THE LANGUAGE OF THE CODE

The Hon Mr Justice Nader of the Northern Territory Supreme Court
and
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Abstract: The authors promote discussion on the terminology and language of the Northern Territory Criminal Code and particularly those provisions which relate to the summing-up and its intelligibility.

Argument

The Northern Territory Criminal Code is the most recent in Australia but its language is a curious mix of the old and the new. Nearly 50 years after the House of Lords in Woolmington v DPP (1935) AC 462 firmly placed the onus and burden of proof upon the Crown, some provisions of the Code speak in pre-Woolmington language as though there were an onus on the accused. In practice, Judges summing up to juries, direct that the Crown ought show that the act was not justified or excused. Other Code provisions do, however raise serious practical problems. We have some suggestions and this paper is intended to stimulate discussion.

1. SELF DEFENCE

S.28 (f) provides '28. Circumstances in which force causing death or grievous harm is justified'

In the circumstances following, the application of force that will or is likely to kill or cause grievous harm is justified provided it is not unnecessary force:

(f) in the case of any person when acting in self-defence or in the defence of another, where the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous harm will result;

At common law, at the time the Code commenced, the judgement of Mason J in Viro v The Queen (1978) 141 CLR 88 set out 6 propositions in this form:

1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an

unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

(b) By the expression 'reasonably believed' is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

3. If the jury is not satisfied beyond reasonable doubt that there was not such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

In Zecevic v DPP (Vic) (1987) 162 CLR 645 Mason CJ recognised that the doctrine in Viro imposed an onerous burden on trial judges and juries and agreed with the joint judgement of Wilson, Dawson and Toohey JJ that no set of words or formula is necessary to explain self-defence. (Mason

CJ at 653-4, joint judgment 661). The formula of the Code commences with a double negative -'not unnecessary force'- which is defined in a peculiar way, 'unnecessary force' means force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion; thus there are alternative definitions of 'unnecessary force' that the jury must consider.

The 'ordinary person' makes an appearance and one should remember that the 'person similarly circumstanced' does not include a person who is voluntarily intoxicated. We will raise for discussion difficulties in summing up on self-defence under the Code but why, if amendments may be made, not simply reflect the joint judgment in Zecevic where their Honours at 661 said:

> 'It is apparent, we think, from the difficulties which appear to have been experienced in the application of Viro, that there is wisdom in the observation of the Privy Council in Palmer that an explanation of the law of self-defnce requires no set words or formula. The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary. Murder consists of an unlawful killing dones with intent to kill or to do grievous bodily harm. Recklessness may be put to one side as having no apparent relevance in the context of self-defence. Manslaughter also consists of an unlawful killing, but without such an intent. A killing which is done in self-defence is done with justification or excuse and is not unlawful, though it be done with intent to kill or do grievous bodily harm. However, a person who kills with the intention of killing or of doing serious bodily harm can hardly believe on reasonable grounds that it is necessary to do so in order to defend himself unless he perceives a threat which calls for that response. A threat does not ordinarily call for

that response unless it causes a reasonable apprehension on the part of that person of death or serious bodily harm. If the response of an accused goes beyond what he believed to be necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence. That is to say, the killing will have been without justification or excuse and it will be for the jury to determine how it must be regarded. If it was done with intent to kill or to do grievous bodily harm, then unless there was provocation reducing it to manslaughter, it will be murder. In the absence of such an intent it will be manslaughter: see Viro (49).'

Or can it be argued that the Code requires no direction in conflict with Zecevic?

2. THE ORDINARY PERSON AND THE 'REASONABLE MAN'

We understand why the criminal law needs the ordinary person. He turns up for example in S.34 Provocation: provided ... (d) an ordinary person similarly circumstanced would have acted in the same or similar way;

Attempts to define him prove difficult if we say the ordinariness is to qualify the whole man. Do we mean, as in provocation, that the person has a capacity of self control within ordinary limits? We return to this in a moment. But what of the 'reasonable man'? The draftsman of the code has kidnapped him from the Clapham omnibus where with bowler, brolly and bag he thought himself above the seamy world of crime, content to be the yardstick of negligence. What does one say to a jury when both the 'ordinary person' and the 'reasonable person' turn up in the same summing up? What is the difference between them? In cases where intent and provocation are both issues they are both there - S31(2) and S.34. In cases of duress the reasonable person is the test. In S.154 the ordinary person reappears. One wonders if a reasonable person would hold an ordinary person in contempt, or would an ordinary person find a reasonable person extraordinary. The subtlety of the distinction is such as to be beyond the comprehension of jurors ordinary, reasonable or otherwise. We believe a change is necessary. Why not relate ordinariness, not to the man as such but to his relevant qualities.

3. INTOXICATION

S.154(4) of the code 'is a clear expression of concern by the legislature over the effect of intoxication on the level of crime in the community in the context of dangerous acts or omissions lacking an intention to cause a specific result '(per Mason CJ, Wilson Deane Dawson and Gaudron JJ in Baumer 83 ALR 8 at 12) Presumably to promote the policy the Code was amended by Act No.9 of 1984 in two ways. Firstly, a definition of 'person similarly circumstanced was added so as not to include 'a person who is voluntarily intoxicated'.

Secondly, S.154 (5) was added and reads 'Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section'. It is difficult to see how voluntary intoxication could be so regarded S.31 deals with 'Unwilled Act etc and accident' and provides in sub section (1).

> (1) A person is excused from criminal responsibility for an act, omission or event unless it is as intended or foreseen by him as a possible consequence of his conduct'.

Voluntary intoxication may raise a doubt whether a person in fact formed the necessary intent or foresaw the consequences but S.31(3) provides 'This section does not apply to the offences defined by Division 2 of Part VI' and it is in that Division that S.154 resides. We wonder therefore if S154 (5) is surplusage, for if it is it should be removed.

4. VOLUNTARY ACT

In Krosel 41 NTR 34 Nader J found an elegant and commensense interpretation of S.31 (1) That interpretation however could not stand when read with S.31(2) and Krosel was not followed in the celebrated case of Pregelj v Manison, Wurramara v Manison 51 NTR 1. We set out the two subsections.

> (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, a reasonable person similarly circumstanced and having such foresight would have proceeded with that conduct.

Sub (2) postulates the situation where a person might foresee his own act, not merely an 'event', as a possible consequence of his conduct. Questions press upon one. What is a persons 'act' that it may be seen as a consequence of his 'conduct'? Has the question any meaning at all? Should sub (2) be retained? If so, it should surely be reworded to make it intelligible. Might it not be made to conform with the relatively simple scheme of sub(1) as reflected in R v Krosel.

Perhaps sub (1) might be amended along the following lines to remove any confusion that might arise from the use of the word 'conduct' in addition to the words 'act' and 'omission':

'A person is excused from criminal responsibility for an act or omission unless it was intended by him; and he is excused from criminal responsibility for an event unless it was intended by him or foreseen by him as a possible consequence of his act or omission.

Attached are pages 14 to 19 of Nader J's judgment in Pregelj to fuel debate. How does one foresee that one's act may be the consequence of ones act.

It must be asked why voluntariness is not dealt with in S.31, although the draftsman inserted it in the heading.

The construction of section 31

This question is by no means as simple to answer as the last. The difficulty stems from the obscurity of wording of s 31 of the NT Code. I say this with some confidence, because an examination of the authorities relating to the corresponding section of the Qld Code (and the WA Code which is in the same terms) serves to show that, even after more than 80 years of operation of that section, they are far from clear: see, for example, *Timbu Kolian v R* (1968) 119 CLR 47 at 53-5, 55-6, 63-6; *R v Payne* [1970] Qd R 260; *R v Sweet* [1972] QWN 28; *Kaporonovski v R* (1973) 133 CLR 209; 1 ALR 296; *Geraldton Fishermen's Cooperative Ltd v Munro* [1963] WAR 129; *Anderson v Basile* [1979] WAR 53; see also Dixon CJ's comments on the similar wording of s 13(1) of the Tas Code in *Vallance v R* (1961) 108 CLR 56.

Dr Elliott in Pt I of his article "Mistakes, Accidents and the Will: The Australian Criminal Codes", asserted that Sir Samuel Griffith's optimism as to the clarity of his codification was unfounded; that after some years of case law there is confusion where the aim was clarity: 46 *Australian Law Journal* 255. With the deepest respect to the authors of the NT Code, it is no more clear in some material respects than the Qld Code.

Section 31 of the NT Code, which has departed from the language of the Qld Code, is as difficult to construe in its own ways. The section provides a defence (in the loose sense) where the act, omission or event is not intended or foreseen by the accused as a possible consequence of his conduct.

Section 23 of the Qld Code provides a defence where the act or omission occurs independently of his will *and* for an event which occurs by accident.

Section 13 of the Tas Code provides a defence for an act unless it is voluntary and intentional, for an omission unless it is intentional *and* for an event which occurs by chance.

Sections 32, 24 and 14 of the respective codes relating to honest and reasonable mistake are, it seems to me, substantially the same.

Section 1 of the NT Code defines "act" as "in relation to an accused person, means the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention". The definition of act does not greatly assist. "Deed" is merely a synonym for "act". However, the statement that it is not limited to bodily movement is significant. I suspect that the draftsman was attempting to resolve the problem of the meaning of "act" illustrated in *Vallance v R* (1961) 108 CLR 56: what is comprehended by the word "act"? The NT Code also defines "event" as "the result of an act or omission". Neither "omission" nor "conduct" is defined.

A striking difference between s 31 of the NT Code and the corresponding provisions of the other codes is the more indiscriminate use of the terms "act", "omission" and "event". Although this lack of discrimination is grammatically obvious, influenced by the ordinary meaning of the words, I imposed a distinction by construction: *R v Krosel* (1986) 41 NTR 34. It seemed an unnatural use of words to speak of foreseeing an act or omission. Foresight seemed appropriate only for an event. So I suggested that the section had the effect of excusing acts, omissions and events that were not

intended and events that were not foreseen. But, I would now accept the charge of superficiality. A moment's attention to the words of s 31(2) shows that the author of the section intended no such complete distinction between "act" and "omission" on the one hand and "event" on the other. Section 31(2) opens with the words: "A person who does not intend a particular act, omission or event, *but foresees it as a possible consequence of his conduct*, . . ." (emphasis added). Section 31(2) refers to acts and omissions that can be foreseen. Not only events can be foreseen under s 31(2). What does it mean to say that an act was *foreseen* by the actor? It surely cannot mean the bodily movements of the accused, for who would speak of *foreseeing* his own bodily movements as a possible consequence of his conduct? I do not think the sub-section can refer to the act of another caused or induced by the accused (see definition of "act" below) because in either case the act would have been intended by the accused. The proposition that "act" does not mean what it ordinarily means is reinforced by the use of "conduct" in both sub-sections. Is there a distinction between "act" and "omission" on the one hand and "conduct" on the other? There would have to be a distinction, at least as to comprehension, if an "act" of the accused can be a *consequence* of "conduct" of the accused. One can readily understand how an "event" can be a consequence of "conduct", but the antecedent of "it" in the passage quoted of s 31(2) is "act, omission or event", not "event" only. In *Krosel*, I should have adverted to the fact that the expression used in s 31(1) is "possible consequence of his *conduct*", not "possible consequence of his *act or omission*". I assume that the meanings of the words "act", "omission", "event" and "conduct" are the same, respectively, wherever they occur in s 31. I conclude, therefore that the words "act" and "omission" are wider in their comprehension than the mere bodily movement by which the other external ingredients of an offence charged are brought into existence. "Act" and "omission" may often include the latter, but for the reasons stated I believe they have different comprehension. Just how wide is the comprehension of "act" and "omission" is another question.

There is a great deal of academic disagreement as to the meaning of "act" and associated words in the Qld and Tas Codes. The dispute includes extremes of possible interpretation. Professor Colin Howard argues confidently that "act" is equivalent in meaning to "the external ingredients of the offence". Professor Eric Edwards argues that "act" is confined to its primary meaning of muscular contraction or bodily movement. Dr Ian Elliott, *supra,* argues yet another construction. Even if I were able to do so, it would be inappropriate to enter the debate here. The only conclusion I am able to reach, independently of the cases, is that "act" in s 31 of the NT Code must include more than mere muscular contraction or bodily movement, if for no other reason, in order to make some sense of s 31(2).

Vallance demonstrated that the finest legal minds in the land could not agree about the meaning of "act" and, by implication, "event" in the Tas Code. Vallance was acquitted by a jury. A Court of Criminal Appeal set aside the verdict of acquittal for misdirection or non-direction and directed a new trial upon one count in the indictment charging wounding under s 172 of the Tas Code. Section 172 provides: "Any person who unlawfully wounds or causes grievous bodily harm to any person whatever is guilty of a crime." Dixon CJ, after a courteous but trenchant criticism of the

introductory part of the Tas Code, said that the wide abstract statements of principle about criminal responsibility were "framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do": at 58. His Honour was contrasting the method of the Tas Code with the method of the common law. He said: "In the Code these abstractions of doctrine are not the generalised deductions from the particular instances that follow: they come *ab extra* and speak upon the footing that they will restrain the operation of what follows": ibid. His Honour, having turned more particularly to the case in hand, asked the question:

"But is s 172 to be read in the Code as doing no more by way of defining the crime than stating the external elements necessary to form the crime, that is to say the wounding . . ., and adding the requirement of unlawfulness relying upon the introductory Part or so much of it as deals with criminal responsibility to define and import the elements which go to intention or other state of mind necessary or sufficient completely to constitute the crime? That seems to be the primary question.

"In the case of s 172 I think that the answer should be 'Yes'. This answer represents, I believe, the plan upon which the Code is conceived and, to some but perhaps to no great extent, drafted. The plan was to provide for specific crimes but to treat the complete definition of them as finally governed or controlled by Ch IV (criminal responsibility) . . . . Section 13(1) is expressed as a wide abstract generalisation which of course ignores the elements of all or any specific crimes into the definition of which so to speak it must go": at 59-60.

Those remarks, if correct, are equally applicable to the corresponding provisions of the NT Code. In particular, the NT Code defines "unlawful" and "unlawfully" as meaning "without authorization, justification or excuse". This case does not involve a consideration of "authorization" or "justification", but it does involve "excuse", which is the title of Div 4 of Pt II, Criminal Responsibility, of the NT Code. His Honour of course recognised that the definitions of some offences include criteria of criminal responsibility, ie mental elements, special to the offences. His Honour said that s 13(1) appeared to him "to be saying negatively that there shall be no guilt unless all acts of the accused forming the ingredients of the crime are voluntary and intentional. It is the punishable act or acts to which the words appear . . . to refer. In the case of unlawful wounding the punishable act is the wounding . . . . It is not enough to say the 'means' used, or perhaps one should say the use of the means, under s 13(1) must be voluntary and intentional and that the wounding need not. The wounding is the crime, the punishable act, and it is the wounding which must be voluntary and intentional": at 60-61. It seems to me that there are significant similarities between offensive behaviour and wounding. The expression "offensive behaviour" is merely a short way of saying "an act which causes offence to another": the act of offending another. The act of the defendant is the means by which the offence is brought into existence. If the analogy is not false, and if Dixon CJ's analysis is correct, it is not enough to satisfy the NT Code equivalent to s 13 of the Tas Code to say the use of the means must be intended and that the offending need not. The gravamen 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 proscribed 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 s 31(1) from criminal responsibility for their 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".

The other main opinion of the High Court in *Vallance* was represented by the judgment of Kitto J. His Honour gave the word "act" in s 13 of the Tas Code its narrow meaning. He said that s 13(1) was framed to recognise the distinction between, on the one hand, a bodily action performed by a person, entailing criminal responsibility either *per se* or in virtue of some quality of the action, some consequence caused by it . . ., some accompanying intent or state of mind . . ., and, on the other hand, something eventuating in consequence of the action and attracting a criminal responsibility which the action otherwise would not have produced. "When s 13(1) speaks of an act being voluntary and intentional, before turning to the event and speaking of that as not occurring by chance, it seems to me to be addressing itself only to the question whether a person charged acted of his own free will and by decision, before asking whether that which eventuated from his act was a merely chance result": at 64. But, unlike s 13(1) of the Tas Code, s 31(1) of the NT Code does not exculpate merely for an event that occurs by chance, but for an event that is neither intended nor foreseen by the defendant as a possible consequence of his conduct. If one were to apply the reasoning of Kitto J, the act of each appellant in the present appeal was the act of sexual intercourse and the offence that might be suffered by an observer was something that eventuated from the act: an event. By virtue of s 31 of the NT Code, the appellants would not be criminally responsible for that event unless they intended it or relevantly foresaw it. "Intended" in this context means, not that they desired it to happen, but that they did the act with knowledge, in its wide sense, that offence to someone would be an actual or possible consequence. I have already said that there was no evidence of knowledge on the part of either appellant that he (or she) would cause offence by their actions. On the contrary, they believed they were concealed, however unreasonable that belief might have been.

Offensive behaviour is not one of that class of offences especially designated by the NT Code as exempt from the provisions relating to criminal responsibility: see ss 3 and 22. It follows that those provisions apply with full force to offensive behaviour. This is so notwithstanding that, in applying the common law doctrine of *mens rea* to offensive behaviour in the past, the courts have not always applied to it all the circumstances of the

offence. But, in *Walker v Crawshaw* [1923] Gaz LR, 22 February 1924, a decision of the Supreme Court at Dunedin, Sim J was there concerned with a person convicted of wilfully doing a grossly indecent act in a public place. On 14 June 1923 at 11.30 pm, a hire car was standing in a public street at the rear of a theatre. The front and rear lights were lit but there was no interior light. The hood of the car was up and the side curtains were in position. Constable Brownlie saw the car and on approaching it he heard a shuffling noise in the car. There was no-one in the front seat and he was unable to see into the rear portion of the car. The constable put his hand over the back of the front seat and flashed his electric torch into the rear portion of the car. He saw the appellant and a woman having sexual intercourse on the back seat. Amongst other arguments on the appeal against his conviction, it was contended by the appellant that he was justified in thinking that he would not be seen and that he was detected only through the misdirected zeal of a prying policeman. The learned judge concluded that: "As the magistrate has convicted the appellant, he must be taken to have found that there was a reasonable probability of the appellant being detected, *and that the appellant appreciated the risk of detection and deliberately and intentionally accepted that risk*." Leaving aside the questionable proposition that the magistrate must be taken to have decided something he did not express, the point of the judgment for present purposes is that Sim J never doubted the necessity ("he must be taken") for a finding that the appellant knew of ("appreciated") the risk of detection. Knowledge was the necessary mental ingredient in his Honour's mind. That case shows that it is no novel proposition to suggest that the mental element implied in the definition of such offences, relating to a circumstance not integral to the central act, is knowledge.

I am aware of some cases of offensive behaviour, decided over the years during which the common law doctrine of *mens rea* has developed and which has recently been so fully expounded in some of the judgments in *He Kaw Teh* (1985) 157 CLR 523; 60 ALR 449, in which cases it has been said that an intention to offend is not an ingredient. However, I am not at all sure that applying, say, the principles as expounded by Brennan J in *He Kaw Teh*, a court would be correct to say today that *mens rea* does not apply to all the external ingredients of offensive behaviour. Of course it must be kept in mind that offensive behaviour provisions take a variety of forms, and special considerations may arise from that fact.

Counsel for the respondent argued that the fact that the maximum fine for offensive behaviour is so trivial, a mere $200, is an indication that it is not a criminal offence in the full sense, but a device to impose decency, decorum and orderly behaviour on members of society. Yeldham J considered that notion in *Jeffs v Graham* (1987) 8 NSWLR 292 at 296. His Honour was concerned with offensive conduct under s 5 of the Offences in Public Places Act 1979 (NSW) for which the maximum penalty is also $200. He said: "The offence created is truly criminal in nature; and clearly causes a stigma to attach to any person convicted of it. The penalty, whilst not heavy, is not insubstantial, at least to many of the people who would be caught by the section's provisions; and I do not regard the subject-matter of the offence as being really within the matter said, in cases such as *Sweet v Parsley* [1970] AC 132 at 163, to be one involving 'potential danger to

public health, safety or morals, in which citizens have a choice whether they participate or not'."

For these reasons I would allow the appeals and quash the findings and orders of the learned judge and the magistrate below.

Kearney J. The history of these proceedings is set out fully by Nader J. I agree generally with his Honour's approach and conclusions. I will therefore be brief.

The offence charged is an offence of circumstance; as written, it consists of two elements — in this case, the act of sexual intercourse and the circumstance that the act was performed within the view of a person in the lane. It is the circumstance of public visibility which is said to make the otherwise innocent act punishable. In the words of Dixon CJ in *Vallance v R* (1961) 108 CLR 56 at 59, these two elements are "the external elements necessary to form the crime"; together they constitute the "punishable act". In common law terminology they constitute the *actus reus* of this offence.

There is, however, a third element which is not apparent from the wording of s 47. Criminal responsibility for this offence is subject to the provisions of Pt II of the Criminal Code, comprising ss 22-43. The most important provision in the Criminal Code is s 31. In my opinion, the word "act" in s 31(1) means the "punishable act" in the sense set out above. The effect of s 31(1) is that the appellants are not criminally responsible for this offence unless they either intended the punishable act — that is, both external elements — or foresaw it as a possible consequence of their conduct.

As a matter of common sense, the appellants could not have intended to commit the punishable act unless they knew of the circumstance of public visibility.

The live question in this case was whether it was proved beyond reasonable doubt that the appellants knew that they could be seen from the lane in the location in the room where they performed the act, or foresaw that they might possibly be seen. The short answer is that the evidence as set out by Nader J does not warrant any such conclusion being drawn.

I add the following observations.

On the question of fact whether the punishable act constituted "offensive behaviour", the learned magistrate in deciding that the relevant questions were whether the person who saw the act was in fact offended by it, and whether that person was unduly sensitive, misdirected himself as to the question which required to be addressed. It did not matter whether or not the witness to the act was offended or whether he was unduly sensitive. The difficult question for the magistrate's decision was whether, according to community standards of decorum, the act in question in the circumstances in which it occurred constituted offensive behaviour. It would have been open to the magistrate to have so found, had his attention been directed to the question; community standards in this area are not yet those attributed many years ago to Mrs Patrick Campbell: "I don't care what they do, so long as they don't do it in the street and frighten the horses."

I agree with the learned appellate judge's comments about "wide screen entertainment", referred to by Nader J.

The vital question on the facts of this case concerned the mental element. As Nader J has pointed out, his Worship did not consider the mental