CITATION: *Kennedy v Eldridge* [2006] NTMC 001

PARTIES:	GAVIN DEAN KENNEDY
	v
	STEPHEN JOHN ELDRIDGE
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act; Summary Offences Act
FILE NO(s):	20510710
DELIVERED ON:	10 January 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	28 November 2005
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

Summary offences – Offensive behaviour – Whether can be committed by "words alone" – Whether mental element proven

Summary Offences Act (NT) s 47(a); *Criminal Code* (NT) s47(a)

Khan v Bazeley (1986) 40 SASR 481; *Brady v Lenthall* [1930] SASR 314; *Pregeli and Wurramurra v Manison* (1988) 31 A CRIM R 383; *Worcester v Smith* (1901) VLR 316

Brown, Farrier, Neal and Weisbrot, "Criminal Laws", 2nd ed Federation Press, 1996

REPRESENTATION:

Counsel:

Complainant:	Ms Brebner
Defendant:	Ms Franz

Solicitors:

Complainant:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 001
Number of paragraphs:	13

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20510710

BETWEEN:

GAVIN DEAN KENNEDY
Complainant

AND:

STEPHEN JOHN ELDRIDGE
Defendant

REASONS FOR JUDGMENT

(Delivered 10 January 2006)

JENNY BLOKLAND SM:

Introduction

1. These proceedings concern a determination of whether the Defendant *Stephen John Eldridge* committed the offence of *offensive behaviour in a public place* contrary to *s47(a) Summary Offences Act (NT).* The Defendant pleaded not guilty to the charge; the prosecution bear the onus to prove each element beyond reasonable doubt. Essentially this matter involves the resolution of two primary issues, first whether the allegation concerns *"words alone",* (and if so whether *"words alone"* are enough to found a charge of *offensive behaviour)*, and second whether in the circumstances of this Defendant the prosecution has proven the requisite mental element beyond reasonable doubt.

2. The particulars of the charge read as follows:

"you approach (sic) a six year old boy and asked "How big is your dick?" You then asked the boy to come behind the play equipment and to pull down his pants and show his penis to you".

3. The Agreed Crown Facts (Ex P1) read as follows:

"On Tuesday 26 April 2005 the victim HZ, then aged 6 years, attended the PINT club netball facilities with his mother. They arrived around 5pm. Mrs Z was coaching netball and the victim went to the nearby playground area to play.

The offender approached the victim who was having trouble reaching the bar for the flying fox. The offender got the flying fox bar and gave it to the victim. The offender said to the victim, "How big is your dick?" The victim responded by showing a length between his two hands. The offender then said, "Come behind the circles and pull down your shorts so I can see how big your dick is". The circles are enclosed pipes in the playground.

The victim became frightened and said he had to go back to his mother. He then went to the netball courts where he spoke with his mother. He then repeated the conversation he had had with the offender. Mrs Z then comforted her son for a short time. Together they then returned to the playground to look for the offender, but they did not see him.

Mrs Z then went back into the club and reported the incident to the bartender. As a result inquiries were made that subsequently identified the offender as Stephen Eldridge.

The victim and his mother returned home shortly after 6pm. Mrs Z then telephoned police and reported the matter.

On 5 May 2005 the offender was arrested. He participated in an EROI where he denied speaking with the victim".

4. By consent there is also a psychological report before the Court by Kim Groves (Ex D1). That report indicates, among other matters that the Defendant has a history of cognitive difficulties associated with intellectual impairment; he had been under the management of a paediatrician between the ages of seven and fifteen years; the paediatrician identified symptoms of his impairment as: *"short concentration span, fidgetingness and difficulty in remaining seated and still, easy distractibility, disruptiveness, poor short-term memory and poor organisational skills"*.

5. That report indicates various cognitive assessments based on neuropsychological measures that place the Defendant's general intellectual ability within the borderline impaired range. This assessment includes measures of attention, concentration, verbal comprehension and verbal abstract reasoning. Of the incident the subject of these proceedings the report notes that he could not identify his thought process at that time, but "reported that he approached the child without any specific motivation in mind". In terms of the consequences of his behaviour the report notes that immediately after the incident he thought *"I've stuffed up"*. As part of the conclusions the author of the report notes that "his offending does appear to have been opportunistic impulsive in nature, which highlights the need for treatment oriented towards this problem".

Whether "words alone" can constitute Offensive Behaviour

6. On behalf of the Defendant Ms Franz submitted that "words alone" cannot as a matter of law constitute *offensive behaviour* within the meaning of *s47(a) Summary Offences Act.* Ms Franz submitted the structure of s47(a) clearly was directed at *behaviour* in the sense of *conduct* rather than at the words used, (in contra-distinction to "obscene language" or "cause substantial annoyance" which, she argued, may have been a more appropriate charge). Ms Franz referred me to various dictionary meanings to "behave".

The Macquarie Dictionary entry reads as follows:

1. To conduct oneself or itself; act: *the ship behaves well*

2. To act in a socially acceptable manner: *did the child behave?*

3. Behave oneself. a. to conduct oneself in a specified way.

The Macquarie entry for behaviour is:

1. Manner of behaving or acting.

Ms Franz also referred me to the Chambers English Dictionary entry that reads as follows:

> behave, to bear or carry: to wield, manage, conduct (commonly with self) – to conduct onself (towards): to conduct onself well: to act: to function.
>
> behaviour, conduct: manners or deportment, esp. good manners: general course of life: treatment of others: mode of act: response to stimulus.

7. Ms Brebner on behalf of the prosecution argued that the definition of "act" in the *Criminal Code* "is not limited to bodily movement" (s1) and does not preclude a criminal act being identified as words. Ms Brebner also submitted that the Chambers Dictionary Definition, in as much as it referred to the idea of conducting oneself was broad enough to incorporate "words" as "behaviour". She submitted that most people would ordinarily include words in the concept of "behaviour". Further, she submitted that this is not a case of "words alone" but involved the words in the context of approaching a young child and inviting the child to go to another spot in the playground and inviting the child to engage in pulling his shorts down.

8. I have come to the conclusion that the words spoken by the Defendant in the context in which they are spoken constitute offensive behaviour. In coming to that conclusion I have reviewed the many examples of both charges of

"offensive language" and "offensive behaviour" set out in Brown (and others) in "Criminal Laws" Vol 2 at pages 956-962. Many of those cases concern the fraught questions of "offensive language/behaviour" in the context of political dissent and entertainment. Some of the matters that were clearly charged as "offensive behaviour" involve words in particular contexts. For example, note 17 (at page 958) involved a charge against an accused walking down the main street of Port Augusta wearing a T-shirt which read "FUCK 'EM – if they can't take a joke". He was charged with offensive behaviour. He was convicted by a magistrate and the verdict was upheld by the Supreme Court of South Australia in *Khan v Bazeley* (1986) 40 SASR 481 in which it is noted by O'Loughlin J that "there were present – or where one could reasonably expect there might be present – people of all ages and both sexes". I take from this reasoning that context is important when assessing whether offensive words can be considered "offensive behaviour". I agree with Ms Brebner's arguments on this point.

9. My researches indicate that the argument advanced by Ms Franz has been specifically rejected by the South Australian Supreme Court in *Brady v Lenthall* [1930] SASR 314 concerning a very similar statutory provision to the Northern Territory's. (Much of the current *Summary Offences Act* (NT) is based on the South Australian legislation). In *Brady v Lenthall* the Court noted the provisions of the South Australian legislation as: "Every person who is guilty (a) of any riotous, offensive or indecent behaviour, or of fighting, or of using obscene language, in any road, street, thoroughfare or public place". Further, the South Australian legislation had specific provisions for obscene language, profane language, threatening, abusive or insulting words etc. In considering whether in these circumstances "words" could constitute "offensive behaviour", Richards J said (at 316-317) "offensive behaviour might include the speaking of words, and the words need not be of any of the descriptions already mentioned; but it would be no less offensive behaviour if the words themselves were obscene, threatening,

abusive or insulting". It is clear from the judgement that the particular words in their particular context were capable of amounting to "offensive behaviour".

10. I am satisfied that the physical elements of the charge are made out and I include in that finding that the words said by the Defendant in the context that they were said would offend a reasonable person of ordinary firmness.

The Mental Element

11. Since the enactment of the *Criminal Code (NT),* there has been significant judicial discussion about the mental elements of various offences under the *Summary Offences Act* particularly considering the operation of *s31 Criminal Code (NT),* requiring proof of intent or foresight of an act, omission or event. As is well known the foundation authority in this area is *Pregelj and Wurramura v Manison* (1988) 31 A Crim R 383, where, after an exhaustive analysis of the area His Honour Justice Nader wrote:

> "The gravaman of offensive behaviour is the offending of another person, and the offending must be intended. Behaviour that does not offend, at least potentially, cannot be offensive. Behaviour, offensive in other circumstances, committed in complete privacy cannot be offensive. It cannot be in the nature of any conduct to be offensive without including in the definition of the conduct the circumstances which render it offensive. Therefore, on one view of it, the offending of a person, actually or potentially, is an integral element of the prescribed conduct. On that view of it the "act" of the defendant includes the act of *offending,* for which he is excused from criminal responsibility unless the offending were intended or foreseen by him as a possible consequence of his conduct. If that be a correct analysis, the appellants in the present case were excused by subsection 31(1) from criminal responsibility for the conduct because, while they knew of the potential of the act of sexual intercourse observed by another to offend, having taken precautions to conceal themselves, they did not intend to offend, nor did they foresee the possibility of offending anyone. By "intent to offend", I mean "do an act with knowledge that the activity would, or at least could, offend". (at 397)

12. The meaning of "offend" generally accepted is that the conduct "must be such as is calculated to wound the feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person" (see eg. *Worcester v Smith* 1901 VLR 316). Although I have found the physical elements are objectively readily made out, because of the Defendant's impaired mental state (as summarized above), it is difficult to say whether, by his words and actions he intended or foresaw the offence in the sense required by the authorities. If not for his cognitive or intellectual impairment I would readily accept on these facts the requisite intention or foresight was present but in this particular case I can't feel confident about that. The highest his intent can be put is that he "stuffed up" or that he had awareness he was doing something wrong. That falls far short of an intent or foresight to wound the feelings, or arouse anger and so forth. I therefore conclude there exists a reasonable doubt and the charge must fail.

13. Usually I would say nothing more upon acquittal, however, it is apparent that the psychologist who wrote the report recommended the Defendant receive further specialised treatment. Even though he has been acquitted it is in both the community's interest and the offender's interest that he be treated so that there is not a repeat of this conduct. I note the Defendant spent between 6 May 2005 and 10 August 2005 in custody prior to this matter being dealt with in this Court. He should be encouraged to take steps to ensure he is not placed in this situation again. I also hope that HZ and his family have or are being given appropriate support to assist in dealing with this issue as although for the reasons given I am compelled to dismiss the charge, that does not negate the objective facts that HZ was indeed approached and spoken to in the manner alleged.

Dated this 10th day of January 2006.

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Jenny Blokland
STIPENDIARY MAGISTRATE