

CHRISTOPHER DELANEY

Informant

and

KYLE MAGEE

Accused

DECISION

Senior Constable Cowley appeared to prosecute and Mr Anderson, Solicitor, appeared for the Accused. The Accused is charged with two offences, both relating to events that occurred on 2nd February, 2010. Charge one, is laid under the Crimes Act 1958 Section 197 (1), charge two is laid under Section 199 (a) (1) of that Act:

1. The accused at Melbourne on 02/02/10 intentionally and without lawful excuse did damage property namely a Bus Shelter at the corner of William and Lonsdale Streets belonging to the City of Melbourne and Adshell and valued at \$40.17;
2. The accused at Melbourne on 02/02/10 did possess an article namely a bucket of paint and paint brush with the purpose of using it without lawful excuse to damage property belonging to City of Melbourne and Adshell.

There was a consent to summary jurisdiction. Pleas of not guilty were entered in respect of the charges.

Crimes Act 1958 s 197 Destroying or damaging property

- (1) A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

S 199 Possessing anything with intent to destroy or damage property

A person who has anything in his custody or under his control –

- (a) with the purpose of using it, or causing or permitting another to use it, without lawful excuse –

- (i) to destroy or damage any property belonging to some other person or to himself, the user or both of them and some other person; or

- (ii) ...

- (b) ...

shall be guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

S 201 Lawful excuse

- (1) This section applies to any offence under sections 197 (1), 198 (a) or 199 (a) (i).
- (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this subdivision as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse -
 - (a) if at the time of the conduct alleged to constitute the offence he believed -
 - (i) that the property in question belonged solely to himself;
 - (ii) that he held a right or interest in the property in question which authorized him to engage in the conduct; or
 - (iii) that the person or persons whom he believed to be entitled to consent to the destruction or damage in question had so consented or would have so consented if he or they had known the circumstances of the destruction or damage; or
 - (b) if he engaged in the conduct alleged to constitute the offence in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of such conduct he believed -
 - (i) that the property, right or interest which he sought to protect was in immediate need of protection; and
 - (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.
- (3)
- (4)
- (5) This section shall not be construed as taking away or otherwise affecting any other defence recognized by law as a defence to criminal charges.

A series of four digital images was tendered which showed, apparently, two advertising displays, forming a part of the bus shelter, obliterated by white brush strokes. Two further digital images showed respectively a "wet paint" sign and a black bucket containing white material and a paint brush. Also tendered was a two page document produced by the Accused during the interview with police; a copy Statement of Stanley Oldfield, a Protective Services Officer, dated 12th February, 2010; a copy Statement of Linda Kemp, a Protective Services Officer, dated 3rd February, 2010; a copy Statement of Leading Senior Constable Brendan Johnson, dated 12th February, 2010 and a copy Statement of Constable Christopher Delaney, dated 11th February, 2010. A record of interview was conducted on 2nd February and recorded on DVD, which was tendered in evidence.

In the course of the interview with police the Accused said

his "intention was to do exactly as I did."

"At that time and in that location there is a lot of police in the area."

"I knew I would be apprehended."

"It is my idea to cause as little damage as possible while making my point, which basically is an anti-advertising protest."

bought them (bucket, paint and brush) to pursue this course of conduct.

A 'Summary of Offence', produced by the prosecutor, was accepted by Mr Anderson. It read:

"On the 02/02/10 at approximately 9:40am, the defendant attended the corner of William Street and Lonsdale Street with one black bucket containing a quantity of white wet paint and a black paintbrush.

The accused approached a bus shelter belonging to the City of Melbourne on the north east corner of Lonsdale Street and proceeded to paint over an advertising poster encased in glass and mounted inside the bus stop shelter (Charge 1)

The accused' actions were observed by County Court Protective Services Officers who arrested the accused and conveyed him into the County Court. The accused was subsequently arrested by Police a short time later and conveyed to the Melbourne East police Station.

The paint and paint brush were seized at this time. In addition to a 'wet paint' sign which the defendant affixed to the bus shelter. A search of the accused' at Melbourne east Police also located another 'wet paint' sign, black electrical tape and a document outlining the accused' political views in relation to the advertising industry. (Charge 2)

The accused was subsequently interviewed in relation to criminal damage and possess article for criminal damage. The accused made full admissions stating he had purchased the articles with the expressed purpose of painting over the advertising posters at the bus stop. The accused also stated he had attended outside the County Court with the intention of painting over the advertising posters at the bus stop. The accused indicated his actions were part of his personal protest against the global advertising industry. The accused indicated an intent to continue in this course of action in the future.

Reason for criminal damage: 'No'

Reason for possess article for criminal damage: 'No' "

The statement of PSO Oldfield recorded the Accused as saying he knew he would be arrested when he started painting. PSO Kemp's statement included that the Accused taped up a sign on the bus shelter with the words "wet paint." The Accused is quoted as saying "I believe advertising should be illegal, it's just something I really hate, I know you probably don't understand but it's just something I feel strongly about and I want to do something about it. I paint over it to make my point".

There was no disagreement as to the facts.

The Accused gave evidence which, amongst other things, expressed his objection to advertising; that it has no place in a democratic society. He said advertising seeks to obtain greater profits at the expense of the community; that it overwhelms critical thinking and critical thinking is very important for democracy. The Accused referred to advertising being a perversion of society and art. He said advertising works a lot through images, it tries to conjure emotional psychological reactions. In his opinion,

he said, art is to help people understand the world; that advertising tries to use art to take something from people, not give. The Accused attacked the media which he said should be a great democratic tool, but is dependent on the advertising of profit driven corporations. He asserted media avoided articles which it believed was not pleasing to advertisers. He said society would have to determine how, in the absence of advertising, the media would be funded.

The Accused said he believed the media had a duty to make facts widely known, but the media was diverting discussion away from terrible injustices, such as the economic inequality between nations. He asserted it was not in the interest of a capitalist corporate media to talk about this a lot, let alone start discourse seeking ways to solve the problem. That was because global equality and democracy is notoriously unprofitable. He expressed the view that the government should completely abolish advertising.

He gave his opinion that advertising played on emotional and psychological reactions, playing on the unhappiness of people by offering a solution to people's problems. In doing so he focused on fashion advertising, dealing with personal image.

Asked to describe the way he painted over the sign, he said "I have just scribbled all over it, taking away all messages and images". He was unable to remember what the subject matter was of the advertising he painted over. He said it was relevant to him what the content was as some is worse than others. He said he covered an advertising panel in white paint instead of a message because he wanted people to think for themselves. Asked why he did not write a message, he said that because of the relatively small space of an advertising panel he did not know what he would write. He wanted to trigger a serious public debate about advertising and how media should be provided and the negation of advertising.

He made observations about 'permission' – that he did not have permission to paint over somebody else's property; that a large advertising corporation did not get permission to dominate public spaces, they simply bought it. Advertisers should obtain permission from the public – the public should have a right to say what is shoved in their faces.

Asked by Mr Anderson what he was trying to express through his actions, the Accused said "a simple non-violent protest against advertising. It's my dissatisfaction with the advertising industry and my wish for a more responsible media of a liberal-democratic persuasion".

He characterised his actions as political expression. He said he had twenty eight convictions for this type of offending in the past; had spent 157 days in prison on sentence and another thirty days on remand since September, 2007. He said the last four offences had related to the 'tram stop shelter' at the corner of William and Lonsdale Streets. He said he feels bad about what his being imprisoned does to his family; what it does to himself. He said he does not engage in legally less questionable means of expressing his opinion because "the corporate view is so dominant that it will require drastic measures to bring about public debate on these issues that needs to happen and I believe the laws protect private domination of public space and discourse which needs to be challenged and they need to change".

The Accused said he used a water based acrylic paint because it was easier to remove and caused less damage than enamel paint. He said he chose this location (corner of William and Lonsdale Streets) as “it’s my intention to get caught. It’s even less damage I have to do to make this point. I would continue until I got caught. It’s my (purpose) to challenge this practice which is unconscionable”.

During cross examination the Accused said he held an interest in the property he damaged because it was in public space. He said “if Adshell knew how important it (the issue) was, Adshell might consent, but that’s nonsense. I didn’t have consent. I agree I damaged property”. Asked whether he believed that a person opposed to animal cruelty should be able to damage a BMW which had leather seats, he said he would not do that. Asked if it was his view that if a person wanted to express an opinion it was alright to damage property, he responded “In my case its okay because advertising is damaging public space ...” He said he did not think it was a good idea to smash something, that’s violence.

Mr Anderson submitted, inter alia, that the charge of ‘criminal damage’ was not reasonably necessary to deal with the type of offending here because of the extreme results provided by the legislation. He submitted that there were summary offences which sufficiently address the purpose of stopping graffiti. However, in my view, the charges here were capable of being laid under the Crimes Act and that was a choice exercised by the Informant.

‘Freedom of expression’, Mr Anderson submitted, should be a defence to all the criminal charges available, as the Charter of Human Rights and Responsibilities Act (the Charter) applied.

Section 7 Human rights – what they are and when they may be limited

- (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
 - (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

Section 15 Freedom of expression

- (1) Every person has the right to hold an opinion without interference.

- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether --
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary -
 - (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

Section 32 **Interpretation**

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of --
 - (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

The Crimes Act makes it an offence, without lawful excuse, to damage property or to possess items for the purpose of using them, without lawful excuse, to damage property. The actions of the Accused were conceded to have damaged property. He also conceded he had no consent to do so.

The Charter provides that a person has the right to hold an opinion without interference (s 15 (1)). S 15 (2) enshrines the right to freedom of expression. That necessarily relates to opinions held by the Accused. This includes freedom in the Accused to impart information and ideas of all kinds. Paragraphs (a) to (e) of s 15 (2) set out the modes by which information and ideas may be imparted: paragraph (a) orally; (b) in writing; (c) in print; or (d) by way of art; or (e) in another medium chosen by him or her.

The issue before the court, at the outset, is whether the actions of the Accused were performed without lawful excuse. Of relevance here is the freedom to impart information and ideas of all kinds:

- (d) by way of art; or
- (e) in another medium chosen by him or her.

Mr Anderson sought to characterize the actions of the Accused, in painting over the advertising panels, as 'art'. The New Shorter Oxford English Dictionary (1993), as relevant here, defines the term 'art':

3. The application of skill according to aesthetic principles, esp. in the production of visible works of imagination or design (painting, sculpture, architecture, etc.); skilful execution of workmanship as an object in itself; the cultivation of the production of aesthetic objects in its principles, practice, and results.

In terms of the way in which the Accused has described his actions I did not understand him to be saying that he considered the act of painting over the advertising panels was artistic. It is not suggested that the Accused employed any skill, imagination or design to achieve the end he did. In my view the actions of the Accused do not constitute the imparting of information and ideas by way of art. However, upon the basis of his evidence, his actions are capable of being characterized as an act of protest and of coming within s 15 (2) (c), as being, 'in another medium chosen by him ...'

Mr Anderson submitted that the Accused had a genuine belief that advertising in its current form was wrong. He said the Accused's actions were a symbolic non-violent protest to express, in an artistic manner, his contempt for advertising. He submitted that the Charter, s 15 (2) protects the expression of ideas, even in the abstract. He submitted that "lawful excuse" in ss 197 (1) and 199 Crimes Act should be interpreted in a way that included the Accused's actions here. Otherwise, he said, consideration must be given to whether the restriction on freedom of expression could be justified by reference to s 7 (2) of the Charter. He submitted that such restriction could not be justified in a free and democratic society.

S 32 (1) provides that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Clearly the relevant provisions of the Crimes Act are capable of being interpreted such that 'lawful excuse' extends to any act in the exercise of the freedom of expression as identified in the Charter. To interpret the term 'lawful excuse' in that way would seriously erode the protection of property afforded by the Act.

In a free and democratic society it is to be expected that there will be intrusion into the lives of its citizens, by the placement of restrictions, with a purpose, amongst others, of ensuring public order. The Crimes Act can be considered to have that as a purpose. It is appropriate to turn to a consideration of what relevance the existence of any such purpose in the legislation has.

S 15 (3) provides that special duties and responsibilities are attached to the right of freedom of expression. It goes on to provide a qualification to the right of freedom of expression in terms of a lawful restriction reasonably necessary to achieve certain things set out in s 15 (3) (a) and (b).

S 15 (3) (a) is not relevant here as the restriction there referred to relates to respecting the rights and reputations of other persons. S 3 provides that "person means a human

being”. The property, the subject of charge 1 here is not alleged to be that of a human being. However, s 15 (3) (b) provides, as relevant, that the right of freedom of expression ‘may be subject to lawful restrictions reasonably necessary – (b) for the protection of ... public order ...’ Relevant here is whether the Crimes Act ss 197 (1) and 199 (1) (a) provide a lawful restriction upon the Accused’s freedom of expression reasonably necessary for the protection of public order.

Mr Anderson submitted that the Accused’s behaviour fell short of being a sufficient threat to public order to limit the right of freedom of expression. He submitted that, in respect of property damage, civil remedies for property owners existed which had a deterrent function.

It may be that the specific individual act of the Accused has a limited affect upon public order. The Crimes Act, insofar as it has application to the damaging of property, is not in place to deal with the acts of the Accused alone. It is aimed at a wide range of anti-social behaviour. The Accused’s undermining of public order by one isolated act may seem relatively trivial, but it is not to be so considered when seen in context with his other behaviour. His evidence was that he had 28 previous convictions for the type of behaviour that brings him before the court now. No doubt, were the Accused to convey his ideas by alternative means available to him there would be no conflict with public order. ‘Public order’ does not simply encompass issues of violence within the community. The actions of individuals and groups are regulated so as to ensure they do not impact inappropriately on other members of the community. Mr Anderson relied upon the civil remedies available to the individual owners of property damaged by the type of action of the Accused here as providing a deterrent. That submission must immediately be seen as hollow when the value of the damage here is put at \$40.17. It is not surprising that this court sees little resort to it, by property owners, relating to damage such as here. Perhaps this is because of the costs involved, the rules relating to recovery of costs, and the lack of certainty in obtaining satisfaction of any judgment.

Ss 197 and 199 restrict the right of freedom of expression, relied upon by the Accused here to justify his actions. It is necessary to consider whether such restriction of a human right is within reasonable limits.

The Charter recognizes that there may be restrictions placed by law on human rights, including freedom of expression. In addition to the reference in s 15 (3), s 7(2) refers to a human right being “restricted to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

In taking into account s 7 (2) (a) 'the nature of the right' it is recognized that the human right of freedom of expression is a basic right in a free and democratic society. Freedom of expression may be exercised in a number of ways as s 15 (2) recognizes.

S 7 (2) (b) requires account to be taken of 'the importance of the purpose of the limitation'. Insofar as ss 197 and 199 provide a limitation their purpose can be seen to be the protection of property. That is an important purpose in a civilized society.

S 7 (2) (c) concerns account being taken of 'the nature and extent of the limitation'. The limitation caused by the Crimes Act ss 197 and 199 is not a complete denial to the Accused of his freedom of expression. What it does do is to limit the means of expression insofar as it is manifested in damage to property.

The Accused complains that it is the public that should authorize the placement of advertising within a public space. He did not provide particulars as to any proposed variation of the present structure for the making of that type of decision. It seems the advertising that concerned the Accused here was the responsibility of the City of Melbourne. That municipality has councillors, elected by residents and ratepayers, to administer its affairs.

An exercise of freedom of expression would certainly encompass an approach to councillors seeking to address the Accused's concerns. This might relate to the placement of the particular advertisement or policies generally concerning advertising within the municipality. The Accused had alternatives. He could take his cause beyond the local display and placement of advertising. He might have preferred to approach Members of State Parliament or even Members of the Commonwealth Parliament, or lobby relevant government ministers directly. He did not suggest that he had taken any of these courses. He had the ability to use a public venue in which to make his views known more widely, using his undoubted oratory skill. It was clear that in the giving of his evidence he was able to reasonably articulate his views. He has the ability to express his views in writing to the media and obtain publication of them; by the production and distribution of posters and pamphlets setting out his ideas; by utilizing placards. He certainly has shown that he can prepare and set out his views in writing. This was established by the presentation to police of a two page document during the course of the record of interview.

The Accused, if he used the above means of communicating his ideas, would not be brought into conflict with the Crimes Act. The message sought to be conveyed by the Accused, in my view, is unlikely to be readily apparent to an observer of an advertising panel obliterated by the application of paint. His views were expressed in the record of interview, the document produced to police and his evidence in court. Those ideas, or any of them, may not be readily understood by the act of obliterating advertising panels with paint. Rather, the observer, in respect of the Accused's current actions, is confronted by a painted-over area. That is consistent with the Accused enjoying white surfaces.

The method of imparting his ideas may attract attention to those who actually observed the painted signage. However, as with most advertising, I would suspect that the majority of passers-by may be simply oblivious to its presence.

In *Ramsden v. Peterborough* [1993] 2 SCR 1084 Iacobucci J observed: “postering has historically been an effective and relatively inexpensive means of communication”.

The Accused has not shown, indeed has not suggested, that he is financially or physically precluded from exercising his freedom of expression in any of the alternative ways canvassed above. It has not been suggested that for any reason the alternative means of expressing himself were not available, or that the means in fact utilized was the only viable method open to him.

S 7 (2) (d) requires account to be taken of ‘the relationship between the limitation and its purpose’. The limitation on the freedom of expression is one which impacts upon that human right, if the means of imparting information and ideas involves the damage to property.

S 7 (2) (e) requires account to be taken of ‘any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve’. The limitation is the prohibition effected within the framework of ss 197 and 199 of the causing, or intending, damage to property. Any lesser restriction would be a licence to cause damage to property, perhaps up to a particular value, or for a particular purpose. Consistent with the purpose of those provisions of the Crimes Act, the restriction of the human right here in question is within reasonable limits.

The effect of Mr Anderson’s submission is that it should be lawful for a person to damage property if he/she does so for the purpose, bona fide, of imparting information and ideas. The separate interests of the community, related to the purpose of the relevant provisions of the Crimes Act, and the interests of the Accused, in the human right of freedom of expression have to be balanced. Taking into account the matters contained in the Charter, given the other means available to the Accused of expressing himself, the restriction caused by the Crimes Act, I conclude, is not a significant one. To the extent that the Accused’s freedom of expression is limited by operation of the Crimes Act, ss 197 and 199, it is justified. I find the charges proved.

Peter Mealy
Magistrate,
14th February, 2011