CASE NOTES

WHEN IS A RUDE WORD NOT A RUDE WORD? — OR, JUDICIAL EXPERIENCE AND THE LAW

It is provided by s. 12 (1) of the Tasmanian *Police Offences Act* 1935 that, 'No person in any public place, or within the hearing of any person therein, shall — (a) curse or swear; (b) sing any profane or obscene song; (c) use any profane, indecent, obscene, or blasphemous language . . .'.[1] The relatively recent case of *Bills* v. *Brown*[2] has raised the problems which seem to arise naturally in this kind of legislation in an interesting, and far from uncommon, form. The facts of the case were quite straightforward, although there was dispute as to whether the offending words had actually been used: a police constable had intercepted a motor car in Murray Street, Hobart and had spoken to the driver. It was alleged that a passenger in the car had then said, tastefully, to the officer, 'You can go and get f----d'. The passenger had been charged and convicted under s. 12 (1) (c) of the Act. He appealed against the conviction and Chambers J. set it aside and further declined to order a re-hearing.

The major[3] ground of the appeal was that the Magistrate had erred 'in holding that there was a case to answer and in convicting the applicant in that he held that the words alleged to have been used were "indecent" in the context of the evidence'. At first instance, the Magistrate had followed his own earlier decision in the case of *Police* v. *Townsend*[4] where he had said that, 'in my view any person who publicly utters the word "f--k" commits an offence', and that matters of intention and the time, place and circumstances in which the word was used were matters which affected penalty and not liability. Chambers J. considered[5] that the Magistrate had misdirected himself and 'fell into error by adopting such an absolute and unqualified view'. In addition, the judge commented, the Magistrate's view was in direct contrast with that expressed in the Full Court of the Supreme Court of South Aus-

1 This is not a typical legislation, although the emphasis may vary from state to state. See, *Summary Offences Act*, 1970 s. 9 (N.S.W.), *Police Offences Act*, 1958 s. 26 (Vic.), *Vagrants, Gaming and Other Offences Act*, 1931 s. 7 (Qld.), *Police Act*, 1936 s. 83 (S.A.), *Police Act*, 1897 s. 59 W.A.).

2 Unreported 54/1974. A note of the case may also be found at [1974] Tas. S.R. (N.C.) 13.

3 The other ground for appeal was that the Magistrate had erred in finding on the whole of the evidence that the charge had been proved beyond reasonable doubt. Chambers J. (54/1974 pp. 1-2) quickly disposed of this contention.

4 Unreported 33/1973.

5 Unreported 54/1974 at p. 3.

tralia in *Romeyko* v. *Somnels*[6] and *Dalton* v. *Bartlett*.[7] Chambers J. specifically followed the remarks of Bray C.J.[8] in the former case, who said that it was, 'equally erroneous to hold that the common four letter words are necessarily indecent in every context..., and to hold that they can never be indecent in any context at all. The next is that I agree that, since the judge or magistrate has to decide for himself without expert evidence what the current standards of the community are, it is inevitable that a large subjective element must enter into the decision... The judge must struggle against the bland assumption that his own views on these delicate matters necessarily reflect the current community attitude.' The Judge then went on to adopt in Tasmania the test which had been laid down by the New Zealand Court of Appeal in *Police* v. *Drummond*.[9] In that case it was held that the standard in such cases was not whether the words used had a tendency to deprave or corrupt but, in the words of McCarthy J., 'The standard which must be taken is the current standard of the community. The statute is not concerned with morality, it is directed towards public behaviour; it prohibits the use of obscene or indecent language as a breach of decorum when that language offends against the contemporary standards of propriety in the community. In any particular case whether it does so offend is not to be decided in the abstract, but must be viewed against the circumstances and the setting in which the words were used.'

In all cases where conduct is judged by relation to community standards, problems invariably arise. For, in the words of Lord Hailsham L.C.,[11] 'there is no such thing as a value-free or neutral interpretation of the law'. Similarly, in 1923, Scrutton L.J. said,[12] of the judge's dilemma in industrial cases, that, 'the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgements as you would like'. A notable feature of both the South Australian cases referred to in *Bills* v. *Brown* was the determined attempt by judges to relate the conduct in question to the actual standards of the community. In the *Romeyko* case, Bray C.J. remarked[13] that, 'if I had been the trial judge I would have remembered that the words in question are very frequently used in familiar and friendly conversation between men in hotel bars, in the course of work and sport, and on innumerable other occasions, and I would hesitate to hold that thousands of offences are committed daily in the public bars

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6 (1972) 2 S.A.S.R. 529.
7 (1972) 3 S.A.S.R. 549.
8 (1972) 2 S.A.S.R. 529 at p. 563. Though he said that he would have come to the same decision had there been no prior authority.
9 [1973] 2 N.Z.L.R. 263.
10 *Ibid.* at p. 267.
11 'Equality and the Law' [1974] *The Listener* 720.
12 'The Work of the Commercial Courts' (1923) 1 *C.L.J.* 6 at p. 8.
13 (1972) 2 S.A.S.R. 529 at pp. 564-565.

of the hotels of South Australia between the hours of 5 and 7 p.m.' Similarly, in *Dalton* v. *Bartlett*, Hogarth J. stated[14] that, 'the words as most commonly used are almost always used in a sense which is not indecent. They may properly be characterised as either uncouth or offensive; I personally find them so, particularly when used in public or in the presence of women... In any case, what is uncouth is merely a matter of personal opinion, and to establish that the words are offensive evidence of context and circumstances is necessary, just as in the case of alleged indecent use. The words may be used simply to denote a feeling of hostility by the speaker to the hearer, or to fate in general, or to convey an emotion of anger or irritation. In many cases, they are completely neutral and devoid of meaning or emotional content. In some circles it seems to be a usage almost *de rigeur* in private conversation for the present participle of the verb in question to precede most nouns, even on so prosaic an occasion as a request to pass the butter. This usage presumably arose from a desire to impress on the hearer the virility and masculinity of the speaker.'[15]

Having ascertained the views of the judges, what do the behavioural scientists say about swearing as a phenomenon? Surprisingly, perhaps, little has been written on the psycho-sociological aspects of this not uncommon practice, though it is, perhaps, less surprising to discover that there is little measure of agreement. On the one hand, in an early article, Niceforo tells us[16] that the common use of ribald and lewd words indirectly satisfies tendencies and instincts of a sexual or anal nature. More recently, on the other hand, Foote and Woodward say[17] that both classical anthropological and recent psychological research suggest that the use of such language is one of man's most frequent types of linguistic expression. As has been observed from the judicial comments in the two South Australian cases, it can fulfil a wide variety of purposes notably, writes Montagu,[18] as a reaction to frustration. It serves, he says, to relieve the tension caused by aggressive feelings and to restore psychophysical equilibrium. The most detailed study, that of Mealy in 1972,[19] specifies seventeen distinct areas in which swearing is used and concludes that it provides, for the swearer, a release from the restraints of ordinary language and custom. Mealy also claims that swearing showed itself to be a conventional expression for that which is un-

14 (1972) 3 S.A.S.R. 549 at p. 557.

15 In *Bills* v. *Brown*, Chambers J. commented (54/1974 at p. 5) that in a record of interview with a detective, the defendant had given his age as, 'thirty f----g seven' and had used the same adjective seventeen times in answering fifteen questions.

16 A. Niceforo, 'Psychologie profonde de l'argot populaire' (1935) 41 *Giust. Penal* 1.

17 R. Foote and J. Woodward, 'A Preliminary Investigation of Obscene Language' (1973) 83 *J. of Psychology* 263.

18 M. F. A. Montagu, 'On the Physiology and Psychology of Swearing' (1942) 5 *Psychiatry* 189.

19 J. B. Mealy, *An Empirical Phenomenological Investigation of Swearing* (1972).

conventional and a conventional means for disengaging the boundaries of custom. In view of all this, it seems to the present writer that there is no way of bettering the conclusion reached by Bray C.J. in *Romeyko* v. *Somnels*,[20] when he stated that, 'the only conclusion I can draw is that the use of these words is not in all contexts in violation of current standards in the Australian community, particularly when they are in print or not addressed to specific individuals with the object of insulting them or obtruded on the world at large in public streets'.

There has been continuing criticism of the insularity of judges[21] and, as has already been observed,[22] judges themselves are sensible of some of the problems which they face. *Romeyko* v. *Somnels*, *Dalton* v. *Bartlett* and *Bills* v. *Brown* represent, it is suggested, a determined and largely successful attempt to ascertain and apply community standards, a task which is by no means easy. Dworkin, for instance, has argued[23] that a distinction exists between values and standards based on popular prejudice, aversions and rationalisations and those based on principled moral conviction. It is only those founded on the latter, he contends, which should be made the basis for imposing coercion on other people. In rebuttal, Stein and Shand[24] claim that, 'such a view, however attractive its championing of rational objectivity against arbitrary prejudice, would minimise the role of the community's popular morality, for the moral convictions of most people are only partly based on explicit principles consciously held; they are largely the product of an amalgam of social forces, little understood by those who hold them'. If Dworkin's view is acceptable, it may well be that the law's interference with linguistic expression is on shaky ground, but relatively few people, on the other hand, would support a move to abolish s. 12 (1) (c) and its equivalents. Perhaps the truth really lies in Oliver Wendell Holmes's too often quoted aphorism that, 'the life of the law has not been logic; it has been experience'.[25] These cases are important because they tell the academic, legal practitioner and layman that judicial experience is much the same as his own in an area which the layman, at least, regards as his own. They can do the reputation of judge-made law nothing but good.

Frank Bates

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20 (1972) 2 S.A.S.R. 529 at p. 565, adopted by Chambers J. in *Bills* v. *Brown* (54/1974 at p. 4).

21 See, for instance, R. Stevens and B. Abel-Smith, *The Lawyers and the Courts* (1967) at p. 299 and *In Search of Justice* (1968) at p. 174.

22 *Supra* text at nn. 11-12.

23 R. Dworkin, 'Lord Devlin and the Enforcement of Morals' (1966) 75 *Yale L.J.* 986 at p. 1001.

24 P. Stein and J. Shand, *Legal Values in Western Society* (1974) at p. 147.

25 *The Common Law* (1881) at p. 1.