NSW POLICE COMMISSIONER HAS A LOT OF WORK IN FRONT OF HIM

The *Alt.L.J* reproduces below a decision by a NSW Local Court Magistrate. The decision attracted some media attention because of the apparent perception that the use of the 'f' word was no longer an offence. Subsequent press reports noted the Commissioner of Police was not going to lodge an appeal. Its easy to see why, once one reads the decision.

The decision is nothing to do with language but instead is about the police acting as agents of social control and more broadly about the normative force of the criminal law.

The decision is an enjoyable read, not only for its social commentary but because it is a straightforward black letter law decision. The good burghers of Dubbo, and elsewhere judging by letters published in the the *Sydney Morning Herald*, may well think they can no longer walk the streets without being assailed by the 'f' word but Magistrate Heilpern's decision stands for no such outcome. Indeed the Sydney media, at more or less the same time as this decision came out, was immersed in discussing the use of the 'f' word and the 'c' word in some new TV show called 'Sex and the City'.

Simply put, the facts clearly show Mr Dunn, the defendant, used certain language to forcefully let the police know they were acting illegally in attempting to remove the bicycle he apparently held as a gratuitous bailee. Both the charge of offensive language and resist police arose from the illegal, as well as misguided and inefficient, actions of the police. Magistrate Heilpern found he could not '...be satisfied beyond a reasonable doubt the the police were acting in execution of their duty...' This no doubt explains why no appeal was lodged.

The NSW Ombudsman over some 15 years has been condemning regularly the practice of the police arresting people rather than proceeding by summons. Leaving aside the fact the prosecution dropped the goods in custody charge, one wonders why the other charges went ahead. Purely from a budgetary point of view one must question the waste of public money not only by the police, but the cost of the time spent by the court in dealing with the matter as a result of their conduct.

The decision should be required reading at the Police Academy, as well as by other police, politicians, lawyers, talk back radio types, journalists and most of all individual citizens, especially those who go on about law and order.

The action of the police in this matter has seriously detracted from the criminal law's normative force and justifies by itself repeal of the crime of offensive language (in other words going back to the position as it was in the 1980s).

If the police seriously believe use of the 'f' word offends public order then they might have a read of two recent decisions of the NSW Administrative Decisions Tribunal. In *Aldridge v Commissioner for Corrective Services* [1999] NSW ADT 33 and *Fernandez v State of New South Wales* [1999] NSW ADT 32, the decisions recount the liberal use of the 'f' word by employees of the NSW Police Service and the Department of Corrective Services towards their own staff.

I can only hope the Police Integrity Commission and the Police Budget Branch get a copy of the decision and start asking lots of questions about policing practices in Dubbo.

Peter Wilmshurst
Peter Wilmshurst teaches law at the University of Western Sydney.

Judgment

Police v Shannon Thomas DUNN
Dubbo Local Court

Proceedings

These matters first came before me on 23 August 1999 at Dubbo Local Court. The defendant had been charged with offensive language, goods in custody, and resist police. The goods in custody charge was withdrawn by the prosecution on an earlier occasion. On 23 August 1999 the matter proceeded by way of tender of the police brief. There was no cross-examination of prosecution witnesses. The defence indicated that it was calling no evidence and proceeded immediately to submissions — firstly that there was no case to answer, and secondly that even if there was that the prosecution should fail on the second leg. The prosecutor also made submissions on both legs and I reserved judgment until 27 August 1999 and indicated that I would provide my reasons in writing.

Facts

D was an 18-year-old Aboriginal male. At 12.30 on Thursday 29 October 1998 two police officers, whilst passing at an intersection, saw the defendant ride a push-bike into a petrol station, enter the workshop area, and leave a short time later. The police then drove into the service station and according to the statement of Snr Const Hembrow the following took place:

> I called out 'Shannon can you come over here?' The defendant then rode his pushbike to where the police vehicle was parked. I

said to the defendant 'How are you. Shannon what were you doing in the workshop area?'. He said 'I was just seeing a bloke I know'. I said 'Who owns the bike' He said 'Wayne. I don't know his last name'. I said 'Wayne who?' He said 'He gave me a lend of the bike. It's not stolen'. I said 'Unless you can tell me who he is we will have to take the bike and make inquiries as to the owner'. He said 'Your [sic] not taking the bike'. I said 'Settle down. We will take the bike to the station and we can sort the matter out there'. I then walked toward the bike and took hold of the handlebars. The defendant then pulled the bike from my grasp and said 'Fuck off your [sic] not taking the bike'. I said 'Your [sic] under arrest for offensive language'.

The last spoken words are those that are relied upon by the prosecution for the charge of offensive language. From the statements there is no evidence that other persons heard the words spoken. Indeed there is a statement in the brief from the proprietor of the service station, Neil Malcolm Gadsby who was present and listening the entire time and yet there is no evidence from him regarding the words 'fuck off'. Thus it was only the police who heard the words despite a number of people being in the vicinity who also gave statements. Further, there is no evidence that the tone used was aggressive or menacing. It may have been 'fuck off' as in 'get away from me'. It may have been 'fuck off' as in 'you must be joking'. It may have been in amazement that the police wanted to or had the power to take the bike.

Things then went from bad to worse. The police then violently struggled with the defendant in an effort to arrest him, including a struggle to handcuff him, further swearing (not relied on for the charge) and the defendant bashing his head on the police vehicle arch as he tried to exit the police truck that had arrived. According to the police statements the struggle was so violent that persons in the service station were frightened for their safety. Customers were so frightened that they locked themselves in their cars during the struggle that went on for six or seven minutes. It is common ground that the defendant thus resisted arrest. The defence submissions are that I cannot be satisfied beyond reasonable doubt that the officers were in fact acting in the execution of their duty.

Issue: offensive language

The submissions that were made to me with respect to no case to answer are that the word is not offensive per se. The test to be applied from *May v O'Sullivan* 92 CLR 654 at page 658 is as follows:

> When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer' the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could be convicted.

If the word is not prima facie offensive in these circumstances then I do not need to consider the further defense submission relating to proof of intent or the statutory defence of 'reasonable in the circumstances'.

Authorities — offensive language

The first point to note is that those words that would be legally offensive language change over time. Thus, in a widely reported decision of Phelan J, the word 'shit' was found no longer to be prima facie offensive in the early 1990s. The court was dealing with a man who had yelled out at a bridge opening 'the roads are shit man'. Judge Phelan said that the word 'shit' was used in every playground and in many households in the country, and that 'the District Court is not here to protect those who have not yet travelled through their anal sensitivities'. Thus prior authorities are only as binding as the times in which they were decided.

In *Ball v McIntire* (1966) 9 FLR 237 per Kerr J the following propositions were laid down:

- Behavior to be offensive within the meaning of the section must in my opinion be such as is calculated to wound the feeling, arouse anger or resentment or disgust or outrage in the mind of the reasonable person. (at 237)
- Conduct which offends against the standards of good taste or good manners which is a breach of the rules of courtesy or runs contrary to accepted social rules may be ill advised, hurtful, not proper conduct. People may be offended by such conduct, but it may well not be offensive within the meaning of the section ... This charge is not available to ensure punishment of those who differ from the majority. What has to be done in each case is to see whether the conduct is in truth offensive. (at 241)
- I believe that a so-called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions (at 245)

In this case the authorities are, at best, conflicting and the latest Supreme Court decision on the word 'fuck' alone is in 1991.

The first case to consider is the decision of *McNamara v Freeburn*, per Yeldham J, 5 August 1988. In that case the defendant was charged under Section 5 of the now repealed *Public Places Act 1979* although the differences with the current Section 4A are not relevant. The defendant was involved in a street brawl, and when police took hold of him and told him to leave he said 'Get fucked, you cunts, I'm just trying to help my mates'. He continued fighting and said 'Get fucked, leave me alone, I'm trying to help my mate'. The magistrate found that there was no prima facie case on the following basis:

> I determined by a consideration as best I could of community standards today and decisions on this kind of legislation over the last twenty years, that the words were not intrinsically 'offensive' in the requisite legal sense of that word.

Justice Yeldham found that the local court had not erred in law. It is important to note that the words complained of included the words 'Get fucked' and 'cunt', and yet the Supreme Court declined to find that the magistrate had erred in law.

This case needs to be contrasted with the decision of *McCormack v Langham* per Studdert J, 5 September 1991. In that case, in a hot food bar in Lismore, the defendant said in a loud voice 'Watch these two fucking poofters persecute me'. The magistrate found that there was no case to answer as the words were 'language of common usage these days and not such as would offend a reasonable man'.

Studdert J stated that in considering whether the language used was offensive the circumstances in which the language was used have to be considered. He found it relevant that the words were spoken in a loud voice in the presence of 30 people including children. Relying on *Thonnery v Humphries* (unreported, 19 June 1987, per Foster J) and *Evans v Frances* (10 August 1990, per Lusher A-J) the court decided that the magistrate did err in finding that there was no case to answer. However, in both of the cases relied upon, the word 'fuck' was used in conjunction with 'cunt' In *Thonnery* the words were 'You fucking moll you, you fucking moll ... cunts, cunts'. In *Evans* the words were 'You

pricks I want my fucking keys ... those cunts won't let me in ... you fucking useless cunts'.

Justice Studdert rejected the proposition that the word used in the case before him was not offensive stating:

> I reject the contention that community standards have slipped to such an extent that the utterances attributed to the respondent in the present case could not, as a matter of law constitute an offence.

Connors v Craigie (1994) 76 A Crim R 502 per Dunford J, and its related earlier case (McInerny J 5 July 1993) arise out of circumstances where an Aboriginal man yelled, from a distance of three meters, a tirade of abuse such as 'Fuck off you white cunts ... you're all white cunts'. Justice McInerny found that the test to be applied was:

> what would be the attitude of a reasonably tolerant bystander be in the circumstances ... in my view there is no answer other that that such an objective observer would conclude the language was offensive.

Since these cases, there have been no binding decisions in this State [NSW], although there have been two of a highly persuasive nature. Firstly, there is the decision of *Anderson* (unreported, CCA CA40469/95) an appeal from a Police Tribunal hearing by Herron DCJ. A police officer used the word 'fuck' and its many derivatives within hearing of a police foyer. In what is clearly obiter Meagher JA stated:

> Without coming to any conclusion on the question the trial judge commented that the words used by the opponent are 'probably not offensive'. I would agree with his Honour. Undoubtedly the behaviour of the opponent was unchivalrous and unbecoming of the office he occupies. This is, however a long way from the language he allegedly used being offensive in any legal sense ... There was no evidence that persons in the public area were ever offended, nor that the public area was frequented by gentle old ladies or convent school girls. Bearing in mind that we are living in a post-Chatterly, post Wolfenden age, taking into account all circumstances, and judging the matter from the point of view of reasonable contemporary standards I cannot believe Sergeant Anderson's language was legally 'offensive'.

Secondly there is an unreported decision of District Court Judge Ducker, in an appeal in the matter of Jason Hardy. The defendant had been convicted of offensive language at the local court for stating the words 'Get Fucked. I'm not going anywhere. Matthew Smith is dead because of you cunts'. This took place shortly after 8.45 pm during a disturbance at a crowded festival. Judge Ducker found as follows on appeal:

> I do not believe that the words are offensive and I uphold the appeal and quash the conviction.

Accordingly it is fair to say that the only authority that the word 'fuck' or its derivatives is prima facie offensive is distinguishable on its facts, is inconsistent with *McNamara,* is now some eight years old and is inconsistent with the *obiter* comments in *Anderson.* It is certainly not a situation where I feel bound to follow *McCormack* .

Community standards

The word 'fuck' is extremely common place now and has lost much of its punch. One cannot walk down the streets of any of the towns in which I sit, day or night, without hearing the word or its derivatives used as a noun, verb, adjective and, indeed, a term of affection. It is used in every school playground every day. In court I am regularly confronted by witnesses who seem physically unable to speak without using the word in every sentence — it has become as common in their language as any other word and they use it without intent to offend, or without any knowledge that others would find it other than completely normal. I know that this may be difficult to comprehend from the leafy suburbs of Sydney — perhaps that explains why so many of the authorities originate by way of appeal from magistrates in the Local Courts.

Flipping through pay TV at any time of the evening one would be likely to encounter it once or twice. On free to air TV the word is now permitted — albeit with a warning. Of course warnings do not help those who flip from one channel to another. If your children like JJJ and listen to it in the morning, one cannot help be assailed by the word 'fuck' with regularity between mouthfuls of toast.

Just the other night I was watching a PG movie — not M or MA or R — and the word was used — twice. Clearly, those who rate our movies do not see it as very serious any longer, as the word has slowly shrunk down the ratings ladder over the last ten years.

In 1991 the Press Council in Adjudication No. 479 (February 1991) considered a complaint brought by Mr J D Purvey over four-letter expletives published in an interview with actor Bryan Brown in the Arts Section of the *Weekend Australian* of 4 August. The report of the determination is below:

> Mr Purvey, a lawyer, found the use of the word 'fuck' utterly offensive and argued that the overwhelming majority of readers would also find the use of the word objectionable. He asked the paper's editor for an apology for the use of 'vile obscene language'. News Ltd responded at some length to Mr Purvey's objections, saying in essence that the use of expletives had gained wide acceptance and such profanities were no longer confined to the factory floor or dockside. It supported its argument with a *Telegraph-Mirror* article quoting a university language expert as saying that four-letter profanities were now widely used by both men and women. The Council believes, in this case, that the use of the word in full was justified.

It is perhaps the internet that illustrates that community standards and technology have overtaken the law. If one searches the word, even on a conservative search engine such as Infoseek, there are in excess of 2.5 million web pages with that word indexed. Of course that is if you are looking for it. But the real difficulty is that one cannot search other words without encountering 'fuck' without warning. For example searching 'please' will get you to 'fuckmeplease.com'. Searching 'birthday' will result in similar accidental finds.

We live in an era where Federal Ministers use the word over the telephone to constituents and are not charged. Since *Connors* we have been blessed with 'Chook Fowler' on our television rattling off 'fucks' as though it was the only word he could manage to say clearly. *Connors* was before advanced microphones could pick up sporting heroes in football telling each other to 'fuck off' with great regularity. The may be sin-binned but they are never charged.

In short, one would have to live an excessively cloistered existence not to come into regular contact with the word, and not to have become somewhat immune to its suggested previously legally offensive status. It is perhaps, as feared by Studdert J, that standards have slipped. It may also be that they have simply changed.

Public policy grounds

It was suggested in submissions that I should take note of public policy issues in determining this issue. I have

conducted some short research on this point and the following is apparent:

- A majority of offenders are still arrested for this offence, despite the maximum penalty only being a fine and even where issued with a CAN. In other words the police are, as in this case, most likely to impose a deprivation of liberty on an offender even though the courts are not empowered to do so.
- Aboriginal people account for 15 times as many offensive language offences as would be expected by their population in the community. (BCSR Brief, Aug 1999)
- In 1997 there were 3609 charges under section 4A(1) of the *Summary Offences Act,* while in 1998 the number rose to 4115, an increase of 14% (BCSR Brief, August 1999). That is about 200 cases every court day in Local Courts around New South Wales.
- The number of offensive language incidents recorded by NSW police rose 37.7% from 1997/98 to 1998/99 (BCSR Brief, August 1999).
- Arrest for Offensive Language has a significant impact on indigenous employment prospects (BCSR, Bulletin June 1999).

I was also drawn by the words of the final report of the Royal Commission into Black Deaths in Custody:

> It is surely time that police learnt to ignore mere abuse, let alone simple 'bad language'. In this day and age many words that were once considered bad language have become commonplace and are in general use amongst police no less than amongst other people. Maintaining the pretence that they are sensitive persons offended by such language — 'obscenities', as their counsel told the coroner's jury — does nothing for respect for the police. It is particularly ridiculous when offence is taken at the rantings of drunks, as is so often the case.
>
> Charges about language just become part of an oppressive mechanism of control of Aboriginals. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others — resisting arrest, assaulting police, hindering police and so on, none of which would have occurred if police were not so easily 'offended'.

These factors do suggest there are good public policy grounds for change. But in the final analysis these issues are of no relevance from a strictly legal perspective and thus do not form part of the reasons for my judgment.

Conclusion

In short, my view is that community standards have changed and that the word in the context of this case is not offensive within the meaning of the Act. I concur with the comments of Justices Meagher, Yeldham Herron and Ducker.

The present case is a classic example of conduct which offends against the standards of good taste or good manners which is a breach of the rules of courtesy or runs contrary to accepted social rules to use the words of Justice Kerr. It was ill advised, and not proper conduct. Some people may be offended by such conduct, but it is not offensive within the meaning of the Section. I do not believe that a so-called reasonable person, a reasonably tolerant and understanding and contemporary person, in his or her reactions would be wounded or angered or outraged. This is especially so where there is no evidence that the words were spoken loudly and there is an absence of evidence suggesting aggression or malice at that time.

Accordingly the charge is dismissed.

I should add that I have noted the submission that in the light of the statement of the independent witness, and thus the inconsistency inherent in the prosecution case it would be difficult to be satisfied beyond a reasonable doubt that the words 'fuck off' were used. I have also noted the identical statements of the police — even down to spelling errors. However it is not necessary for me to consider those points at this time.

Practical implications

I have no doubt that should this judgment stand there will be a period where police have to grit their teeth and bear an extra word in abuse. That is unfortunate, but will pass quite quickly. Indeed, I suspect that the word will lose some of its use toward police once it is found to have little effect.

I should also stress that I do not think that the use of the word is good or acceptable, especially toward police. Indeed Mr Gall, prosecutor, asked me in submissions how I would feel if I were told to 'fuck off' as I were doing my job. Well it happens, and it is of course uncomfortable — but it comes with the territory. It would be rude and improper and an affront to the office of magistrate and to the legal system in which we serve.

In giving the judgment with respect to the offensive language charge I make no criticism of the police in bringing this matter to court. It is the higher courts of this State that have determined that the words used were offensive.

Resist police — prima facie case

The resistance relied upon by the prosecution is resisting the attempts at arrest and detention after the defendant had been informed he was under arrest. The *Crimes Act* provides that the police have the power to arrest a person if they have reasonable suspicion that the person has committed an offence. If the person resists that arrest they are prima facie guilty of an offence. Prima facie the police were acting in the execution of their duty to arrest a person who they reasonably suspect of having committed an offense. Accordingly I find that the defendant has a case to answer.

Resist police — beyond reasonable doubt

It was put to me that the offensive language charge was merely a pretence to arrest for the possession of the bike, about which the police clearly had suspicions. If that were the case, the arrest would have been illegal and thus the officer was not acting in the execution of his duty. There is insufficient evidence for me to come to that conclusion.

But that is not the test. I must be satisfied to the requisite standard with respect to each element of the offence. One element is that the police were acting in the execution of their duty. In *R v K* 118 ALR 596 Gallop, Spender and Burchett JJ the court quoted the following passage with approval.

> It is important that the constable should have a wide discretion to act swiftly and decisively: it is equally important that the exercise of that discretion should be subject to scrutiny and control so that he should not too easily or officiously clothe himself with the powers of the State and by so doing affect the rights and duties of other citizens.

The court then reviewed a wide range of cases in considering the concept of when an officer is executing his or her duty and concluded that:

> a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with the functions as a police officer, and continues to act in the execution of his duty...provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein.

In other words, an officer who is not acting lawfully is not acting in the execution of his duty. The prosecution must bear this burden, and the suggestion that there is some sort of rebuttable presumption that police are acting lawfully has no foundation in law that I can find. In most cases of course, strict proof that the officers were acting lawfully will not be necessary — an inference can easily be drawn as to the purpose of arrest.

In this case I must be satisfied that the arrest was lawful. For the arrest to have been lawful it must have been for the purpose established by statute and as per the interpreting cases. It must have been to bring the accused before a justice to be dealt with according to law.

Arrest for any other purpose is not lawful, and thus the officer in this case would not be acting in the execution of his duty (*Bales v Parmeter* (1935) 35 SR NSW 182, *Williams* (1986) CLR 278). In *Pirani and Diggins v Hardy* SC NSW, Smart J, 9 September 1984 the court found as follows:

> An arrest will not be within power unless it is effected in good faith and for the purposes contemplated by the enactment ... the purpose of the acts done must be to vindicate and to give effect to the law.

Mr Gall candidly agreed with me that the arrest was plainly not the best option available for the offensive language. It may have been in breach of the Commissioners Instructions. There was no reason given to me as to why the defendant could not have been summonsed at a later time. In *Pirani and Diggins v Hardy* SC NSW, Smart J, 9 September 1984 the court commented as follows:

> The Court of Appeal has deplored the inappropriate use of arrest when the matter can proceed satisfactorily by summons: *Daemer v Corporate Affairs Commission*, Unreported, 4 Sept 1990, per Meagher JA.

I share this view. The police actions served to ignite a volatile situation. Their actions were the antithesis of modern community policing. It led to violence and to community fear. But it is not my task to comment on the appropriateness of the arrest — it is to assess whether each element of the offence has been established to the requisite level — including that of the lawfulness of the arrest and thus the execution of duty.

The police in this case may have been arresting the defendant for the purpose of bringing him before a justice to be dealt with according to law. This could be the case. They may have really been arresting him by way of pretence, by way of harassment or for other reasons. It may have been some sort of holding charge.

And that is the problem — there is no evidence as to the purpose of his arrest and it is unclear from the brief. I find myself asking this question — is there any reasonable doubt in my mind that the purpose of the arrest was to bring the defendant before a justice to be dealt with according to law.

In this case I am left, as a question of fact, with a reasonable doubt as to the purpose of the arrest. The factors that lead to this doubt are the nature of the offence itself, that the defendant was obviously known to police, that the police were clearly suspicious of the bike, the police were clearly suspicious of the defendant himself and that the police were passing by at the time of the offence. Further, the defendant was released without charge or bail, being issued with Court Attendance Notices for these offences. Thus I cannot be satisfied beyond a reasonable doubt that the police were acting in the execution of their duty and the Resist charge is also dismissed.

David Heilpern

David Heilpern, Magistrate, Dubbo Local Court, New South Wales.