THE POLITICAL DEMONSTRATOR AND THE LAW

Melser v. **Police** [1967] N.Z.L.R. 437

This decision is an important one because it shows the way in which the courts in New Zealand will deal with certain types of behaviour of political demonstrators within the framework of the existing criminal law.[1] The four defendants were jointly charged with behaving in a disorderly manner within view of a public place, namely the grounds of Parliament House, under s.3D of the Police Offences Act 1927 as enacted by s.2 of the Police Offences Amendment Act (No. 2) 1960 which provides:

> Every person commits an offence, and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred pounds, who, in or within view of any public place as defined by section 40 hereof, or within the hearing of any person therein, behaves in a riotous, offensive, threatening, insulting, or disorderly manner, or uses any threatening, abusive, or insulting words.

This section is part of an Act designed to deal with a variety of "criminal fringe" behaviour. To behave in a "disorderly manner" first became an offence in 1924 when s.2 of the Police Offences Amendment Act of that year repealed s.3(ee) of the Police Offences Act 1908 which had provided that:

> 3. Every person is liable . . . who—
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> (ee) Uses any threatening, abusive, or insulting words or behaviour in any public place . . . within the hearing or in the view of passers by, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.

The 1924 amendment substituted a new paragraph:

> (ee) In or in view of any public place . . . or within the hearing of any person therein, behaves in a riotous, offensive, threatening, insulting, or disorderly manner, or uses any threatening, abusive, or insulting words, or strikes or fights with any other person.

Apart from making disorderly behaviour an offence, the most important change in the new legislation was the removal of the breach of the

1. See also: *Burton* v. *Power* [1940] N.Z.L.R. 305.
Derbyshire v. *Police* [1967] N.Z.L.R. 391.
Wainwright and Another v. *Police* (not yet reported).

peace requirement which was felt by the Government of the day to be preventing conduct, otherwise within the section, from being an offence.[2] The 1924 amendment was later re-enacted as s.3(ee) of the Police Offences Act 1927. In 1960, largely in an atmosphere of concern over juvenile delinquency and hooliganism exemplified that year by incidents at the Hastings Blossom Festival, s.3D was enacted increasing the maximum penalty and giving a power of arrest without warrant to any constable who found any person committing, or whom he had good cause to suspect of having committed, an offence against the section. The arrest provisions are now contained in s.315 of the Crimes Act 1961 which gives to any constable, and to all persons whom he calls to his assistance, a power to arrest without a warrant any person whom he finds committing any offence punishable by death or imprisonment or whom he has good cause to suspect of having committed any offence punishable by death or imprisonment (s.315 (2) (a), (b)).

In a reserved decision the magistrate outlined the facts. The defendants chained themselves to the pillars at the top of the steps at the entrance of Parliament Buildings on the occasion of the visit to New Zealand of the Vice-President of the United States of America. The purpose of this action was passively to protest against the political implications of the visit for New Zealand's military involvement in the Vietnam war. Although the defendants could move slightly by reason of the slackness of the chains, they could not slip out of them and had apparently arranged to stay in position until after the departure of the Vice-President, when they were to be released by some other person who had the key to the padlocks holding the chains. The defendants were not carrying any banners or making any vocal demonstration and it was not contended that they had any intention of trying to prevent the Vice-President from entering or leaving Parliament House. When asked by the police to leave the steps and congregate in the open space in the grounds below, the defendants refused to do so, and indeed they could not have done so without first being released from the chains. When asked later in the day to leave their positions the defendants again refused and said they intended to remain where they were until after the departure of the Vice-President. They were then arrested and after the arrest the police used bolt cutters to cut the chains and release them.

Counsel for the defendants submitted that the behaviour of the defendants was not so serious or so substantial as to fall within the ambit of the section. The magistrate rejected his submission and found that the action of the defendants, in voluntarily placing it outside their own control to comply with the directions of the police, went beyond the standards of good and proper conduct generally accepted by right-thinking people and that the defendants were thereby behaving in a disorderly manner. It was not contended, apparently, that refusal to obey the orders of the police to move from their positions was in itself

2. It is now settled that it is not an ingredient of an offence under s.3D that the conduct was such as to provoke a breach of the peace or be calculated to do so; *Police* v. *Christie* [1962] N.Z.L.R. 1109.

disorderly behaviour.[3] The magistrate felt the matter could be adequately dealt with by way of a nominal fine and convicted and fined each defendant five pounds plus costs. This display of leniency in imposing a sentence suggests that, although the political nature of the defendants' conduct was regarded as irrelevant to the question of guilt, it was not altogether overlooked by the court.

The defendants appealed to the Supreme Court on the grounds that the decision of the magistrate was erroneous in fact and in law. In delivering the judgment on the appeal[4] Tompkins J. agreed with the magistrate's findings of fact, adding only that the Vice-President could not have entered Parliament House by the main steps without passing between the appellants. Like the magistrate, Tompkins J. was prepared to follow the decision of Henry J. in *Police* v. *Christie* [1962] N.Z.L.R. 1109 as outlining the considerations which should be applied in deciding whether conduct is disorderly within the meaning of s.3D. He held that the conduct of the four appellants was "disorderly".

> It was contrary to proper behaviour; a defiance of the forces of law and order; it was conduct which contravened proper conduct within view of a public place; and was in its effect lawless conduct; I think it was conduct which seriously offended against those values of orderly conduct which are recognised by right-thinking members of the public. (at 440)

He also rejected the contention of counsel that proof that someone was insulted or offended is an essential ingredient of the charge and he dismissed the appeal. He did, however, grant the appellants leave to appeal to the Court of Appeal because he had no doubt:

> . . . that this prosecution does involve the limits to which demonstrators may go in exercising their right to make a public political demonstration; it concerns the liberty of the subject to make a political protest.[5]

The Court of Appeal upheld the convictions but went further than the lower courts had done in setting the limits of s.3D. Three separate judgments were delivered. Since they appear to adopt a similar line of reasoning it may be wondered why the court did not take the opportunity of imprinting its authority on this branch of the law in a single judgment, particularly as s.398 of the Crimes Act 1961 indicates that in appeals under that Act the presiding judge shall pronounce the judgment of the Court of Appeal unless the court directs that separate judgments shall be pronounced.

3. Cf. Kerr J. in *Ball* v. *McIntyre* (1966) 9 F.L.R. 237, 242 (infra) "if behaviour is offensive behaviour it continues to be offensive if persisted in, but it is not easy to envisage behaviour which is not offensive becoming offensive merely because it is continued, despite a request to discontinue".
4. [1967] N.Z.L.R. 437.
5. Unreported judgment of Tompkins J. granting leave to appeal to the Court of Appeal, dated 7 July 1966 and filed in the Wellington Registry under No. C.A. 3—6/67.

The President, North P., agreed with the appellants' submissions that to justify a conviction under s.3D it must be established that the conduct caused or was likely to cause a disturbance or annoyance to some person or persons present. On this issue he disagreed with Tompkins J.'s interpretation of Henry J.'s judgment in *Police v. Christie* (supra)

> Section 3D forms part of the Police Offences Act 1927, and the collation of the words in that section in my opinion show that they are directed to conduct which at least is likely to cause a disturbance or annoyance to others. (at 443).

He held that not only must the behaviour "seriously" offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must also be likely to cause annoyance to others who are present even though it is not calculated to provoke a breach of the peace.

> To lay down a wider test would, I think, be contrary to the public interest and might unduly restrict the actions of citizens who, for one reason or another, do not accept the values of orderly conduct which at the time are recognised by other members of the public. (at 443).

He concluded, however, that the conduct of the appellants was likely to cause annoyance to other persons who were present at the time.

Turner J. thought the problem was whether the admitted conduct of the appellants was sufficiently disorderly to be in breach of the statute. This, in his view, was "a question of degree". He suggested that disorderly conduct was something short of a likely or imminent breach of the peace but more than mere conduct *contra bonos mores*. His test looked to the quality of the annoyance caused to viewers of the conduct. Disorderly conduct was . . .

> conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well-conducted and reasonable men and women, is also something more—it must, in my opinion, tend to annoy or insult such persons as are faced with it—and sufficiently deeply or seriously to warrant the interference of the criminal law. (at 444).

He concluded that the conduct of the appellants was "calculated to give serious annoyance to the public". (at 445). In adopting the phrase "annoyance to the public" the learned judge seems to mean actual or likely annoyance to those who were assumed to be faced with the conduct:

> It might not, in my opinion have been disorderly conduct on the part of the appellants . . . to have chained themselves to posts or pillars on different days or times, and in some other place, less calculated to arouse serious annoyance to the public. (at 444-5).

McCarthy J. directed his judgment to counsel's submission that conviction would constitute a penal restriction upon the rights of freedom of speech and freedom of expression. He upheld the convictions on the basis that the appellants, while having alternative avenues of protest available to them, ("They could even protest in the grounds of Parliament Buildings itself" (at 446)), sought to exercise their freedom in a way which interfered with the freedoms of others, which included their "rights of privacy".[6] The people who were likely to have their freedoms interfered with were, it seems, the Members of the House:

> I accept unhesitatingly the appellants' right to protest; but I remember, too, that the Speaker and Members of the House of Representatives had a right to freedom from interference at the doorway of their House and the right freely to entertain their visitors within that House unembarrassed by unseemly behaviour on the part of intruders. Should the appellants then be entitled to exercise their freedom of protest in a way which seriously interfered with these freedoms of the Members of the House? I think not. (at 446)

At first sight the three judges in the Court of Appeal seem to have taken somewhat different paths in reaching the conclusion that the appeal should be dismissed, but if their judgments are analysed it appears that all accepted the same basic proposition: in order to decide whether a conviction for disorderly behaviour under s.3D can be sustained the behaviour in question must be judged, not only in relation to the standards of behaviour generally recognised in the community, but also in relation to its effect at the particular time and place. The second element did not form part of the test applied by Tompkins J. in the Supreme Court, nor by the magistrate, and the judgment of the Court of Appeal may be regarded as a significant though perhaps incomplete attempt to add an objective element to the highly subjective test of failure to come within some standard of behaviour supposedly acceptable to the public at large.

The ingredients of the offence which must be found to exist by applying this two fold test were stated somewhat differently by North P. and Turner J. on the one hand and by McCarthy J. on the other. The two first-named judges held in effect that:

1. The behaviour must offend against the values of orderly conduct which are recognised by the right-thinking man, and

2. The behaviour must be of a character which causes or is likely to cause disturbance or annoyance to other persons who are present. Although McCarthy J. did not expressly adopt the test of the "right-thinking man" he said that "there must be conduct which . . . can fairly be characterised as disorderly . . . " (at 446) and this formula appears equally to require some generally acceptable standard of behaviour to be breached. On the other hand, McCarthy J. as

6. See: Hammond, *Privacy and the Press* (1967) 1 Auckland University Law Review 20.

explained below, appeared to adopt a somewhat different standard by which to measure the conduct complained of in relation to the surrounding circumstances.

There was another slight difference of emphasis, though not, it is submitted, a significant one. North P. said that the behaviour must seriously offend against the values of the right-thinking man. Turner and McCarthy JJ. considered that the annoyance or potential annoyance to those present must be serious. All three judges, however, appear to be expressing the single idea that the behaviour in question has clearly to offend against the standards by which it is to be measured before the sanctions of the criminal law will be invoked.

The right-thinking man whose views or likely views have thus been adopted by the courts to determine whether behaviour is disorderly seems to be a close relative of the reasonable man in the law of negligence. Indeed, in a recent Australian case *(Ball* v. *McIntyre and Another* (1966) 9 F.L.R. 237) involving the prosecution of a political demonstrator, the test adopted by the Supreme Court of the Australian Capital Territory for determining whether the behaviour in question was offensive was its effect on the feelings of the reasonable man. The case is also interesting because it shows the widely differing attitudes which a court can attribute to the "right-thinking" or "reasonable" man. During a large demonstration outside Parliament House, Canberra, against the Vietnam war, the appellant hung a placard upon, and squatted on the pedestal of, a statue erected as a public memorial to King George V, and was subsequently convicted of behaving in an offensive manner in a public place. He appealed. Kerr J. allowed the appeal because in its full setting what was done could be readily seen not to be a pre-arranged defilement or abuse or misuse of the statue but merely an incidental resort to it during the political demonstration " . . . with the emphasis on the protest and not on some mistreatment of the statue" (at 240). He held that this "political behaviour" was not offensive behaviour, because it was not "calculated to produce a stronger emotional reaction in the reasonable man than is involved in indicating difference from or non-acceptance of his views or values". He did " . . . not believe that the reasonable man, seeing such conduct to be truly political conduct, would have his feelings wounded or anger, resentment, disgust or outrage roused. He may agree or disagree with the politics of the student and with the general propriety of his method of protest, but bearing in mind that he could see that the student's dominant motive was one of political protest, I do not believe that the reasonable man would regard such protest as offensive." (at 244) " . . . For my part I believe that a so-called reasonable man is reasonably tolerant and understanding, and reasonably contemporary in his reactions." (at 245)

It might be suggested that this case is distinguishable from *Melser* v. *Police* on the ground that it involved a prosecution for offensive behaviour rather than disorderly behaviour, but in *Derbyshire* v. *Police* [1967] N.Z.L.R. 391 the Supreme Court has recently upheld the conviction of a political demonstrator for offensive behaviour and has

endorsed the definition of offensive behaviour enunciated by Haslam J. in *Price* v. *Police* [1965] N.Z.L.R. 1086, 1088 as "a course of action calculated to cause resentment or revulsion in right-thinking persons". With more reason, *Ball* v. *McIntyre* might be distinguished on the grounds that the resort to the pillars at the entrance to Parliament House was not such an incidental part of the protest as was the resort to the statue of King Georve V. In any event the Court of Appeal in *Melser* v. *Police,* attributed to "the right-thinking man" more conservative views than those with which Kerr J. endowed the reasonable man in *Ball* v. *McIntyre;* but, at best, a judicial determination of "right thought" can scarcely go beyond what is believed to be the view held by the majority of the community at any given time. Even if the community is thought to be relatively tolerant of political protest in principle, the conduct of the dissenter is likely to have the tendency to annoy, if he decides to call attention to his minority view by conspicuously disassociating himself from some public occasion or ceremony of which the majority approve.

The Court of Appeal's endorsement of the added ingredient of annoyance to other persons who are actually present at the time in question may have been an attempt to lessen the subjective aspect of the first ingredient, but the method of applying this test to the facts still remains in doubt. It seems that no actual annoyance need occur, but that it is enough for such annoyance to become a potentiality. The annoyance which the appellants' conduct might have caused those members of the public who may have gathered to witness, approvingly, the arrival of the Vice-President appears to have been the crucial factor in supporting the conviction of the appellants under this head, although there was no evidence that any such group was actually present or that its members were annoyed or likely to be annoyed. Such a test, speculatively applied by the court, is a vague one by which to judge the criminality of behaviour that is quite different from the hooliganism at which the section was originally aimed. It is submitted that a more realistic test by which to judge the effect of the conduct in the particular circumstances can be found in the judgment of McCarthy J. His test was one of conflicting individual freedoms and interests and the role of the law in striking a compromise between them according to their relative importance. Thus members of the House of Representatives have a right to receive important guests and members of the public have a right to demonstrate their opposition to the political implications of the visit; but neither group can exercise its rights in a manner which seriously interferes with and obstructs the rights of the other. This approach is a more realistic one because it recognises that at the centre of each case is a conflict of interests and that a conviction should lie only when one group, in pursuing its interests, has been guilty of behaviour which offends against the values of the community as a whole and has seriously interfered with the rights of others.

In delivering a recent judgment of the Supreme Court in *Wainwright and Another* v. *Police* (not yet reported), the Chief Justice has given some support to this approach. He upheld the conviction of two

men who insisted on laying on the Wellington Cenotaph in the course of the Anzac Day ceremony a wreath bearing an inscription which indicated their opposition to New Zealand's participation in the Vietnam war. Wild C. J. expressly adopted the dictum of Turner J. in *Melser* v. *Police* that judgment of the conduct in question is a matter of degree depending upon the relevant time, place and circumstances. He then went on to say:

> Anzac Day ceremonies in New Zealand are by national tradition and universal acceptance occasions of remembrance and dedication . . . That being the nature of the occasion, it was in my view disorderly behaviour on the part of the appellants to introduce into it by means of their wreath and, indeed, to press upon people present, a point of view however sincerely held which they knew would be annoying to most and offensive to many. I do not question the appellants' sincerity but neither do I doubt their purpose.

This seems a clear cut finding that on this occasion, the exercise of the right of the appellants to make a political demonstration had seriously interfered with the right of those taking part in the solemn observance of Anzac Day to conduct their ceremony in peace.

In his judgment in *Melser* v. *Police* McCarthy J. emphasised the freedom of the demonstrators to use different avenues of protest, through the press, on the platform and "in the market place", whatever forum that may represent in a community where by-laws regulate the use of most open spaces including the streets. It is clear, however, that the media through which the political dissenter can express his views are restricted. He is denied the means of communication with the public which are available to wealthier, better-organised and more popular groups, and must of necessity choose less sophisticated methods. There is no indication that the courts are acting contrary to the wishes of the legislature in holding that conduct intended as a political demonstration may be a criminal offence, even though that conduct is not intended or likely to lead to a breach of the peace. For these reasons the courts have a heavy responsibility to lay down with reasonable precision the tests to be applied in deciding whether the behaviour of political demonstrators is "disorderly" or "offensive" under s.3D.

The "reasonable balance of conflicting interests" test—if the approach adopted by McCarthy J. may be so described—does make it necessary to determine the criminality of a political demonstration not only by reference to community standards generally, but also in relation to all the surrounding circumstances. It might be argued that the test is still a vague one, but it is submitted that, in the two cases where it has so far been applied, the defendants themselves must have been aware that, in choosing a form of political protest which impinged so closely on the rights of other sections of the community, they were risking the sanctions of the criminal law.

R.K.P.