IN THE SUPREME COURT OF VICTORIA **S CR 201101137**
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 *Criminal Procedure Act 2009*

KYLE MAGEE
Appellant
v.
CHRISTOPHER DELANEY
Respondent

OUTLINE OF SUBMISSIONS IN RESPONSE

Date of Document: 26 July 2012
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Grounds 1, 2A, 2B

Ground 1 - The learned Magistrate erred in law in finding that an act of expression protected by section 15 of the Charter is not capable of amounting to a 'lawful excuse' for the purposes of sections 197 and 199 of the Crimes Act 1958.
Ground 2A -The learned Magistrate erred in his construction of the phrase 'public order' in section 15(3)(b) of the Charter.
Ground2B -On the correct construction of the phrase 'public order':

- *it was not open to the learned Magistrate to find that the accused's act was contrary to 'public order' and therefore not protected by section 15 of the Charter; or*
- *if the accused's act was capable of being contrary to 'public order', it was not open to the learned Magistrate to find that the extent of the impact of the accused's act on 'public order' was sufficient to deny his act the protection of section 15 of the Charter.*

Freedom of expression right not engaged

1. The right of freedom of expression under s.15(2) of the *Charter* is not engaged in this case. In order to benefit from the protection of the *Charter* 'an act of expression' must be in a form that conveys a specific meaning to an audience. The conduct of the appellant in painting over the advertisement is not an act of 'expression' within the meaning of s. 15(2) of the *Charter*. The conduct here, of itself, was a purely physical act and conveyed

no message or communication.[1] As the learned Magistrate pointed out, the message sought to be conveyed would have not have been apparent to an observer of the painted over advertising.[2]

2. Further, properly construed "expression" under section 15(2) of the *Charter* does not encompass conduct involving violence or damage to property. It is highly improbable that Parliament intended, by enacting s.15(2) of the *Charter*, to confer a right of free expression which included the right of one private citizen to damage property in pursuit of protest. The equivalent rights in other jurisdictions have been held not to cover acts of property damage.[3] Just as it is accepted that "expression" directed towards physical harm of persons can find no protection in the right to freedom of expression, it is submitted that "expression" directed towards the infliction of physical harm to the property of others can attract no such protection.[4]

3. The *Charter* seeks to balance the relationship of the individual with the power of the State. It does not seek to fundamentally alter rights as between private citizens.[5] Parliament plainly did not intend to dilute respect for private property rights: s. 20 of the *Charter* explicitly reinforces the respect to be given to property rights.

4. It is therefore submitted that the questions raised by the appellant do not arise and do not require answering.

Construing sections 197, 199, & 201 of the Crimes Act 1958

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[1] See, e.g., *Tabernackle v Secretary of State for Defence* [2009] EWCA Civ 23 at [35]-[37]; *Mayor of London v Hall* [2011] 1 WLR 504 at [37]; *Samede v City of London* [2012] EWHC 34 at [100] (though note that this issue was conceded by the City of London: at [14]); *Weisfeld v The Queen* (1994) 116 DLR (4th) 232 at 242-247; *City of Vancouver v Zhang* (2010) 325 DLR (4th) 313 at [32].[32]; and *Batty v City of Toronto* 2011 ONSC 6862 at [70]-[72]; *Irwin Toy v Quebec* [1989] 1 SCR 927 at 969

[2] Written Decision of Magistrate Peter Mealy dated 14 February 2011 page 9.

[3] *SG v France* Human Rights Committee, *Views: Communication No 347/1988*, 43rd sess, UN Doc CCPR/C/43/D/347/1988 (15 November 1991) [5.2]; *GB v France* Human Rights Committee, *Views: Communication No 348/1989*, 43rd sess, UN Doc CCPR/C/43/D/348/1989 (15 November 1991) [5.2]; *R v Keegstra* [1990] 3 SCR 697, 830 per McLachlin J.; *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 588 per McIntyre J; *Irwin Toy Ltd v Quebec (A.G.)* [1989] 1 SCR 927, 970 per Dickson CJ. *R v Behrens* [2001] OJ No 245 (QL) at [55]-[58], [64]-[65]

[4] Ibid; *Suresh v Minister of Citizenship and Immigration et al.; United Nations High Commissioner for Refugees et al., Interveners* 208 D.L.R. (4th) 1 (Supreme court of Canada)

[5] s. 1(2)(c), 38 and 39 of the *Charter*

5. If the right to freedom of expression is engaged, as a matter of statutory construction, inflicting damage to property in the purported exercise of freedom of expression does not amount to a lawful excuse to an offence under s. 197 and 199 of the *Crimes Act 1958*.

6. Properly construed, the concepts of criminal damage and lawful excuse are not elastic concepts. Parliament intended to prohibit intentional damage or destruction of property subject to recognised and limited legal excuses. The language of the statute is express and unambiguous.

7. The concept of damage covers injury, mischief or harm to property, permanent or temporary physical harm, and permanent or temporary reduction of functionality, utility or value.[6] The legislature has stated that the element is made out, even if the accused mitigated the damage. For reason expanded upon below as a matter policy Parliament could never have intended have intended that

8. The meaning of lawful excuse is to be ascertained from its text and purpose. In broad terms s.201 of the *Crimes Act 1958* covers two types of limited lawful excuses: belief in authority to destroy or damage (which depends on the accused having held a particular belief that he or she had specific rights in relation to the subject property) or belief that damage was necessary to protect property (which depends upon the requirements of urgency and immediacy).

9. The lawful excuses spelt out in s.201 operate in addition to any other defences or excuses that are otherwise recognised by statute or under the common law (*Crimes Act 1958* s201(2), (5)). There are two common law matters that are well recognised: self-defence and consent.[7] These excuses are also confined in their operation by their own specific requirements.

10. Sections 197 and 199 of the *Crimes Act 1958* are aimed at the protection and respect of property. In order to achieve that object, the legislature has been careful to restrict the available legal excuses to the intentional damage of property belonging to another. The

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[6] *R v Previsic* [2008] VSCA 112; *Samuels v Stubbs* [1972] 4 SASR 200

[7] See Criminal Charge Manual, *Judicial College of Victoria* http://www.justice.vic.gov.au/emanuals/CrimChargeBook/default.htm, Part 7.5.4.1.1

concept of lawful excuse has never been self-adjusting, to be identified through balancing the interests of those who claim to be exercising free speech; rather, lawful excuses (certainly those created by Parliament) have hitherto been clearly identified, defined and strictly limited in their scope.

11. Self-evidently, but tellingly, prior to the *Charter*, lawful excuse did not include any statutory provision for any form of personal expression, such as a right to protest. The excuse contended for by the appellant is far removed from the two categories of recognized excuses, namely the claim of right excuses and the necessity / self defence type excuses. Such an excuse was not recognised by statute or by the common law. The appellant does not appear to contend otherwise. Certainly, he cites no authority to suggest it was.

12. Further, intent must be proved, but it is equally plain that, as a matter of statutory interpretation, motive (even a "good faith" motive) is irrelevant to the elements of these offences.

13. The question then becomes, has the *Charter* provided a defence where there was quite plainly none before?

14. Section 32(1) of the *Charter* does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but requires the Court to give meaning to the provision in accordance with the canons of statutory construction dictated by *Project Blue Sky Inc v Australian Broadcasting Authority*.[8]

15. To give the meaning to lawful excuse contended for by the appellant would require this Court to radically depart from the ordinary meaning of lawful excuse within s. 197, 199 and 201 of the *Crimes Act 1958*, and the intention of Parliament in enacting the

[8] (1998) 194 CLR 355. *Momcilovic v R* (2011) 280 ALR 221 [18] and [51] (French CJ), [544], [565] and [566] (Crennan and Kiefel JJ), [170] (Gummow J), [280] (Hayne J) and [684] (Bell J); *Slaveski v Smith & Anor* [2012] VSCA 25 at [20]; *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91 at [139]

provisions. It would broaden the concept of lawful excuse well beyond the hitherto limited exceptions.

16. There are good policy reasons to not impute to the legislature an intention to make damaging property in the course of exercising freedom of speech a lawful excuse to the offences in question.[9] The recognition of a right of a citizen to damage the property of another in the course of mere expression would significantly undermine the utility and object of these criminal offences, and diminish the rights and enjoyment of others in relation to property. It would be a licence for citizens to destroy and damage property of other citizens.[10] On the other hand these criminal offences in question only restrict the freedom of speech incidentally, at the margins, and to a very minimal degree.

17. The approach advanced by the appellant would also offend against the principle of legality, namely that the criminal law and limitations on rights must be capable of ascertainment in advance. On the appellant's approach it would be impossible to predict with any precision whether expressing a particular view through the damaging or destruction of property constitutes a criminal offence. It would introduce uncertainty into offences whose limits are otherwise unambiguous and unequivocal.

18. In all the circumstances, it is highly improbable that Parliament intended, by enacting s.15(2) of the *Charter*, to create as a defence to the serious offences s. 197 and 199 of the *Crimes Act 1958* that the property was damaged by an accused in pursuit of protest.[11]

19. Lest there be any doubt, the terms of s. 15(3) of the *Charter* limit the right to freedom of expression. These limitations must be taken into account in interpreting the legislative provisions in question compatibly with the rights pursuant to s. 32 of the *Charter*.[12]

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[9] *R v Burgess R v Saunders* [2005] NSWCCA 52, (2005) 152 A Crim R 100; *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499; *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136; *Morrow, Geach and Thomas v Director of Public Prosecutions* [1994] Crim LR 58; *Blake v Director of Public Prosecutions* [1993] Crim LR 586. Written Decision of Magistrate Peter Mealy dated 14 February 2011 page 9

[10] Written Decision of Magistrate Peter Mealy dated 14 February 2011 page 9.

[11] *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91 at [144]-[147]

[12] *Momcilovic v R* (2011) 280 ALR 221 at [165]-[168] per Gummow J (with whom Hayne J agreed) at [416] per Heydon J, at [681] per Bell J. see also French CJ at [23]

20. Any restrictions imposed on freedom of speech by s. 197 and 199 of the *Crimes Act 1958* are reasonably necessary to protect the property rights of other persons pursuant to s.15(3)(a) of the *Charter*. Section 15(3)(a) of the *Charter* did apply when construing whether sections 197 and 199 of the *Crimes Act 1958* are compatible with human rights. It is submitted the Magistrate wrongly concluded that it did not. It was beside the point that in this case the property in question was not owned by a natural person:

a. Sections 197 and 199 of the *Crimes Act 1958* do not discriminate between property owned by natural persons or property owned by corporate bodies (or by government);

b. The application of the concept of lawful excuse has never been dependent upon the category of the owner of the property (individual, corporate, government);

c. The construction of sections 197 and 199 of the *Crimes Act 1958* and the identification of defences cannot be assessed by reference to the circumstances of an individual case. They were created to apply to the community as a whole, and must be construed in that context;[13]

d. Property rights have not been limited by the *Charter*. Each member of society has a right not to have his or her or its property damaged or destroyed. That right is enshrined under s. 20 of the *Charter*. At law, property rights are equally enjoyed by corporate bodies and government. Those rights are not limited by the *Charter* – see s.5 of the *Charter*. The concept of another person's rights under s.15(3)(a) of the *Charter* was intended to have abroad application;[14]

e. Against this background, it cannot be inferred Parliament intended a different result for sections 197 and 199 of the *Crimes Act 1958* depending upon whether or not the property in question was owned by a natural person.

21. The Magistrate correctly held that in this case the freedom of expression must be subject to lawful restriction contained in s. 15(3)(b) of the *Charter* because it posed a threat to public order. [15] The purpose of the criminal damage provisions in the *Crimes Act 1958* is to protect property of other persons. It is aimed at a wide range of anti-social behaviour. The precise scope of public order is unclear, but at international law public order includes

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[13] Authorities?

[14] *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91 at [148]

[15] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 198 - 199. *Hogan v Hinch* (2011) 243 CLR 596 at 549 per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

"prescription for peace and good order", public "safety" and "prevention of disorder and crime"[16]. It is submitted the preservation of property and the prevention of crime involving physical damage falls within the concept of public order.

22. It is also submitted that sections 197 and 199 of the *Crimes Act 1958* constitute a reasonable limit upon freedom of expression which is justified in a free and democratic society under s.7(2) of the *Charter*.[17] In particular, the limitation is a fundamental one (to protect and respect property rights and to preserve public order) and the nature of the restriction is incidental and mild (it only limits the means of expression to property damage).[18]

Offences involving language or non-violent behaviour

23. The respondent submits that the authorities relied upon by the appellant relating to offences which criminalise language or non-violent expressive behaviour[19] do not support the proposition that an accused can find protection in the right to freedom of expression when willfully damaging property. Nor do they support the proposition that the concept of "lawful excuse" can be identified by reference to the particular circumstances pertaining to the case at hand.

24. The approach taken in those authorities turn upon the particular construction to be given to the legislative offences in question. Gleeson CJ said in *Coleman v Power*:[20]

> *"Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs. The same is true of insulting behaviour or speech. In the context of legislation imposing criminal sanctions for breaches of public order, which potentially impairs freedom of speech and expression, it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person's feelings should involve a criminal offence.*[21]

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[16] *Coleman v Power* (2004) 220 CLR 1 at [242] per Kirby J including the authorities cited therein

[17] Section 7(2) is to be considered only after the statutory provision in question has been interpreted in accordance with section 32(1). See *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91 at [142]

[18] Written Decision of Magistrate Peter Mealy dated 14 February 2011 page 9.

[19] *Coleman v Power* (2004) 220 CLR 1; *Brooker v Police* [2007] 3 NZLR 91; *Ferguson v Walkley and Another* (2008) 17 VR 647

[20] (2004) 220 CLR 1

[21] *Coleman v Power* (2004) 220 CLR 1 at [12] per Gleeson CJ

25. That being the case, as matter of statutory construction and having regard to the will of Parliament, the Courts have found it necessary to confine the operation of these offences.[22]

26. The offences under s 197 and 199 of the *Crimes Act* 1958 (including the concept of lawful excuse) have a very different legislative context and purpose, which leads to a different result:

a. Assessing the elements of the offences under s 197 and 199 of the *Crimes Act* 1958 – or the concept of lawful excuse - does not involve a value judgement or questions of degree. There are no difficulties in marking out the boundaries of these offences. This can be contrasted with the more vague and ambiguous offences which criminalise language or non-violent expressive behaviour, where it can more readily be inferred the legislature intended boundaries to be imposed;

b. Damaging or destroying criminal property does not inherently risk restricting freedom of speech to any significant degree. It is well recognised that the offences which criminalise language or non-violent expressive behaviour do have the potential to very significantly circumscribe and overlap with legitimate freedom of expression. It can be more readily inferred that Parliament intended to balance freedom of expression in marking out the boundaries of those offences;

c. The offences which criminalise language or non-violent expressive behaviour (ie. disorderly, insulting or offensive behaviour type offences) involve no physical harm to property. Criminal damage is directed towards a more significant social evil (i.e. a physical harm), which is reflected in the higher maximum penalty;

d. It is submitted the construction of s 197 and 199 of the *Crimes Act* 1958 (and the concept of lawful excuse) and its impact upon freedom of expression can only be assessed by reference to the terms of these provisions, and the effect which they have upon freedom of expression as a whole. As argued above, the concept of lawful excuse has never been a fluid concept identified and defined by reference to the circumstances of each individual case. The legislature could not have intended such extreme and novel approach to the interpretation of these crimes.

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[22] *Coleman v Power* (2004) 220 CLR 1 at [11]-[12] per Gleeson CJ, at [185] per Gummow and Hayne JJ; *Ferguson v Walkley and Another* (2008) 17 VR 647 at [25]-[29]

Ground 3

The learned Magistrate erred in finding that the Informant was entitled to prefer charges pursuant to section 197 and 199 of the Crimes Act 1958 rather than charges that carry a lower penalty but which cover the same conduct:
It was unlawful under section 38(1) of the Charter for the Informant to fail to give proper consideration to a relevant human right in deciding what charge to prefer against the accused.
Had the Informant properly done so he would have preferred charges carrying a lower maximum penalty which represent a lesser interference with the accused's right of freedom of expression.
To commence a prosecution based on an unlawful decision is an abuse of the Court's processes.

27. At no stage in the hearing below did the appellant make an application to stay the proceedings because of an abuse of process.[23] The failure to do so is fatal this ground.

28. There are, in any event, a number of problems with the ground 3:

a. Decisions involved in the prosecution process, including the decision as to the charge which is to proceed are, of their nature, insusceptible of judicial review.[24] The existence of prosecutorial immunity prevents the appellant from having the Informant's decision to proceed with the more serious charges reviewed, and from being able to seek a permanent stay;

b. Gummow J.'s reference to *Barton v R*[25] in the passage relied upon by the appellant indicates that His Honour was suggesting that the Charter might incorporate rather than expand upon the scope of the common law remedy of permanent stay. In accordance with *Barton,* to justify a permanent stay of criminal proceedings at common law, there must be a fundamental defect which goes to the root of the trial "*of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences*".[26] Gummow J.'s comments were, in any event, *obiter* only as he held that there was no breach of the *Charter*;

c. The common law has never regarded the laying of a more serious charge in preference to an equally (or more) appropriate less serious charge as an abuse of the

[23] Transcript Delaney v Magee Day 2 pages 16 – 18.
[24] *Maxwell v R* (1996) 184 CLR 501 at 513 – 514, 534.
[25] *Barton v R* (1980) 147 CLR 75.
[26] *Barton v R* (1980) 147 CLR 75 at p 111, per Wilson J; *Jago v The District of New South Wales* (1989) CLR 27 at [21] per Mason CJ; *Williams v Spautz* (1992) 174 CLR 508; *Ridgeway (*1995) 184 CLR 19 (at 46, 60, 75)

Court's process. Any resulting unfairness to an accused so charged can be alleviated at the sentencing stage;[27]

d. The scheme under s. 38 and 39 of the *Charter* also suggests there is no free standing right to seek a permanent stay upon the basis of a mere breach of s. 38 of the *Charter*. Section 38 provides for no such relief or remedy. Section 39 of the *Charter* provides that such relief or remedy can only be sought if the aggrieved party has a cause of action independent of the *Charter*. There is no such cause of action here.

e. If the *Charter* does provide a source of power to a stay of prosecution, it is submitted the proper test to be applied is that with respect to a stay under common law principles set out in *Barton v R*[28] and *Jago v The District of New South Wales*[29] i.e. where it is no longer possible to conduct a fair trial. In the United Kingdom[30] and New Zealand[31], a stay of prosecution is a remedy of last resort. Other appropriate and less drastic remedies may include: expedition of the trial; public declaration of breach; or reduction of sentence[32]. As advanced above, proceeding with the more serious charge does not render a trial an unfair one or constitute an abuse of process.

29. In any event, the evidence in the Court below did not support a finding that the informant had failed to give proper consideration to a relevant human right, let alone to the degree required to establish an abuse of process justifying a permanent stay:

a. There is no evidence that the informant 'failed to give proper consideration to a relevant human right';

b. The appellant had the opportunity of cross-examining the Informant at the hearing to give the Magistrate the opportunity hear the Informant's considerations in deciding the appropriate charges, but failed to do so;[33]

c. The fact that the Informant proceeded with more serious charges does not support the inference that human rights were not properly considered, especially in

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[27] *Liang and Li* (1995) 82 A.Crim. R. 39 at 44; *R v McEachran* [2006] VSCA 290. See also section 51 of the *Interpretation of Legislation Act 1984* section 51(1)

[28] *Barton v R* (1980) 147 CLR 75.

[29] (1989) 168 CLR 23

[30] *AG's Reference (No. 2, 2001) (No 2, 2001)* [2004] 2 AC 72 (HL) at [24], [29] (Lord Bingham), [31] (Lord Nicholls), [43] (Lord Steyn), [44] (Lord Hoffman), [111] (Lord Hobhouse), [129] (Lord Millet), [140] (Lord Scott), *Spiers v Ruddy* [2008] 1 AC 873 (PC).

[31] *R v Williams* [2009] NZSC 41 *at [18].*

[32] *Martin v Tauranga District Court* [1995] 2 NZLR 419 at 28; *Sentencing Act* 1991, s5(1)(a)

[33] Transcript Delaney v Magee Day 1 page 2. Note, the appellant did not seek to cross-examine any witnesses. See also Transcript Delaney v Magee Day 1 pages 4 – 7 where Charge 1 was amended, the appellant consented to jurisdiction and the summary was read and accepted.

circumstances where this was never put to the Informant. The decision on the choice of which charge to prefer involves the exercise of a very broad discretion.[34] At the time of being charged the Applicant already had a very substantial criminal history involving damage to property including some 5 sentences of imprisonment.[35] Those terms of imprisonment had not deterred him. In the circumstances, the decision to proceed with the more serious charges was manifestly appropriate;

d. The fact that the appellant was charged with the more serious offences, carrying greater maximum penalties, does not, as a matter of logic, interfere with the appellant's right to freedom of expression. Any argument to the contrary is patently absurd;

e. If the Informant did fail to give to give proper consideration to a relevant human right in deciding what charge to prefer against the accused (which is denied), there is no evidence of bad faith or prosecutorial misconduct which would come remotely close to justifying a permanent stay whether at common law or under the *Charter* (assuming the *Charter* provides for such a remedy).

Peter Kidd SC

Elizabeth McKinnon

26 July 2012

[34] *Maxwell v R* (1996) 184 CLR 501

[35] See Exhibit JA-5 to the affidavit of James Anderson sworn on 15 March 2011 field and relied upon by the applicant in these proceedings.