

IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

No. B 13 of 2002

BETWEEN:

MELISSA JANE COUCHY

Applicant

and

JEANNIE ANNE DEL VECCHIO

Respondent

RESPONDENT'S SUMMARY OF ARGUMENT

Part 1 - Why special leave should be refused

1. *Does the policing and prosecution of language offences serve unduly to alienate Indigenous A Australians particularly the Poor, from the police and the criminal justice system? How might principles of equality before the law prevent or at least ameliorate this effect? How should the courts in determining language offences arising out of this interaction accommodate the disproportionately frequent contact between police and itinerant Indigenes?*

1.1. There is no question of law in this proposed question. Rather, it raises political or social issues or issues bearing upon the exercise of the discretion to prosecute.

2. *This court has held that discourtesy is to be distinguished from insult. Should random crudeness '(including the usage of expletives in language also be so distinguished?*

2.1. What is in issue in this case is whether the words were "insulting".

2.2. Compartmentalising behaviour into categories of "discourtesy", "Insult" and "random crudeness" serves no useful purpose and does not raise any issue of principle.

2.3. Whether the words used in this case were or were not insulting is an issue of fact.

3. *To what extent, if at all, are (in alleged insultor's socioeconomic and other personal circumstances relevant in determining the allegation of making criminal insult?*

3.1. The legal test applied by each of the three courts who considered this case to date is whether the words used were objectively insulting according to contemporary standards and in the context of the background circumstances. The present application does not challenge the correctness of that test.

3.2. It was conceded by the applicant during argument in the Court of Appeal that the words used by the applicant were capable of being insulting (p.6 of the transcript).

3.3. The real point of the applicant's case is as stated by the applicant's solicitor in the Court of Appeal (p. 2 of the transcript) during argument:

“The Chief Justice: Are you saying really that this sort of conduct is such an endemic feature of the aboriginal presentation in these sorts of circumstances that it should be accepted by the general community as an ordinary aspect of life which doesn't regard this sort of censure - does not warrant this sort of censure?”

Mr Boe Yes. -

3.4. That submission by the applicant, if accepted, has the effect of granting immunity against prosecution for this type of offence to a particular section of the community.

3.5. It is submitted that the clear answer to the proposed question is "none". Whether or not words are insulting must be determined by objective community standards and cannot depend upon idiosyncrasies of the speaker.

4. *How are contemporary community views assessed in determining whether the words are insulting? Can judicial notice be relied upon?*

4.1. It is, submitted that the answer to this question is "by applying the tribunal of fact's opinion of what community standards are". "Judicial notice" is something of a misnomer for the decision making process of the trial tribunal.

4.2. The three courts who have already considered this case reached their conclusions applying the appropriate legal test to the evidence and the question raises no point of law.

Part II - Factual Issues

5. The applicant's recitation of the facts is accepted.

Part III - Summary of Argument

6. Although the appeal to the Court of Appeal was only by that Court's leave (s. 118 District Courts Act 1967), substantive argument was entertained and the leave declined on the basis that the appeal had no merits.

7. The Court of Appeal held:

- 7.1. That the words spoken were, in context, insulting (p.120 -30), such finding being made in the light of a concession by the applicant that the words were capable of being insulting.
 - 7.2. That the Magistrate's decision was open on the evidence (p.3:40-50).
8. There is no suggestion that the wrong legal test was applied although the applicant cites *Dillon v Byrne* (1972) 66 QJPR 113 @ 133 as authority for the proposition, it seems, that the offence is only made out if the words "intend to annoy or insult such persons as are faced with it - and sufficiently, deeply or seriously to warrant the interference of the criminal law" (see paragraph 16 of the applicant's outline). However, *Dillon v Byrne* was a case involving a charge of disorderly conduct not a charge of speaking insulting words. The test is simply whether, in context, the words were insulting by community standards in the context of the circumstances of the case (see for example the approach in *Thurley v Hayes* (1920) 27 CLR 548). It is submitted that here, the words the subject of the charge are at the pinnacle of the category of insulting expressions in contemporary Australian usage and, in the context of being spoken in public, these words clearly fall within the section.
9. The applicant in her outline (paragraph 20 and footnote 41), seems to submit that *DPP v Orum* [1988] 13 All ER 449 decided that similar words used to a police officer were not insulting. That case did not decide anything of the sort. There, the section under which the offender was charged made it an offence for the insulting words to-be spoken within the hearing of a person "likely to be caused harassment, alarm or distress thereby". The magistrates dismissed the complaint on the basis that, as the only people present when the insulting words were spoken were the offender, his female companion and two police officers, there was no person (as a matter of law it seems) who was likely to be caused harassment, alarm or distress. The question on appeal was whether the magistrates were right in law. The case on appeal proceeded it seems, on an assumption, that the words were in fact insulting.

10. It is submitted that:

- 10.1. The Court is not a court of general criminal appeal;
- 10.2. Special leave is only granted where a case raises some important point of principle;
- 10.3. Here the applicant has had the benefit of not one, but two appeals;
- 10.4. The case is one of a trial court applying a settled legal test to the facts with two appeal courts reviewing the evidence and its application to the undisputed legal principles;

10.5. No special leave point arises.

11. The draft notice of appeal complains about the appeal against sentence to the Court of Appeal (ground 2.3). Complaint is also made about sentence at paragraph 12.6 of the outline of argument. However, there is no proposed special leave question relating to sentence and the respondent assumes that there is no application for special leave to appeal against sentence.

Part IV - Costs

12. While the respondent does not concede that the fact that she is a police officer indemnified by the Crown is sufficient reason to deny her costs of the application, the respondent makes no application for costs in the event that the application by the applicant is unsuccessful.

13. It is submitted that in the event that the applicant obtains a grant of special leave then the costs of the application should be reserved to the appeal.

Part V – Authorities

14. Thurley v Hayes (1920) 27 CLR 548

Part VI - Oral Argument

15. The respondent wishes to supplement this summary with oral argument.

Dated this day of April 2002.

R V Hanson QC, P Davis
Counsel for the Respondent

