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513, at pp518, 519; [1950] ALR 944, at pp944-5, and in particular the passage cited by Latham CJ at (CLR) p518; (ALR) p945 from the judgment in *House v R* [1936] HCA 40; (1936) 55 CLR 499, at pp504, 505; 9 ABC 117; (1936) 10 ALJR 202.

More recently, in *Rodgers v Rodgers* [1964] HCA 25; (1964) 114 CLR 608, at p619; [1965] ALR 109, at p117; 38 ALJR 27, the High Court quoted as a convenient summary of the principles applicable to appeals from orders involving discretionary judgments, a passage in the judgment of Kitto J in *Australian Coal and Shale Employees' Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, at p627, where that learned judge said:

> "I shall not repeat the references I made in *Lovell v Lovell* to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law imposes in the court of first instance; *House v R* [1936] HCA 40; (1936) 55 CLR 499, at pp504, 505; 9 ABC 117; (1936) 10 ALJR 202."

With those principles in mind, Mr Charles made three broad submissions in relation to the reasons given for dismissal of the informations:–

> (a) In considering whether the offence was in the particular case trifling, the Stipendiary Magistrate took into account irrelevant and extraneous matters.
>
> (b) There was a failure on the part of the Magistrate to take into account or give adequate weight to relevant matters which really amounted to a failure to exercise the discretion entrusted to the court.
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> (c) The Magistrate moved directly from a determination that an offence had been committed to the question what penalty should be imposed and that he took the course of dismissing the information without directing his attention properly or at all to the intermediate and necessary inquiry whether the offence was in the particular case of a trifling nature.

I do not accept the last submission which, I think, not only gives a too literal and narrow meaning to the phrase "the question of penalty" but also fails to have sufficient regard to the whole of the reasons as expressed. I think, as Mr Woodward in effect put it, that when the magistrate spoke of "the question of penalty" at the outset of his reasons, he was speaking of the next step he had to take in order finally to dispose of the informations before him. Mr Woodward went on to contend that the magistrate had already at this stage of his judgment formed the view that the offence was trifling and that in what he proceeded to say he did not set out any reasons for taking that view. The six matters he listed, Mr Woodward argued, related solely to a decision in the exercise of discretion to dismiss the informations pursuant to paragraph (a) of s75 rather than take the alternative course provided by para.(b) thereof. I do not agree with that contention.

The reasons given by the magistrate in his reserved judgment show that he had given close and careful attention to all the matters in issue and debated before him. In invoking s75 there can be no room for doubt that he was fully conscious that the fundamental matter for his consideration was whether the offence was of so trifling a nature that it was inexpedient to inflict any punishment. I am unable to think that he would not set out reasons for his conclusion on that vital question but would set out *seriatim* reasons for his choice in relation to the subsidiary question whether he should act under paragraph (a) or, on the other hand, paragraph (b) of s75. I think, when regard is had to the whole of the passage I have quoted, the proper conclusion is that the matters set out therein were intended to represent and in fact represented his reason for finding that the offence was trifling—if I may abbreviate the language of the section. That, of course, is not to say that they were not also taken into account in arriving at his decision on what I have described as the subsidiary question. It is not, I may add, without significance in relation to Mr Woodward's contention, that the matters so set out are points on which before the magistrate counsel relied, either directly or by reference to earlier submissions, in support of a contention that the offence if found proved, should be held to be trifling.

Mr Woodward presented an alternative argument to the effect that the passage quoted contained reasons some of which were intended to relate solely to the subsidiary matter of choice between para (a) and para (b) of s75 and others of which were intended to relate to the question of triviality or to "triviality" and "choice". There is nothing in the language employed by the magistrate which points to his making any such distinction or which enables the distinction to be made. It is implicit in what I have earlier said that I do not accept the argument but it is desirable to add that even if accepted it would not, I think, for reasons presently appearing, assist Mr Woodward's cause. He conceded before me, and, in my opinion, properly so, that the considerations introduced by "Firstly", "Secondly" and "Finally" were irrelevant to and, accordingly, could not properly be taken into account in determining the question whether the offence was trifling. As to the third consideration, he submitted it was relevant thereto and he referred to the evidence that the Chief Secretary of New South Wales had attended a performance of the play in Sydney and that no action by way of censorship or otherwise had been taken following that occasion. The fourth consideration Mr Woodward sought to uphold, but in fairness to him without any enthusiasm. In my opinion, the third and fourth considerations were equally irrelevant to "triviality". In the result the only matter mentioned by the magistrate which could be considered relevant to that question was the fifth consideration that potential patrons were warned that the play was suitable for adults only. I am unable to think that out of the six matters referred to by the magistrate this was the only one on which he founded his conclusion that the offence was trifling. If I am right in that view, it follows, even if Mr Woodward's alternative argument were accepted, that the magistrate took into account one or more of the other considerations stated which were extraneous to the question he was required to consider. Be that as it may, since I am of opinion that all of the matters stated in the passage I have quoted represent his reasons for thinking that the offence was in the particular case trifling, the proper conclusion is that the decision that the offence was trifling was arrived at by taking into account matters irrelevant thereto.

Accordingly, in my opinion, there was a miscarriage of the discretion given by s75 to the Court of Petty Sessions and the order in each case dismissing the information should be set aside.

It is unnecessary in these circumstances to express any view on the further submission made by Mr Charles that the Stipendiary Magistrate, in arriving at his decision, failed to take into account or give sufficient weight to relevant matters.

It was urged by Mr Woodward that if I were to come to the conclusion that the orders of dismissal should be set aside I should then remit the informations to the Stipendiary Magistrate for further consideration of the question of "triviality" and the exercise of his discretion in the light of this judgment. He submitted that course was the proper one to adopt because the magistrate having attended a performance of the play had material before him which was not available to me in that he was aware of the context and setting in which the offending language was used. I have given careful consideration to this aspect of the matter, but I am satisfied that the factors referred to played no part in his coming to the conclusion that the offence was trifling.

It is to be remembered that the magistrate in his judgment when dealing with the issue of obscenity referred to his attendance at a performance, to the theme and action of the play and the

standard of the production and of the acting, and that he took into account in determining that issue the context in which the language was used. (I refer without reading them to pp2 and 3 of the reasons for his decision) I think, particularly having regard to the care which the magistrate clearly directed to the preparation of his reasons, that if any of these matters, or anything else arising from his attending a performance had affected his mind in favour of a finding of triviality, it is highly improbable that he would have failed to make some mention thereof. Rather, I think, it is highly probable that he would have expressly referred to them, at least in some general way.

I am of opinion, accordingly, that I have before me the material necessary for the determination of this matter and that I should consider it for myself.

Mr Woodward, in support of his contention that the offence was one of a trifling character, relied before this Court on the fact that the language was used in the course of the presentation of a serious play—as distinct from what he termed some pornographic performance—that the nature of the obscenity was "not serious" and that it was published to persons who by advertisements in the press and on hoardings were warned in advance that the play was "Suitable for adults only". To speak of the obscenity as "not serious" is, of course, to indulge in the use of a relative term, but what Mr Woodward meant was that there was in the language used by the defendants in the course of the play and the way it was used, "no particular tendency or intent to deprave", as distinct from what Windeyer J in *Crowe v Graham* [1968] HCA 6; (1968) 121 CLR 375; [1968] ALR 524 at p535; (1968) 41 ALJR 402 at p409; spoke of as the "evil tendency and intent...taken to be apparent" from the publication of obscene matter. *Vide* also per Barwick CJ in the same case at (ALJR) p403; (ALR) p526, per Windeyer J at (ALJR) pp408-10; (ALR) pp533-8, and per Owen J at (ALJR) p413; (ALR) pp542, 543, to all of which passages Mr Woodward drew my attention.

These considerations must be viewed against the background of the magistrate's finding that the language used was obscene and the provisions of s17 of the *Summary Offences Act* 1966, and s75 of the *Justices Act* 1958. As appears from the magistrate's reasons, the finding that the charge was proved was made having regard to the fact that the language was used in a well-produced, well-acted play, and by the application of tests laid down by authority. The finding of obscenity meant, accordingly, that the language used in the performance of the play did, when so used, transgress or offend against contemporary standards of decency in the community, the standards ordinary decent-minded people accept. The offence so found is one of several created by s17 of the *Summary Offences Act*, which would appear to be designed, in part at least, to preserve decorum in speech and conduct in a public place and, by penalizing the offender, to protect the public against such infringements of decency. Whilst the section in its present form differs somewhat from its predecessor, s26 of the *Police Offences Act* 1958, the substance thereof is of long standing in the legislation of this State. It may also be noted that whereas in the 1958 legislation the penalty provided for the offence was one of not more than £10, Act No. 6557 of 1959 increased the maximum penalty to £25, and the *Summary Offences Act* 1966 introduced an alternative punishment by way of imprisonment. The offence is one punishable on summary conviction and it is to offences punishable on summary conviction that s75 of the *Justices Act* applies—*vide* also the concluding language of that section as I have already quoted it, and see also s102A and the following sections of the Act which were introduced by Act No. 6958 of 1962.

In the category of offences "punishable on summary conviction under" the *Justices Act* "or any other Act", the offence of using obscene language in a public place cannot, in my opinion, be regarded as one of a minor or trivial character. In that category Parliament apparently treated it as in its nature, and, speaking relatively, a serious offence. That being so, it would seem necessary to find some special circumstances, something marked about the circumstances, accompanying or surrounding the use of the obscene language to enable a court properly to conclude that in the particular case the offence was trifling within s75.

It is to be noted in applying s75 that the question is not whether the obscenity was trifling but whether the offence was trifling. The offence is using obscene language in a public place. The public place in the present case was a theatre with a capacity to seat approximately 300 persons, and, as I understand the evidence, on each occasion of a visit by police officers, the accommodation was substantially if not fully occupied. There was evidence, which it was not sought to dispute, that as to two of the defendants, one particular word—which it was accepted at the bar table was the most objectionable of the words used—was employed by them on more

than one occasion at each performance. But leaving that evidence aside, the case is not one of an isolated or unrehearsed use of obscene language. The play was staged nightly and the language was intentionally used by the defendants on each occasion as part of a play, albeit a "serious" and well-acted play, they were as professional actors engaged to perform.

Having considered the matter for myself and all that was urged by counsel on behalf of the defendants, I am, with due deference to the Stipendiary Magistrate, constrained to differ from him in the view he formed. The matters relied on by Mr Woodward do not persuade me to think that the offence was trivial and, in my opinion, it is unwarranted, on the whole of the material, to say that the offence committed is, within s75 of the *Justices Act*, of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment. It is not inappropriate to recall a remark made in this Court on an earlier occasion, although in somewhat different circumstances: "The Court is not called upon to overlook or minimize what is really obscenity merely in order supposedly to show its own judicial broad-mindedness or tolerance or imperturbability or even cynicism." It is the obligation of the courts to apply the law as it stands and, accordingly, in the present cases the proper result is that the defendants should be convicted of the offences with which they were charged.

Counsel for the defendants was not prepared to consent to this Court finally disposing of the charges and I think in the circumstances the proper course for me to adopt is to remit the informations to the Stipendiary Magistrate for the purposes of his imposing in each case an appropriate penalty pursuant to s17 of the *Summary Offences Act* 1966. No doubt for that purpose a copy of these reasons for judgment will be made available to him.

The order of the Court in each case is that the order nisi is made absolute, the order of dismissal made on each information is set aside and in lieu thereof there will be an order in respect of each information that the defendant be convicted of the offence charged therein. It is further ordered that the informations be remitted to the Court of Petty Sessions at Melbourne for the imposition by the Stipendiary Magistrate of an appropriate penalty.

I should add that Mr Woodward, at the conclusion of his argument, submitted that if I decided to remit the informations to the magistrate for the purposes of his considering afresh the question of triviality I should order a complete rehearing thereof, because, so he contended, the Stipendiary Magistrate had misdirected himself in finding that the language was obscene. As I have considered the matter for myself, I need only say in the circumstances that I think there was no such misdirection.

Orders absolute. Order of dismissal made on each information set aside. Order that in each information the defendant be convicted. Informations remitted for imposition of penalty.[Ed note: In a discussion which followed the decision, it was suggested that the charges might be the subject of an adjournment under s92(6) of the *Justices Act* 1958. The following dialogue ensued:
Little J: Mr Brusey, I had not overlooked s92(6) but it seemed to me to be quite inappropriate simply because of the continuation of these offences.
Mr Brusey: I thought it right to raise that because it would be obviously undesirable that we should have a debate below as to what Your Honour said and meant.
Little J: As far as I know the language that has been held to be obscene is still being used and so on, but at any rate you see that before the Court of Petty Sessions this much appeared in this connection. I have not thought it necessary to advert to it at all, but on the first occasion that the police went to see this play they were introduced to the defendants or the defendants were introduced to them, whichever way you like to put it, and introduced I think by the manager of the theatre or the producer of the play. They were asked as to what explanation they had for the use of this language. They said they had no comment to make. I am not criticising them for that at all, they probably acted under instructions in any event. I am not making any criticism of that. But nonetheless haviing a warning or what would to most people be regarded as a warning, neither the producers nor the actors heeded it.
Mr Brusey: Of course Your Honour will understand they were acting upon a view of the law that what was being done did not constitute an offence.
Little J: Maybe, but all that means is that they continued to offend the law with knowledge that the law was looking at them at any rate, let me put it that way. And to act under s92(6) would have been I should have thought quite inappropriate.]

APPEARANCES: For the informant Farrelly: Mr S Charles, counsel. Thomas F Mornane, Crown Solicitor. For the respondents/defendants Little & Ors: Mr EA Woodward QC, counsel. EL Vail and Benjamin, solicitors.