

Melbourne Magistrates' Court
VPOL v K. Magee
Case No. D10987761
7 October 2013

[Magistrate Capell] Well today is my decision in relation to this matter.

Mr. Magee is charged under section 10 subsection 1 of the Summary Offences Act 1966, that on the 14th of February this year, he posted a document on an advertising board at Southern Cross Railway Station, without consent of any person having authority to give consent.

Mr. Magee unashamedly admits that he placed black paper and typed documents upon an advertising sign within the concourse of the station.

They were pasted with a flour and water paste, Mr. Magee admits that his purpose was to obscure the message being conveyed on the advertising board, and that he did so without the consent of the appropriate authority, in the knowledge that consent was required.

Mr. Magee made it clear in both his evidence and his submissions, that his actions were part of his personal protest against the global advertising industry.

In his submissions he stated: "This expression is rational and intentional, I conducted this expression in the middle of the day, in a busy public location I knew to be surveilled by security staff, with the full expectation of being disturbed by police. I make no attempt to hide or get away with my expression as I am neither ashamed of my expression nor unwilling to defend it in a court of law. This expression is meant to be calm and peaceful, non-threatening to members of the public, as well as being totally unobtrusive to those uninterested in the expression, in contrast to the jarring imagery of modern advertising, that is clambering for the attention of passersby through any means available."

In other words, on the face of it, the charge has been made out, however Mr. Magee argues that his actions are protected under section 15 of the Charter of Human Rights and Responsibilities Act 2006, and his summary argues: "I hold a genuine belief that for-profit advertising has a detrimental effect on both individuals and democracy, and that intervention by the government to ban or regulate such advertising is required. My actions of posterage over advertisement panels inside Southern Cross Station are a symbolic, non-violent, non-damaging protest designed to express, in an artistic manner, that includes literal explanation, my logically justified objection to for-profit advertising. Section 15(2) of the charter protects expression of ideas, even where the form of expression is abstract, the practice previously relatively unknown and the action deemed unacceptable by police culturally conditioned to accept and protect the exclusive private domination of public space"

During the course of his evidence Mr. Magee tended his own prior convictions, indicating that i would find out about them anyway, given that he intended to rely, in his submissions, on the distinction between the facts of this case, and the decision of Mr. Justice Kyrou in Magee v Delaney reported at (2012) VSC 407, where he was the appellant in the Supreme Court of Victoria.

In that matter Mr. Magee was charged with criminal damage, and possessing materials for the purpose of damaging property, both offences being under the Crimes Act 1958.

In that matter Mr. Magee, like here, did not dispute committing the physical elements of the offences,

but contended that his acts engaged the right of freedom of expression, in section 15 subsection 2 of the Charter, and that the exercise of that right in furtherance of his philosophical opposition to advertising, constituted a lawful excuse for the purposes of those two provisions of the Crimes Act.

The facts of that matter were that Mr. Magee painted over an advertisement in a bus shelter owned by the City of Melbourne, whilst the advertisement was owned by a private company.

In the present case Mr. Magee argued that as much as Southern Cross Railway Station may be private property, that it is a railway station that is a very public area, and that one should be able to express oneself politically in such a public area, and that the limitation imposed by this provision under the Summary Offences Act cannot be justified within a free and democratic society.

During the course of argument at the hearing on the 18th of September, Mr. Magee agreed with me, that the circumstances of his behaviour were exactly the same in the other matter, save that a different method was used, his whole purpose was to be seen in a busy area and was to interfere with advertising which had been paid for and which was in a private place, freely used by the public.

Mr. Magee argued that the difference here was that he was not charged with damaging property and that was a significant reason why I could distinguish the matter from the decision of Mr. Justice Kyrou

Mr. Justice Kyrou approached his task by defining six main issues on the appeal, given his decision is binding on me, I intend to approach consideration of Mr. Magee's arguments the same way:

a. Was the pasting over of the advertisement capable of imparting information or ideas for the purposes of section 15 subsection 2 of the Victorian Charter?

Mr. Justice Kyrou found that the painting over of the advertisement was a means of imparting information and ideas.

By his expression in the current matter, Mr. Magee was doing exactly what was doing in the earlier matter, as Mr. Justice Kyrou said, at paragraph 65, those messages include that the person who performed the act was protesting about something, was protesting about advertisements in bus shelters, objected to the contents of the particular advertisement, or did not want the public to see the advertisement.

There is no doubt in the current matter that this expression is capable of expressing information or ideas for the purposes of section 15 subsection 2 of the Victorian Charter, those same comments can apply to the current facts, save that it was a train station and not a bus shelter.

Mr. Justice Kyrou dismissed the appeal under section 199 a) subsection 1 of the crimes act, at this point on the basis that the provision, or sorry the possession, of the items to effect the purpose was preparatory of conduct capable of imparting information or ideas.

The second question posed by Mr. Justice Kyrou was "does the imparting of information or ideas by means of damage to a third party's property engage the right to freedom of expression conferred by section 15 subsection 2 of the Victorian Charter?", in that case Mr. Justice Kyrou said no.

Mr. Magee says that this is the point of difference between the previous matter and this matter, no restitution has been claimed and he has not been charged with an indictable offence, but rather a

summary offence, he's not been charged with an offence involving damage.

In his written submissions Mr. Magee makes the point that criminal damage is not an element of the present charge, and that, and I quote from his written submission, paragraph 34: "the public policy limitation imposed by Justice Kyrou on expressions that involve damage has no application in this case".

At footnote 9, Mr. Magee makes reference to paragraph 97 of Mr. Justice Kyrou's decision to support that contention, it ignores that Mr. Justice Kyrou also said that would not apply to threat of such damage.

In other words, there does not actually have to be damage caused for there to be limitation on the expressive conduct.

Mr. Justice Kyrou then went on to say, that if he had been wrong, re. the dismissal of the section 199 charge at the earlier stage, the preparatory behaviour was akin to a threat of damage, and would be conduct which fell outside section 15 subsection 2.

I cannot read Mr. Justice Kyrou's decision as narrowly as Mr. Magee would like.

It is apparent in the further discussion around section 15 (3) a. and b. of the Charter that damage is just an example of a general principle that one has the right to own and enjoy one's property free from unlawful interference, damage is but just one example of such interference.

At paragraph 129 of the decision, Mr. Justice Kyrou says: "It follows that an absolute prohibition on intentional damage to the property of another without lawful excuse, such as that contained in section 197 of the crimes act, is a restriction that is reasonably necessary to respect the rights of property owners, the same applies to an absolute prohibition on being armed with materials for the purpose of damaging property without lawful excuse"

At paragraph 151: "Without limiting the lawful restrictions that may be reasonably necessary for the protection of public order, they obviously include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property".

In paragraph 156: "In the present case I've already held that Mr. Magee's conduct in painting over the advertisement, and being armed with materials for the purpose of painting over more advertisements did not engage the right to freedom of expression"

At paragraph 181: "The right to freedom of expression has never been treated as a license to ignore the criminal law, including laws designed to protect property rights".

In paragraph 192: "The mode of expression selected by Mr. Magee did not only effect the property rights of the City of Melbourne and Adshel, it also prevented other persons from exercising their right conferred by section 15 subsection 2 of the Victorian charter"

Mr. Magee has been charged with posting a document on another's property without consent, sorry without consent of an authority.

Why does this law exist? It's to protect the property rights of another or others.

Why does the charge of criminal damage exist? it's to protect the property rights of another or others.

Mr. Magee argues he has no other means of communicating his message, hence he has to take the action he has, i disagree.

There are many ways one can communicate a message without it interfering with the property of another.

Further it is clear Mr. Magee himself has attempted to prevent members of the public receiving information, namely advertising, which of itself could be a breach of the Charter.

During the course of argument i raised with him whether he would interfere with a public health message at Southern Cross Railway Station, he said he would not, in itself this means Mr. Magee becomes the arbiter of what the public see and don't see, is that what is intended by the Charter? i don't believe so.

If one returns to the second question posed by Mr. Justice Kyrrou, and and transposes it to the fact of this case, it reads: Does the imparting of information and ideas by means of interfering, by bill posting, with a third party's property engage the right to freedom of expression conferred by section 15 subsection 2 of the Victorian Charter? I am bound to follow the reason of Mr. Justice Kyrrou, and the answer would have to be no.

Section 7 subsection 2 of the Charter sets out the relevant matters to consider when determining the circumstances in which a human right may be limited.

Here the owners of southern cross railway station are entitled to rent out space that they own to advertisers, advertisers who have rented that space are entitled to convey their message, as members of the public we can consider that message and accept or discard it, the public have that right, it is not for Mr. Magee to assume ownership of what we see or don't see by posting over that message.

For these reasons I am satisfied that restriction in section 10 subsection 1 of the Summary Offences Act constitutes a reasonable limitation on the right to freedom of expression referred to in section 15 of the charter, taking into account all the matters referred to in section 7 subsection 2 of the Charter.

Given those findings, there is no need to make a referral of this matter to the supreme court for a declaration of inconsistent interpretation.

I find the charge proven.

Yes, Mr. Magee, I think on the last occasion you said you had a psychological report?

[Mr. Magee] Yep, I've got that here.

[Magistrate Capell] May I have a look at that?

[Mr. Magee] Yep.

[Magistrate Capell] The prosecutor needs to read it first.

[Mr. Magee] Oh, okay.

[Magistrate Capell] Yes, I've read that Mr. Magee, now, what do you want to say to me?

[Mr. Magee] Umm, I guess, one reason for giving you my criminal record was because you were going to find out anyway because of the Kyrrou decision, but another reason was just to demonstrate that it's the only time that I've broken the law is to make this political expression, which um, apart from some damage, which would have been an imperceptible subtraction from the bottom line of a few advertising companies, it is ultimately victimless.

Um, apart from that, I don't know what a lawyer would say in this situation, there's my child, she'll get sad.

[Magistrate Capell] Arr, put it this way, I don't intend to jail you, because I've noticed this: "aside from a focus with regard to symptom management, treatment sessions have also provided a forum for Mr. Magee to discuss his philosophical views and underlying beliefs in a non-judgmental and supportive environment, while also attempting to challenge his avenue of social and political expression and related behaviours that have consistently resulted in detrimental outcomes with regard to his freedom, incarceration and his previous and ongoing legal involvement".

Um further, the fact that you are seeing someone where you can actually express those things, and discuss them, and philosophise over them.

Are you seeking a jail term?

[Prosecutor] No, your honour.

[Magistrate Capell] Further, um, I see the point that's made by the psychologist, it's obvious to anyone involved in the criminal justice system: "a custodial sentence would also most likely lead to Mr. Magee being unnecessarily exposed to a high concentration of criminal and antisocial elements within the prison system and to a culture of antisocial behaviour and violence that may potentially expose him to harm from inmates due to his political beliefs."

It also refers to you as having the positive role of a young daughter, um, overall positive and supportive family and social relationships, high level of functioning, high level of intelligence and insight, and your academic ability, you're not silly.

In other words, you'll work it out one day.

A lot of the political issues you raise are not lost on me I can assure you, the problem is I have to impose the law.

I think I mentioned during the hearing that I went to university in the 1970's where a lot of what you would argue was very much a part of the course that I did, and understand, but I've got to impose... er, apply the law.

Is there any forfeiture of the items sought?

[Prosecutor] Your honour all I have is the photograph in relation to the items.

[Mr. Magee] The items were taken from me on the day.

[Magistrate Capell] Yeah, that's why i thought there might be an application to destroy them.

[prosecutor] Your honour, perhaps, if your honour would be minded to make the order in relation to the paste and the, or the bucket and the, umm, from the photographs, it'd just be the paintbrush and the bucket your honour.

[Magistrate Capell] Well that property will be forfeited and destroyed.

Otherwise Mr. Magee I acknowledge your financial circumstances, that at the beginning of the hearing you advised me that you're not in any employment, I intend to convict you and fine you \$400.

[Prosecutor] As your honour pleases.

[Magistrate Capell] If you choose not to pay it, there are consequences, you know what they are.

I'll grant an initial stay of 3 months for payment for that amount, which is, until the 4th of January next year.

Yes, thank you.

[Clerk] Silence all stand please, the 20th division of the melbourne magistrates court is now adjourned.

[magic wardrobe] beep beep.