IN THE HIGH COURT OF AUSTRALIA

BRADBURY

*v.*

STAINES

# REASONS FOR JUDGMENT

Oral

*Judgment delivered at* Sydney

*on* Thursday 4th December 1969

BRADBURY

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ORDER

Application for special leave to appeal refused with costs.

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JUDGMENT

(ORAL)

BARWICK C.J.

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The applicant seeks special leave to appeal against a judgment of the Supreme Court of Queensland which, by majority, set aside the conviction of the respondent by a stipendiary magistrate, of having in a public place used obscene language contrary to s. 7(c) of The Vagrants, Gaming and Other Offences Act, 1931-1967 of that State.

The statute, in defining an obscene publication defines "obscene" for the purposes of that definition as including, but not limited to, emphasising matters of sex or crime or calculated to encourage depravity. But there is no statutory definition of what is obscene language.

The facts before the magistrate are not in dispute. The word charged was used in the public performance of a play and as part, indeed, the final line, of its script. The only question for the magistrate's consideration was whether, in the circumstances of its use, that use was a use of obscene language.

What is obscene, like what is indecent, must be judged according to the current standards of decency of the community. The magistrate decided the matter according to what he considered the standards of the community in this respect to be.

The Full Court set aside his conviction of the respondent, solely on the ground that no reasonable man could hold that the use of the word charged in the

circumstances of its use was the use of obscene language within the meaning of the section.

No other question, it seems to me, is in terms involved in the reasons of the majority of the Full Court. But the applicant submits that the use of the words charged ought, in all circumstances, to be held to offend the section, and he says therefore that the Full Court could not say that there was no evidence before the magistrate on which he could convict.

But the circumstances of the use of the language must always, in my opinion, form part of the relevant material upon which the question as to its obscenity is to be judged.

It is important at this point to remark upon the need for some special reason to appear in this Court when special leave to appeal is sought, there being no appeal as of right.

There does not appear to me to be any matter of general principle or importance involved in the Full Court's judgment. No doubt there is considerable force, and it may be validity, in the proposition that there clearly was material before the magistrate on which he, as the Tribunal to express the relevant views and standards of the community, could hold the word charged an obscene word in the circumstances of its use. If such use of the word were capable of being considered, by the standards of the ordinary citizen, as obscenity then clearly it was not for the Supreme Court to substitute its own view of the matter. But the Supreme Court decided that no person could reasonably regard such use of the word charged as the use of obscene language. That is to say, that the use of the word charged in the circumstances of its use

could not be regarded by the current standards of the community as the use of obscene language.

Strong as this finding may be and however much open to doubt its validity may be, it seems to me that special leave to appeal should not be granted simply to afford an opportunity to decide whether or not it was erroneous. At best, the magistrate's decision was no more than a particular instance of the application of now well known principles which the Supreme Court appears to have understood, and the Supreme Court's decision turns on a view of the evidence before the magistrate. Neither decision forms a precedent of any kind and, in particular, neither can govern the use of the same word in other circumstances.

In my opinion, because of the lack of any special reason to do so and not because I think the Supreme Court's decision was right, I would refuse special leave.

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JUDGMENT
(ORAL)

MENZIES J.

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I agree that special leave should be refused. Were leave to be granted and the appeal heard the only question to be determined would be whether or not there was evidence upon which the learned magistrate could find as he did. Upon this question there was a difference of opinion in the Full Court but the resolution of this difference by this Court is not a matter of such importance as to warrant the giving of special leave.

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JUDGMENT
(ORAL)

WINDEYER J.

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I agree with what the Chief Justice and my brother Menzies have said. The administration of the criminal law is a matter primarily for State courts. It is not for this Court, unless, for some special reason, we give leave to appeal. No special reason was shown why we should do so in this case.

The question in the case was simply whether certain very vulgar language which was used in a stage play amounted to the offence of using obscene language in a public place. That was for the magistrate to decide according to his understanding of what amounted to obscenity, his decision being subject to such appeal as the law of Queensland allows. It is not, I think, a case for this Court.

In saying that I do not mean that I think that the magistrate's decision was not one which it was fairly open to him to find. We have not heard the matter fully argued, so I express no final opinion. I say only that, although as I see the matter at present I have considerable misgivings as to whether the Supreme Court ought to have set aside the magistrate' decision, that does not mean that I think we should entertain an appeal.

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JUDGMENT
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OWEN J.

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For the reasons given by the Chief Justice I am of the opinion that special leave should be refused.

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JUDGMENT
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WALSH J.

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I am also of opinion that special leave should be refused and I agree with the reasons given by the Chief Justice.