IN THE SUPREME COURT OF NEW ZEALAND

SC 10/2010
[2011] NZSC 45

VALERIE MORSE

v

THE POLICE

Hearing: 5 October 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: A Shaw, F E Geiringer and S J Price for Appellant
C L Mander and C J Curran for Respondent

Judgment: 6 May 2011

JUDGMENT OF THE COURT

A The appeal is allowed.

B The conviction entered against the appellant in the District Court for offensive behaviour is set aside.

REASONS

Para No

Elias CJ	[1]
Blanchard J	[59]
Tipping J	[68]
McGrath J	[75]
Anderson J	[121]

ELIAS CJ

[1] By s 4(1)(a) of the Summary Offences Act 1981, it is an offence, punishable by a fine not exceeding $1,000, to behave "in an offensive or disorderly manner ... in or within view of any public place". The appellant was convicted in the District Court under s 4(1)(a) of behaving in an offensive manner in a public place, "namely Victoria University, Lambton Quay".[1] The charge particularised the offensive behaviour as "burning [the] NZ Flag". The appellant acknowledged setting fire to the New Zealand flag in the grounds of the Law School of Victoria University in Wellington, behind but within view of the people assembled at the Wellington Cenotaph for the dawn service on Anzac Day 2007. She was part of a small group of people who had taken up position inside the University grounds to protest against New Zealand military involvement in Afghanistan and other foreign conflicts. The appellant maintained that her expression of opinion in this way was not offensive behaviour but was expression protected by s 14 of the New Zealand Bill of Rights Act 1990:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[2] On conviction, the appellant was fined $500, and ordered to pay court costs and witness fees. Her appeals to the High Court and the Court of Appeal against conviction have been dismissed.[2] The further appeal to this Court raises both the meaning of s 4(1)(a) and its application to expression of opinion, matters considered by this Court in *Brooker v Police*[3] in the context of the disorderly behaviour limb of s 4(1)(a). I consider that the disposition of the appeal turns on the meaning of s 4(1)(a). For the reasons given below I conclude that "offensive" and "disorderly" behaviour are two sides of the same coin, both directed at the preservation of public order. On this view, "offensive" behaviour is behaviour productive of disorder. It is not sufficient that others present are offended if public order is not disrupted. On the other hand, it is not necessary that the conduct be violent or likely to lead to violence

---

1 *Police v Morse* DC Wellington CRI-2007-085-2806, 23 November 2007 per Judge Blaikie.

2 *Morse v Police* HC Wellington CRI-2007-485-153, 29 May 2008; *Morse v R* [2009] NZCA 623, [2010] 2 NZLR 625.

3 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

since behaviour with that effect constitutes the more serious offence described by s 3 of the Summary Offences Act. The behaviour must however be such as to interfere with use of public space by any member of the public, as through intimidation, bullying, or the creation of alarm or unease at a level that inhibits recourse to the place.[4]

[3] That is not the meaning given to offensive behaviour in the Courts below. Because the District Court Judge looked to the effect produced on those present without reference to the touchstone of public order,[5] I consider that the hearing miscarried. In my view the criminal penalty under s 4(1)(a) does not attach to behaviour held after the event to tip a balance between freedom of speech and the reasonable feelings or other interests of those present. In s 4(1)(a), the legislature has struck the balance at preservation of public order. The text, purpose, and context of the offences described by s 4(1)(a) make it clear they are concerned, not with the protection of individuals from upset, but rather with "the protection of the public from disorder calculated to interfere with the public's normal activities".[6] On this view, s 4(1)(a) is not concerned with offending others, but with provoking disorder in the sense of inhibiting use of the public space. Offensive and disorderly behaviour are both productive of such effect.

[4] The conviction was entered on an erroneous view of the elements of the offence. What constitutes "offensive" behaviour was wrongly treated as a contextual judgment arrived at after balancing the interests of the appellant against the impact of her expression on the feelings of those present.

The appeal

[5] Offensive behaviour, unlike disorderly behaviour, was thought by Judge Blaikie to require no tendency to disrupt public order. Rather, he considered, it was behaviour "capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected

4 As suggested in *Brooker* at [45].
5 At [23] and [25].
6 *R v Lohnes* [1992] 1 SCR 167 at 178–179, applied in *Brooker* at [32].

to it in the circumstances in which it occurs”.[7] Whether behaviour capable of giving rise to such feelings amounts in the particular case to offensive behaviour, contrary to s 4(1)(a), was treated as requiring a judgment of degree, arrived at after balancing the rights and interests of those present against the rights and interests of the defendant, including the right to freedom of expression.

[6] In both the suggested test, and in the approach which balances freedom of expression only in its application (rather than by interpreting s 4(1)(a) consistently with the rights and freedoms in the New Zealand Bill of Rights Act), the District Court Judge and the appellate Courts after him relied upon the judgment of Blanchard J in *Brooker*. Although Tipping, McGrath and Thomas JJ in *Brooker* also reached their conclusions as to whether the behaviour was disorderly after balancing the interests of the defendant in freedom of expression against the interests of the policewoman who was the subject of the protest,[8] Blanchard J was the only member of the Court in *Brooker* to consider the meaning of offensive behaviour directly.[9] He took the view that, while “disorderly” behaviour is “behaviour which disturbs or violates public order”,[10] “offensive” behaviour is behaviour “which is liable to cause substantial offence to persons potentially exposed to it”.[11] Although he accepted that expression of views could amount both to disorderly and offensive behaviour, Blanchard J suggested that disorderly behaviour concerned the manner of expression, if disruptive of public order, whereas offensive behaviour was concerned with the content of expression, if it was “offensive to those affected by the protest in the sense and to the degree described” in the suggested test.[12]

[7] In *Brooker* I discussed the meaning of s 4(1)(a) without distinction between disorderly and offensive behaviour.[13] I consider that s 4(1)(a) as a whole is concerned with the preservation of public order. I am unable to agree with the view tentatively put forward by Blanchard J in *Brooker* that disorderly behaviour is

---

[7] At [21], citing Blanchard J in *Brooker* at [55].

[8] At [89]–[92] per Tipping J, at [130]–[135] per McGrath J, and at [274]–[277] per Thomas J.

[9] See [54]–[56], [61]. Tipping J commented briefly, at [79], that Mr Brooker was not charged with “offensive” behaviour, and therefore that “the level to which members of the public, right-thinking or otherwise, would be offended was not the ultimate issue”.

[10] At [56].

[11] At [55].

[12] At [61].

[13] See, for example, at [41].

concerned with the manner of expression, and offensive behaviour with its content. For reasons more fully developed below, the terms in context appear to me to be complementary and to cover the field in which behaviour constitutes criminal disruption of public order (but in circumstances where violence is not likely). Section 4(1)(a) thus prohibits conduct that is productive of disorder as well as conduct which is itself properly characterised as disorderly. Such meaning is consistent with the association of the two terms in s 4(1)(a). In many cases the terms may be used interchangeably about the same behaviour.[14] But unless behaviour is disruptive or provocative of disruption of public order, objectively assessed, it is neither "disorderly" nor "offensive" within the meaning and purpose of s 4(1)(a).

[8] It is not clear that Blanchard J intended to suggest that impact on public order is unnecessary to constitute offensive behaviour.[15] It may be that the impact upon those affected was in his view pitched in the suggested test at a level which necessarily impacts upon public order.[16] And he may have intended that, at the second-stage balancing he proposed for cases where freedom of expression is in issue on the facts, it would be balanced against the value of public order (as he made clear was necessary with respect to disorderly behaviour),[17] rather than against wider interests not identified by the statute but left to be identified in the circumstances by the judge. But in the Courts below in the present case the view has been taken that whether behaviour is offensive turns, not on its impact on public order, but on whether those present are offended.

[9] In the District Court and in the High Court on appeal, this view of the meaning of the section seems to have been acquiesced in by the appellant. It was only on appeal to the Court of Appeal that the appellant argued that "offensive" behaviour is concerned with behaviour properly characterised as indecent and, in the alternative and if covering other behaviour, that it requires disruption of public order. Both suggested meanings were rejected in the Court of Appeal, which applied the test

---

[14] In *R v Ceramalus* CA14/96, 17 July 1996 at 4 the Court of Appeal commented that a charge of offensive rather than disorderly behaviour may have been "more appropriate" on the facts of the case but found the charge as worded proved.

[15] As suggested in the Court of Appeal in the present case by Arnold J at [21](a) and by Glazebrook J at [102].

[16] See Glazebrook J at [103].

[17] At [59].

suggested by Blanchard J in *Brooker* and the balancing methodology he adopted in its application. Young P and Arnold J applied both without modification.[18] Glazebrook J would have modified the test to apply general community values, tolerant of minority viewpoints and unpopular views, rather than the reasonable reactions of those actually present.[19] She preferred to leave open the question whether disruption of public order is required by s 4(1)(a).[20]

[10] All members of the Court of Appeal were agreed that the Judges in the District Court and High Court had correctly interpreted s 4(1)(a) of the Summary Offences Act in the test applied (although Glazebrook J added the two caveats already mentioned). Arnold J, with whose reasons William Young P expressed general agreement, took and applied three features from Blanchard J's decision in *Brooker*:[21]

> (a) First, offensive behaviour is described by reference to its likely impact on persons potentially exposed to it. Unlike disorderly conduct, there is no requirement of a tendency to disturb or violate public order.
>
> (b) [Although the test incorporates an objective element] ... the "reasonable persons" are the same type of people as those actually subjected to the conduct.
>
> (c) Third, in assessing the reasonable reaction, the circumstances in which the conduct occurs must be taken into account.

In rejecting the submission on behalf of the appellant that a tendency to disrupt public order is necessary to constitute offensive behaviour (while expressing the view that the behaviour in issue was in fact disruptive of public order),[22] Arnold J considered that "the objective element which Blanchard J identified [the reasonableness of the reaction] ... provides the appropriate limiting mechanism".[23]

[11] In the District Court and in the High Court the case therefore turned on the second-stage balancing judgment that the right to freedom of expression was outweighed in context, justifying the conviction for offensive behaviour. In the

---

18 At [19]–[27] per Arnold J and at [46] per William Young P.
19 At [106].
20 At [102]–[103].
21 At [21].
22 At [43].
23 At [27].

Court of Appeal, the rejection of the interpretative arguments put up by the appellant meant that the case was also disposed of in the end on the basis of the second-stage balance, on which the Court divided.

General approach to interpretation of s 4(1)(a)

[12] The meaning of s 4(1)(a) is to be ascertained from its text and purpose (as s 5 of the Interpretation Act 1999 directs), and consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act (as s 6 of that Act requires wherever an enactment can be given such a meaning). Since s 4(1)(a) describes a criminal offence, its interpretation should conform to the principle that criminal law must be certain. As with all enactments, it is also necessary for the meaning of s 4(1)(a) to be consistent with developing community attitudes, so that the provision may apply to "circumstances as they arise", as s 6 of the Interpretation Act requires. Other aids to interpretation include the legislative history of the provision, discussed in the judgments in *Brooker,*[24] and which needs only to be touched on here, as I do at [18] and [19] below.

[13] While the words "offensive" and "disorderly" are ones in ordinary use, they are elastic concepts which take their meaning from the way in which they are used in the statute and according to the general principles of construction already mentioned. They are not properly left, without more, to be applied in a broad contextual balance, even if subject to a standard of reasonableness in outcome. It is true that ultimately, in application, contextual judgment is inescapable. But that does not mean abdication of the interpretative responsibility to construe s 4(1)(a). The crime contained in s 4(1)(a) is not to be left to be described only in application according to a "balance" between the interests of those whose conduct or speech is in issue and the feelings of those exposed to it, as is the effect of the judgments in the Courts below, unless that is the unmistakeable effect and purpose of the statute. If it is not, such approach offends against the principle that criminal law and limitations on rights must be capable of ascertainment in advance, touched on in my reasons in *Brooker* at [38] and [39].

[24] At [25]–[28] of my reasons, at [104] per McGrath J and at [187] per Thomas J.

[14] Nor does such an approach conform to the requirement of s 6 of the New Zealand Bill of Rights Act that a provision capable of impacting on rights must be given a meaning consistent with such rights, if it can. A number of rights and freedoms recognised in Part 2 of the New Zealand Bill of Rights Act, including freedom of expression in s 14,[25] are capable of being restricted by s 4(1)(a), as the speech of the Minister of Justice in introducing the Summary Offences Bill acknowledged.[26] It is not, I think, proper discharge of the s 6 interpretative obligation to leave the New Zealand Bill of Rights Act protection to be balanced in application. Section 6 does not look to an ambulatory meaning of an enactment according to whether, on the facts of a particular case to which it is to be applied, it limits rights and freedoms. It requires the enactment itself to be given a meaning consistent with the rights, if it can. That is consistent with the purpose of the New Zealand Bill of Rights Act in promoting human rights. Leaving consideration of the New Zealand Bill of Rights Act to application of a provision capable of being interpreted consistently with the rights as expressed in Part 2 also risks dilution of rights, both in the at-large contextual balancing generally and in the inevitable value judgments about the particular exercise of the right. This may be destructive of the s 14 protection of "the freedom to seek, receive, and impart information and opinions *of any kind in any form*".[27] So, in the High Court, Miller J in the present case thought that a "high value" must be attached to freedom of expression "because the protestors were expressing genuine political opinions".[28] It is not only "genuine political opinions" that are entitled to protection under s 14. Classification of expressive conduct as within or without the s 14 protection invites erosion of the freedom.

[15] Rights-limiting effect is exacerbated by the identification of the reasonable-person standard with those actually subjected to the conduct, an audience very likely to be offended by the expression in the case of protest. The composition of the audience ("the type of people who were in attendance") was critical in the

---

25 See also the rights to freedom of peaceful assembly (s 16), to freedom of association (s 17) and to freedom of movement (s 18).

26 See below at [19] and the fuller account in *Brooker* at [28].

27 Emphasis added.

28 At [32].

assessment of Arnold J that the behaviour was offensive: "[f]or such people on such an occasion, the national flag would reasonably have had special significance".[29]

[16] Moreover, passing over the interpretative obligation in s 6 of the New Zealand Bill of Rights Act to go directly to balance the Bill of Rights Act value in contextual application undermines the responsibility of the courts to supervise for reasonableness or proportionality in that application. In supervising for proportionality or reasonableness in outcome, close attention to the purpose of a restriction imposed by law is critical. The more vague the purpose and meaning of an enactment, the less protection for human rights. That is why the interpretative responsibility is the first responsibility. And it is why I do not regard with equanimity the view that the width of the language used in s 4(1)(a) means that the section is "self-adjusting".[30]

[17] An at large balancing of competing interests is what the legislature has done in enacting s 4. For the reasons I go on to explain below, I consider that it has anchored the limitation of rights in this provision to public order. The Court is not required to undertake the same legislative or law-creating balancing exercise here. The task for the Court is first to interpret the public order offence created by Parliament in accordance with s 6 of the New Zealand Bill of Rights Act. It requires the meaning least restrictive of the rights in Part 2 to be given to the provision.

The history, text, and statutory context of s 4(1)(a)

[18] Offensive and disorderly behaviour were made offences through amendment in 1924[31] of s 3(ee) of the Police Offences Act 1908. Before 1924, and beginning with s 4 of the Vagrant Act 1866 Amendment Act 1869, it had been an offence to use threatening, abusive or insulting words or behaviour in a public place, "with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned". The Police Offences Amendment Act 1924 dropped the element of intention to provoke a breach of the peace and the alternative objective requirement that the

---

29 At [31].
30 As Thomas J suggests in *Brooker* at [188].
31 Police Offences Amendment Act 1924, s 2.

behaviour could occasion a breach of the peace. Instead, it became an offence under s 3(ee) for someone to behave in public "in a riotous, offensive, threatening, insulting, or disorderly manner, or [to use] any threatening, abusive, or insulting words, or [to strike or fight] with any other person". The same formula was retained in the Police Offences Act 1927. The provision was then re-enacted in substantially the same form as s 3D of the 1927 Act by amendment in 1960,[32] with the omission of the element of fighting, which became a stand-alone offence.[33]

[19] Section 3D of the Police Offences Act was replaced with ss 3 and 4 in the Summary Offences Act 1981, which split the offending according to seriousness. The Minister of Justice, in introducing the Bill, referred to criticisms made of the former s 3D and acknowledged that, because of the potential for impact upon free speech, such laws were "of central importance to our criminal and constitutional law".[34]

[20] In the Summary Offences Act, s 4 is one of a number of provisions under the heading "Offences Against Public Order". Sections 3 and 4 cover similar behaviour, distinguished by whether or not violence is a likely consequence of the behaviour:

> **3 Disorderly behaviour**
>
> Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.
>
> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
>
> (b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
>
> (c) In or within hearing of a public place,—

32 Police Offences Amendment Act (No 2) 1960, s 2.

33 The offence of "[f]ighting in any public place" was inserted as s 3B of the Police Offences Act 1927 by s 2(1) of the Police Offences Amendment Act 1960.

34 (16 June 1981) 437 NZPD 418.

(i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or

(ii) Addresses any indecent or obscene words to any person.

(2) Every person is liable to a fine not exceeding $500 who, in or within hearing of any public place, uses any indecent or obscene words.

(3) In determining for the purposes of a prosecution under this section whether any words were indecent or obscene, the Court shall have regard to all the circumstances pertaining at the material time, including whether the defendant had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended.

(4) It is a defence in a prosecution under subsection (2) of this section if the defendant proves that he had reasonable grounds for believing that his words would not be overheard.

(5) Nothing in this section shall apply with respect to any publication within the meaning of the Films, Videos, and Publications Classification Act 1993, whether the publication is objectionable within the meaning of that Act or not.

"Offensive behaviour" is not confined to behaviour that is indecent

[21] The appellant and the Crown both developed arguments as to the meaning of s 4(1)(a) focussed on the word "offensive". The Crown, adopting an approach found in pre-*Brooker* cases, maintained that it is concerned with offending others, to a degree which justifies the imposition of criminal liability. This meaning is one I consider and reject at [26] to [38] below, in acceptance of the appellant's fall-back argument. The appellant's primary submission however also focussed on the meaning of the words "offensive" and "disorderly" and treated them as descriptive of different types of offending. It was suggested that, in order to avoid overlap between two distinct offences, "offensive" behaviour is properly interpreted as behaviour that disturbs public decency, leaving "disorderly" behaviour to apply to behaviour that disrupts public order. I deal first with this argument.

[22] My principal reason for rejecting the argument that "offensive" behaviour means behaviour that is indecent is the same as that for which I reject the Crown submission that "offensive" behaviour is behaviour which offends: that such

division between "offensive" and "disorderly" is inconsistent with the structure and purpose of the offences described in s 4.[35] But the attempt to confine "offensive" behaviour to behaviour that is indecent and obscene is I think objectionable for other reasons in addition.

[23] The argument does not conform with the legislative history of s 4(1)(a), described above at [18]–[19]. No such restricted meaning is to be found in the terms of the legislation which preceded s 4(1)(a), and into which the terms "disorderly" and "offensive" were first added in 1924 (at the time the requirement that behaviour be "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned" was dropped).[36] Nor does the case law on offensive behaviour after 1924 suggest it was confined only to behaviour that is indecent.[37] The Minister's speech on the introduction of the Summary Offences Bill gives no support to the suggested restricted meaning. It simply made it clear that Parliament had accepted that the more serious offence introduced there would reinstate a requirement of likelihood of violence, leaving the lesser offending in the "wider terms" used in the existing legislation and subject to minor penalties.[38]

[24] The suggested restriction of the meaning of "offensive" to behaviour that is indecent has no textual or contextual basis in the present statute and its scheme. It introduces a different controlling concept from that found in the other provisions within ss 3 and 4. Although use of indecent and obscene words may amount to offences under s 4(1)(c)(ii) and s 4(2) it is there subject to a condition of targeting (under s 4(1)(c)(ii)) and a defence of reasonable belief that the words will not be overheard (under s 4(4) in relation to s 4(2)). Both the condition and the defence are consistent with impact upon public order being the purpose of these offences also. They do not suggest a stand-alone purpose of preventing indecency irrespective of impact upon public order. "Indecency" is a distinct heading in the Summary Offences Act under which is found the offence of indecent exposure.[39] And other

---

35 Discussed below at [32]–[35].

36 Police Offences Act 1908, s 3(ee) (as amended in 1924); Police Offences Act 1927, s 3(ee); Police Offences Act 1927, s 3D (following amendment of the Act in 1960). See above at [18].

37 See, for example, *Derbyshire v Police* [1967] NZLR 391 (SC).

38 (16 June 1981) 437 NZPD 419.

39 Summary Offences Act 1981, s 27.

offences deal with specific nuisance behaviour which may impact on public decency.[40]

[25] For these reasons, as well as for the reasons further explained below as to the meaning of "offensive" in this context, I consider that the suggested restriction of "offensive" to behaviour that is indecent or obscene is not tenable.

The meaning of s 4(1)(a)

[26] The alternative argument advanced by the appellant is that offensive behaviour, like disorderly behaviour (as it was held in *Brooker*),[41] is behaviour which disrupts public order. As already indicated, that is not how it was treated in the Courts below. Instead, "offensive" behaviour was interpreted to mean behaviour that is capable of offending others to the extent of "wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person actually subjected to it in the circumstances in which it occurs".[42] The formula is derived from Australian case law decided under legislation comparable to the New Zealand legislation which preceded the Summary Offences Act.[43] So, in *Worcester v Smith*, O'Bryan J in the Supreme Court of Victoria took the view that "offensive behaviour": [44]

> [M]ust ... be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.

The same approach was adopted by the Supreme Court of Australian Capital Territory in *Ball v McIntyre*.[45]

---

40 Summary Offences Act 1981, ss 32–38. More serious crimes against morality and decency are also located in ss 124–126 of the Crimes Act 1961.

41 At [24] per Elias CJ, at [56] per Blanchard J, at [90] per Tipping J, at [118] per McGrath J. But see Thomas J at [190]–[191].

42 The formula used by Blanchard J in *Brooker v Police* at [55], adopted from his earlier judgment in *O'Brien v Police* HC Auckland AP219/92, 12 October 1992.

43 Police Offences Act 1928 (Vic), s 25. Compare Police Offences Act 1927 (NZ), s 3D.

44 *Worcester v Smith* [1951] VLR 316 (SC) at 318.

45 *Ball v McIntyre* (1966) 9 FLR 237 (ACTSC). See also *Inglis v Fish* [1961] VR 607 (SC) at 611 per Pape J; *Ellis v Fingleton* (1972) 3 SASR 437 (SC) at 443 per Mitchell J; *Khan v Bazeley* (1986) 40 SASR 481 (SC) at 484 per O'Loughlin J; *Wurramura v Haymon* (1987) 24 A Crim R 195 (NTSC) at 199 per Asche J.

[27] The Australian cases were not decided in a context which included provisions such as those contained in the New Zealand Bill of Rights Act. They were also decided under provisions which differ from the offences described in s 4(1)(a) and in a different statutory and social setting. They seem no longer to be good law in Australia. There, the High Court has indicated in *Coleman v Power*[46] (a case concerning use of "insulting words") that such offences must cause disturbance to public use of the space, and not simply private affront, even if serious.[47]

[28] The *Worcester v Smith* test seems first to have been applied in New Zealand in the High Court in *Ceramalus v Police*[48] and later in *O'Brien v Police*.[49] In *O'Brien*, the refinement was added that the "reasonable person" whose feelings must reach the level of intensity suggested was "of the type of person actually subjected to [the behaviour] ... in the circumstances in which it occurred".[50] This refined test was that adopted by Blanchard J in *Brooker*, applied by the District Court in the present case, and affirmed by the High Court and Court of Appeal (with Glazebrook J alone entering the caveat that the reasonable person is not to be identified with those actually present on the occasion).[51] In *Ceramalus* and *O'Brien* there was no analysis of the structure and purpose of s 4 of the Summary Offences Act. In *R v Rowe* the Court of Appeal applied without reconsideration the *Ceramalus* test.[52] *Rowe* was decided before the decision of this Court in *Brooker*. The Court of Appeal in *Rowe* also applied without reassessment a number of pre-Bill of Rights Act cases, including *Police v Christie*,[53] *Melser v Police*,[54] and *Wainwright v Police*,[55] none of which can be regarded as authoritative following the decision of this Court in

---

46 *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1.

47 Indeed, both the joint judgment of Gummow and Hayne JJ and the judgment of Kirby J would have required the likelihood of a breach of the peace, despite its earlier removal as an element of the statutory offence in a reform which corresponded to the New Zealand amendment in 1924: at [183] per Gummow and Hayne JJ and at [224] per Kirby J. Gleeson CJ at [23] preferred "a requirement related to serious disturbance of public order or affront to standards of contemporary behaviour".

48 *Ceramalus v Police* (1991) 7 CRNZ 678 (HC) at 683.

49 *O'Brien v Police* HC Auckland AP219/92, 12 October 1992.

50 Ibid, at 7. Compare the formula used by Tompkins J in *Ceramalus v Police* at 682: "[i]t is not necessary for the Court to prove that persons present found the behaviour to be offensive. It is sufficient if the Court considers it would be so regarded by persons whose views are representative of the community."

51 At [105]–[106].

52 *R v Rowe* [2005] 2 NZLR 833 (CA) at [23]–[24].

53 *Police v Christie* [1962] NZLR 1109 (SC).

54 *Melser v Police* [1967] NZLR 437 (SC, CA).

55 *Wainwright v Police* [1968] NZLR 101 (SC).

Brooker. Although the test for offensive behaviour adopted in *O'Brien* was repeated by Blanchard J in *Brooker*, it was not directly in issue and we heard no argument in *Brooker* on the meaning of offensive behaviour.

[29] In *Brooker* it was necessary to reconsider the meaning of "disorderly" behaviour in the light of the purpose and statutory context of s 4(1)(a), including the context of the New Zealand Bill of Rights Act.[56] The test applied in *Melser*[57] was discarded. In the same way, I consider the meaning of "offensive" must be reconsidered. I am of the view that it is not correctly interpreted as being "to offend", even seriously. And as a result I think the test adopted from *O'Brien* is wrong.

[30] A test based on the tendency of behaviour to "offend" those present, even seriously, is just to step up the *Melser* test (from "annoyance") by use of a word ("offend") capable of embracing annoyance as well as reactions which do disrupt use of public space. Unpopular expression will often offend those who do not agree with it. In the Court of Appeal, the emphasis on those present was material in the reasons of the majority to dismiss the appeal. Arnold J, with whom the President expressed agreement, considered that "[b]urning the flag in protest on such an occasion [was] ... well capable of being regarded as offensive" by "the type of people who were in attendance".[58] This emphasis undermines the objective assessment required. It is not necessary to tailor behaviour to the specific audience in order to protect the vulnerable, such as children. In a public place to which all members of society may have resort, the vulnerable and the young are included in the objective assessment.

[31] An inquiry into whether someone present is "offended", without more, is not sufficiently tied to the public order purpose of this section. Nor do I think s 4(1)(a) is properly concerned with whether behaviour "offends". The starting point that "offensive" behaviour is behaviour which "offends" is oversimplification which

---

[56] As is implicit in the rejection of *Melser* in *Brooker*, I consider that the view expressed without developed reasons in *R v Ceramalus* CA14/96, 17 July 1996 by the Court of Appeal in declining leave to appeal (that the values of the New Zealand Bill of Rights Act had already been built into the tests for disorderly and offensive behaviour and which relied on the judgment of McCarthy J in *Melser*) is incorrect.

[57] At 443 per North P, at 444 per Turner J and at 446 per McCarthy J.

[58] At [31].

concentrates on one available definition, to the exclusion of another more in keeping with the structure and purpose of the provision.[59] Its reliance on word association is reminiscent of the approach taken, I think misguidedly, in *Police v Christie*.[60] Neither the approach in *Christie* nor the stricter view building on it adopted in *Melser* was accepted in *Brooker*.

[32] The structure of the Summary Offences Act locates s 4 under the heading "Offences Against Public Order". The scheme of ss 3 and 4 makes it clear that the offences they describe have the purpose of preventing disorder in public places. The offences described by s 4 do not turn on likelihood of violence. That is the threshold set in the more serious offence provided by s 3. But offensive behaviour under s 4(1)(a) is on the same continuum as the more serious offence of offensive behaviour under s 3 and "offensive" must bear the same meaning within the two provisions (as indeed "disorderly" must also).[61] Offensive and disorderly behaviour must therefore be behaviour capable of disrupting public order on a continuum that under s 3 is likely to cause violence. Merely causing someone to feel offended is not "offensive" behaviour within the meaning of either s 3 or s 4(1)(a).

[33] The structure of s 4 links offensive with disorderly behaviour. The same linkage is to be seen in s 3. The coupling of "offensive" with "disorderly" suggests equivalence. If they cover different types of offending (so that one is concerned with behaviour that offends others and the other with behaviour that creates disorder), it is unclear why they are separated out from the other offences in s 4(1)(a) by such close association. The coupling of the two suggests that offensive behaviour is behaviour that tends to provoke or bring about disorder, thus closing the circle of conduct that impacts on public order at a lower threshold of seriousness than the disruption envisaged by s 3.

---

59 See below at [34].

60 At 1113. There, "disorderly" was interpreted through its antonym "orderly" and its dictionary definition of "well-behaved", to the conclusion that "disorderly" behaviour is behaviour which contravenes the standards of proper conduct which right-thinking members of the public would consider deserving of punishment.

61 A point I made in *Brooker* at [31].

[34] This meaning accords with the context and scheme of s 4(1)(a) and is consistent with a principal definition of "offensive" as "attacking" or "aggressive".[62] On this construction, "behaves in an offensive or disorderly manner" covers behaviour which provokes disorder as well as behaviour that is itself disorderly. Such interpretation accounts for the association of the two terms in the one offence. It also plugs an otherwise unaccountable gap in omission of behaviour not in itself disorderly but "whereby [disorder] may be occasioned" (in the language of the pre-1924 offences against public order). On this approach, the 1924 amendment (which removed the necessity to show breach of the peace) maintained similar circle-closing in respect of the new standard of disorder falling below the level of violence, through the offence of "behaves in an offensive or disorderly manner". In England the common law relating to breach of the peace is similarly concerned with behaviour which provokes such breach, as well as behaviour itself amounting to breach.[63]

[35] The scheme of s 4 also supports "offensive" being used in its sense of "attacking". Section 4 contains a number of offences of targeted aggression, within a scheme of generally comparable culpability. It is not an offence under the other provisions of s 4 to "offend" someone in public. It is, rather an offence under s 4(1)(b) to *address* words *to* someone else *intending* to offend (or threaten, or alarm, or insult) that person. Two points occur. First, such targeted aggression is not only more culpable than simply offending someone, it is inherently likely to disrupt public order (consistent with what I consider to be the purpose of the offences contained in ss 3 and 4). The offences in s 4(1)(c) are similarly not concerned simply with whether someone is "offended". They are using words which are threatening or insulting *recklessly* as to whether anyone is alarmed or insulted and addressing *to* someone indecent or obscene words. Again, such behaviour not only contains additionally culpable elements but is behaviour inherently likely to disrupt public order. Secondly, the targeted offending described in ss 4(1)(b) and (c) is

---

[62] Thus the Shorter Oxford English Dictionary gives as a principal meaning of "offensive" "of or pertaining to attack; attacking; aggressive": *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007).

[63] *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 AC 105 at [96]–[97] per Lord Carswell. See also *Nicol v Director of Public Prosecutions* [1996] Crim LR 318 (QB) per Simon Brown LJ and *Redmond-Bate v Director of Public Prosecutions* [1999] Crim LR 998 (QB) per Sedley LJ.

consistent with “offensive” behaviour in s 4(1)(a) being used in its aggressive or provocative sense, since the offending in the three provisions is of equivalent culpability.

[36] In the tendency to disrupt public order, I consider there is no distinction to be made between the two limbs of disorderly behaviour and offensive behaviour contained in s 4(1)(a). They are, as I have already suggested, properly regarded as two sides of the same coin, as their association in s 4(1)(a) suggests. On this view, “disorderly” behaviour is behaviour which tends to disrupt public order and “offensive” behaviour is behaviour which tends to provoke such disruption. This interpretation answers the Crown argument that the word “offensive” is redundant if both limbs of s 4(1)(a) are concerned with disruption of public order.

[37] So construed, s 4 is not in conflict with s 14 of the New Zealand Bill of Rights Act and no question of whether it is a limitation justified in a free and democratic society under s 5 of that Act arises. Section 14, itself construed in the context of art 19(3) of the International Covenant on Civil and Political Rights,[64] permits limitations on freedom of expression necessary to protect public order (among other limitations with which s 4(1)(a) is not concerned).

[38] In summary, the test applied did not reflect the meaning of the offence. I consider that the Courts below were wrong to take the view that behaviour is offensive within the meaning of s 4(1)(a) simply on the basis that it is capable of wounding feelings or arousing outrage in a reasonable person, irrespective of objectively assessed disruption of public order. The appellant was also, I think, right to say that this is to reinstate the “right-thinking man” test used in *Melser v Police*, even if the impact described is amplified from “annoyance” to “outrage”. And, as Glazebrook J recognised in the Court of Appeal, grafting the “reasonable man” on to those actually affected by the behaviour[65] risks erosion of even this level of objectivity.[66] There are especial dangers in identifying the interests to be balanced with those present on the particular occasion, as the reasoning in the lower Courts

---

64 As to which see the discussion in *Brooker* at [4].

65 As Arnold J in the Court of Appeal thought necessary: at [21] and [27] he emphasised that the “reasonable persons” are the same type of people as those actually subjected to the conduct.

66 At [105].

permits.[67] Such approach leaves minorities and those expressing unpopular views insufficiently protected by s 14. It is not necessary to consider those actually present in order to protect the vulnerable (in the way suggested in the references in the lower Courts to the presence of children at the Anzac service). The vulnerable are protected because all members of the public are entitled to resort to public space and the level of order protected must reflect that entitlement.

[39] Preservation of public order is recognised by art 19 of the International Covenant on Civil and Political Rights (on which s 14 is based) to be a basis on which the freedom of expression recognised by s 14 of the New Zealand Bill of Rights Act is properly limited.[68] And in s 4(1)(a) Parliament has limited freedom of speech in order to protect public order. Other offences strike similar legislative balances in protection of other legitimate interests. But offensive behaviour is concerned with behaviour which, objectively assessed, disrupts order in public space. That was not the view taken of the offence in the District Court in the present case. As a result, I consider that the hearing miscarried.

Disposition of the appeal

[40] Whether particular behaviour is disruptive of public order ultimately entails contextual judgment and is a matter of degree. In *Brooker* I suggested that the assessment cannot be too nice.[69] Tolerance of the expressive behaviour of others is expected of other members of the public resorting to public space[70] because of the value our society places on freedom of expression. Whether behaviour is disruptive of public order will be a matter of judgment on the facts, usually giving rise to no question of law. But if in the result the limitation of freedom of expression is

---

67 So, in the Court of Appeal in the present case "the type of people who were in attendance" was critical in the assessment of Arnold J at [31] that the behaviour was offensive.

68 The right to freedom of expression is enacted in affirmation of New Zealand's commitment to the International Covenant on Civil and Political Rights; art 19(3) of which makes clear that the exercise of the right carries with it "special duties and responsibilities" and may therefore be subject to "certain restrictions" provided the restrictions are only such as are "provided by law" and are "necessary":

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

69 At [42].

70 See McLachlin J in *R v Lohnes* [1992] 1 SCR 167 at 181.

disproportionate to the statutory purpose of securing public order, the courts (which in their decisions must conform to the New Zealand Bill of Rights Act) are not justified in finding criminal liability under s 4(1)(a). Lack of proportionality in outcome (more restriction than is necessary to achieve the legitimate outcome of preservation of public order under s 4(1)(a)) is a result that is substantively unreasonable and amounts to error of law able to be corrected on appeal restricted to point of law, as Glazebrook J in the Court of Appeal rightly recognised.[71]

[41] The appellant was one of a small group of protestors who had gathered within the grounds of the Law School intending, when a former Secretary of Defence started to speak at the dawn service, to burn the New Zealand flag while sounding horns to draw the attention of the crowd to the flag-burning. She acknowledged as much in her own evidence. Other evidence put between 50 and 80 people within the grounds of the Law School, across the road from and behind a crowd estimated to number about 5,000 on Lambton Quay facing the Cenotaph. Of the prosecution witnesses, three gave oral evidence and five provided written briefs of evidence admitted by consent. They were all close to the protestors, either at the back of the crowd near the hedge separating the Law School from the road or within the grounds of the Law School.

[42] The two police witnesses were within the Law School grounds, behind the protestors and observing them at the time they began their protest. As soon as the officers saw New Zealand flags set alight, they moved to stop the demonstration. The appellant was immediately arrested for offensive behaviour, a matter of seconds into her protest. As the two flags were set alight, two other protestors blew horns for an estimated 3-5 seconds before police stopped them. Some time estimates were longer, but it seems from the evidence of the police witnesses (who were in the best position to make the assessment) that the shorter time should be accepted. One of the people sounding a horn, Mr Rawnsley, refused an officer's request to pass over the horn, resisted arrest and tried to run off. He was eventually arrested, following a noisy and physical struggle, and was charged with resisting and obstructing an officer in execution of his duty under s 23(1)(a) of the Summary Offences Act.

---

71 At [111]–[112].

[43] By agreement, the charge faced by Mr Rawnsley was heard together with the different and separate charge of offensive behaviour faced by the appellant. Mr Rawnsley's defence (that he did not appreciate he was under arrest and that the constable lacked a basis for arresting him) required proof that the constable apprehended a breach of the peace and was justified in demanding that he surrender his horn. That laid the foundation for the charge of obstruction when Mr Rawnsley refused to give up the horn, leading to a tug of war. The charge of resisting arrest required evidence of how Mr Rawnsley had broken away, run to the fence, and been subdued by the arresting constable with the assistance of a plain-clothes policeman. Much of the evidence of disturbance given by witnesses related to his flight, capture, and eventual arrest. (Evidence by one witness that he had seen Mr Rawnsley punched by a "member of the public" may well have been a reference to the struggle with the plain-clothes policeman, since the arresting officer did not refer to intervention by any member of the public, but acknowledged an officer in plain clothes had assisted.) This episode, the focus of much of the evidence, was after the involvement of the appellant had ended with her arrest.

[44] When witnesses described their own reactions to the protest, they did not always differentiate between the flag-burning protest which was associated with the horn-blowing and the subsequent incident with Mr Rawnsley. Judge Blaikie himself explicitly acknowledged as much: "[i]n fairness to Ms Morse, I should indicate that some [of the witnesses' comments] apply to the other persons who were there protesting on that occasion, and in particular, to [Mr Rawnsley]".[72]

[45] Two witnesses said that the sound of the horn prevented them from hearing the speaker. One was the witness watching from the Law School building porch, behind the protestors. The other was the constable who arrested Mr Rawnsley who was also behind the protestors. He said that he could not hear the speaker after the horn started and thought the sound "was probably overbearing the speaker at the time". Another witness, just outside the fence, had his attention drawn to the protest by the horn. He "wasn't too fussed about the horn itself", but was more fussed about the burning next to it. He did not think it was "the right time and the place to be burning flags and creating disturbance". This witness said that what he called "the raucous"

[72] At [11].

started after the police approached Mr Rawnsley. Most of his evidence was directed to the resisting arrest, which he regarded as the aspect that "upset the whole thing" and disturbed his family.

[46] Three witnesses gave evidence that members of the crowd were angry with the flag-burning and horn-blowing. One, who was standing 20 metres to the right of the protestors and further away from the Cenotaph, said that "people in the area started yelling at the protestors" as soon as the noise started. The second, the police officer who arrested the appellant, said that at the time of the arrest "several dozen people in the vicinity of the law building were agitated and angry with the protestors". The third, a witness standing across the fence from the protestors, said that his young son was "spooked" by the flames (the only witness to suggest anxiety in relation to the fire, as opposed to anger at the treatment of the flag in this way). The same witness expressed the view that he thought the crowd would have hurt the protestors if they had not been on the other side of the fence and if the police had not been there, saying "[h]ad the police not been there I would have been sorely tempted to do something myself".

[47] Although most of the eight prosecution witnesses who gave evidence relevant to the appellant expressed anger or shock about the flag-burning, some simply regarded it as "childish" or ill-mannered. Most objected to it on the basis that it was not "the right time and the place" to burn the flag.

[48] In the District Court, Judge Blaikie made it clear that the conviction was entered by him solely because setting fire to the flag at the Anzac commemoration was itself offensive. In particular, he did not rely on disruption of the speech at the Cenotaph by noise, saying that "Ms Morse, of course, was not involved with a noise protest, rather the protest of burning the New Zealand flag, which I understood occurred shortly after the commencement of the address".[73] Such approach was consistent with the conduct of the hearing and the almost total absence of evidence called by the prosecution relating to the extent to which those attending the service at the Cenotaph were unable to hear the speaker by reason of the protest. It was also consistent with the pre-hearing amendment of the charge by consent to specify the

[73] At [14].

offensive behaviour as "namely, burning [the] NZ flag". Judge Blaikie emphasised that the behaviour in issue was "offensive, and I stress offensive, as compared to disorderly", and that it comprised only the burning of the New Zealand flag.[74]

[49] Both counsel and the Judge proceeded on the basis throughout that disorder was not in issue in relation to the appellant. Her position was that because the flag-burning was "political speech", it was not offensive behaviour. The way in which the hearing proceeded was indicated when there was some doubt as to which of two burnt flags produced as exhibits had been the one held by the appellant. One was more extensively burned than the other and the Judge inquired whether it was necessary to identify which flag was set alight by the appellant. The agreed view of defence and prosecution, indicated in the transcript, was that it was immaterial which flag was involved in the behaviour of the appellant. Mr Lillico, for the defence, advised the Court:

> [W]hat My Friend and I agree about, is that this would be – the extent of the flame and the obstruction and so forth would be relevant if the charge was disorderly behaviour, because as *Brooker* and the other cases say, disorderly behaviour is about public order. This is a case, I hate to frame the prosecution's case for them, but they're saying that burning a flag at Anzac Day is offensive and whether a corner, a centimetre corner of the flag is burnt or the half a flag is burnt it is [interrupted]

The prosecution did not demur from that view of the respective cases. The Judge was invited to decide the matter, not on the basis of disorder, but on the basis of a clash between freedom of speech and "people's sensitivities about flags and Anzac Day and so on". And that is how he decided it.

[50] Judge Blaikie accepted that burning the flag was an act of "considerable symbolism",[75] within the protection of freedom of expression contained in s 14. On the other hand, he considered that the circumstances of the Anzac service, "a time for sombre reflection and commemoration" by New Zealanders, including children, were such that the people attending could "legitimately expect to attend and participate in the commemoration without offensive intrusion from others".[76] In balancing "the legitimate interests of the public against the legitimate interests and

---

[74] At [16].
[75] At [23].
[76] At [20].

rights of the defendant"[77] (an approach I consider to be based on a wrong interpretation of s 4(1)(a) for reasons already expressed), the Judge concluded that, in all the circumstances and "in the balancing exercise", the offensive behaviour "cannot be protected by the Bill of Rights":[78]

> To me, the threshold is passed when a New Zealand flag is burned, as a symbolic protest, at an Anzac service in the nation's capital – that service being an event of significant importance to the country and the people in attendance. Accordingly, the charge has been proved.

[51] On appeal, as has already been described, the High Court and Court of Appeal agreed with the interpretation of s 4(1)(a) adopted in the District Court and with the conclusion that the behaviour of the appellant was "offensive" within that meaning. In addition, although not of the view that disruption of public order was required in the case of offensive behaviour,[79] the majority of the Court of Appeal also expressed the view that the appellant's conduct was in fact disruptive of the service.[80]

[52] In the High Court and Court of Appeal, the Judges were prepared to treat the flag-burning (treated as a stand-alone offence in the District Court) as part of a strategy of disruption of the Anzac service which included the horn-blowing. It was material to the balancing of interests in application of s 4(1)(a) there undertaken that the behaviour of the appellant interfered with the rights to freedom of expression of the speaker, a former Secretary of Defence, and the audience (whose right to receive information and opinions was infringed). Arnold J (with whom the President expressed agreement, while considering the judgment raised no question of law)[81] considered it significant that the crowd had gathered "at a specific place for a specific purpose", exercising the right of freedom of association:[82] "[t]his was not an occasion on which the members of the crowd who did not wish to receive the appellant's message could simply pass by or avert their eyes". Because other, less intrusive, forms of protest were available to the appellant, treating the flag-burning

---

77 At [17].
78 At [25]–[26].
79 At [26]–[27], [43] per Arnold J. Glazebrook J left the question open at [103].
80 At [43] per Arnold J and at [51] per William Young P. Glazebrook J dissented: see [116].
81 At [50]–[51].
82 At [35].

as offensive behaviour did not prevent the exercise of freedom of expression; rather, it limited "the means of expression that may be used on the particular occasion".[83]

[53] The District Court Judge did not find that disruption of the service through the noise of the horn made the flag-burning offensive (as was reasoned in the High Court and Court of Appeal).[84] That conclusion in the Court of Appeal required primary findings of fact to be made on appeal. It is a conclusion urged upon us on further appeal by counsel for the police, should we find impact on public order to be an element of the offence.

[54] It may be accepted that the public expression of views could in some circumstances give rise to disturbance of public order, justifying a conviction for offensive behaviour. But I do not think an appeal court could draw such a conclusion from the record of a hearing conducted on a very different basis, in which objective disruption of public order was not thought to be an element of the offence. Because of the way the issue was addressed at the hearing in the District Court and the evidence there led by the prosecution, I do not think it was open on appeal to find that the appellant's behaviour was "part of a strategy of disrupting the service" (as Miller J thought it to be)[85] or "part of protest activity ... deliberatively disruptive of the commemoration" (as Arnold J treated it).[86]

[55] If public order had been the focus, the course of the hearing is likely to have been very different. The witnesses were not in the main body of the crowd which had gathered at the Cenotaph. There was little evidence that the witnesses could not hear the speaker. The only witnesses to suggest that the horn-blowing drowned out the speaker were the witness positioned on the Law School building (some distance from the speaker and behind the protestors) and the arresting police officer (who it might be thought would have been properly focussed on the protest). It may be inferred quite readily that the protest would have distracted others. But if ability to hear the speaker had been seen as critical, it is not clear on the evidence (because it

---

83 At [37].

84 Indeed, although Judge Blaikie was not required to consider a charge of offensive or disorderly behaviour in relation to Mr Rawnsley, he seems to have treated his conduct of blowing the horn as not "beyond the bounds" but taking the protest to "the maximum ... that you could": see [41].

85 At [41].

86 At [34].

was not explored) whether those who wished to hear could have moved away from the protest, closer to the Cenotaph.

[56] Important in the reasoning of Arnold J that the conduct was disruptive of public order was evidence of a witness in a brief admitted by consent (a course the District Court Judge had encouraged as "pragmatic" and in order to save time) that members of the public might have taken matters into their own hands if the police had not intervened. If assessment of impact on public order had been thought to be the touchstone for offensive behaviour, such expression of opinion on the ultimate issue was unlikely to have been admitted by consent in that untested form. I do not think in the circumstances it can safely be relied upon as evidence of reasonable reaction.

[57] I would decline to affirm the conviction on such different basis in this Court. The approach taken in the District Court skewed the course of the hearing in a way that makes it dangerous to rely on the transcript of the proceedings to draw a very different conclusion than the District Court Judge was asked to draw (that the behaviour was disruptive of public order). The evidence does not allow a confident conclusion of impact on public order to be drawn. I consider that a conclusion of guilt would have to be based on a more careful analysis of facts which were largely unexplored at the hearing, such as the extent of disruption to the service (as opposed to the impact on those watching from a distance), particularly in light of the location of the protest at some distance from the Cenotaph and behind most of the audience.[87] These judgments an appellate court could not I think properly undertake on the record of this hearing.

[58] Because I take the view that the hearing of the case was distorted by failure to identify the meaning of the provision in issue, I do not think the Court of Appeal was warranted in forming its own view on the question of disruption of public order, and I do not think this Court can be confident on the evidence that a conviction could properly have been entered had s 4 been properly interpreted as requiring the behaviour to be assessed as objectively disorderly or provocative of disorder to the

[87] The distance of the protest and the lack of active disturbance of the crowd were factors which weighed with Glazebrook J, in her dissenting judgment, against a conclusion of "offensive" behaviour: see [125], [128].

standard suggested in *Brooker* of inhibiting public recourse to the place. I would allow the appeal and quash the conviction**.** Given the time that has elapsed and the nature of the charge, the matter does not seem to me to warrant rehearing.

BLANCHARD J

[59] I agree that this matter proceeded at trial on an erroneous understanding of what constitutes offensive behaviour and that the conviction cannot stand. The public interest would not be served by ordering a new trial so long after the event for a matter which is obviously considered by the legislature to be minor offending carrying upon conviction a maximum penalty of a fine of $1,000 only.

[60] I write separately for two reasons. First, I may have contributed to the misunderstanding of the law by the Courts below by an aside in my reasons in *Brooker*,[88] a case about disorderly behaviour, which referred back to something I had said in *O'Brien*[89] many years ago. Secondly, although I would now modify the test I there suggested in one respect (relating to the need for a disturbance of public order), I otherwise continue to see it as satisfactory if properly understood and I hope now to clarify that understanding.

[61] *O'Brien* was a simple case of vulgar abuse of police officers (by giving them the fingers). There was no possibility of disturbance of public order. What occurred in *O'Brien* obviously, I thought, should not have attracted the attention of the criminal law. So a need for a public order dimension was not present to my mind. In hindsight, it was unfortunate that I referred to it in *Brooker* in a way which others have understandably read as taking the view that there is no need for a disturbance of public order where the charge is one of offensive behaviour. In saying in *Brooker* that disorderly behaviour is not necessarily offensive in the way I had described in *O'Brien*, I was in fact concerned only with pointing out that behaviour can be disorderly without being offensive in character. I had not turned my mind to whether behaviour of the character I identified in *O'Brien* could be offensive behaviour within s 4(1)(a) if public order was not disturbed. To that extent,

[88] *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [55].
[89] *O'Brien v Police* HC Auckland AP219/92, 12 October 1992.

mea culpa. I should confirm, however, that I do not resile from what I then proceeded to say in the balance of my reasons in *Brooker* about disorderly behaviour, especially in a New Zealand Bill of Rights Act 1990 context.

[62] I now accept that before behaviour can in any case be said to be offensive within s 4(1)(a) of the Summary Offences Act 1981 it must, as well as being of the character described in my test in *O'Brien*, have given rise to a disturbance of public order, either because the behaviour of the defendant has directly and substantially disturbed the normal functioning of life in the environs of the public place in question (in which case it would also be disorderly conduct) or because it has had the kind of indirect effect upon members of the public in those environs which Gleeson CJ describes in *Coleman v Power*.[90] He spoke of kinds of behaviour that in some circumstances might constitute a serious interference with public order, even where there was no intention, and no realistic possibility, that the affected person, or some third person, might respond in such a manner that a breach of the peace would occur.

[63] In such a case of an indirect effect, the behaviour is capable of being offensive behaviour within s 4(1)(a) without necessarily being disorderly behaviour. The two kinds of offending under s 4(1)(a), though they may well overlap in many instances, have their separate characteristics. But both require proof of a form of disturbance of public order.

[64] In *Brooker*, referencing what appeared in *O'Brien*, I said that offensive behaviour was behaviour in or within view of a public place which is liable to cause substantial offence to persons potentially exposed to it. I said that it must be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person *of the kind actually subjected to it* in the circumstances in which it occurs.[91] The portion of this formulation which I have italicised has been criticised as giving undue weight to the views of the affected persons. Therefore, it is said, it may lead to slippage back into the mind-set which gave rise to the "right-thinking person" standard which permeated New Zealand cases before the

---

[90] *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1 at [9].
[91] At [55] (emphasis added).

New Zealand Bill of Rights Act. But that would occur only if insufficient emphasis were given to the fact that the mind of the hypothetical person actually subjected to the behaviour is the mind of a *reasonable* person. A reasonable person, in a context involving freedom of expression or another right guaranteed by the New Zealand Bill of Rights Act, must surely be a person who is sensitive to such values and displays tolerance for the rights of the person whose behaviour is in question. In other words, the hypothetical reasonable person (of the kind affected) is one who takes a balanced, rights-sensitive view, conscious of the requirements of s 5 of that Act,[92] and therefore is not unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage, particularly when confronted by a protester.

[65] I should also respond to the criticism made by Glazebrook J in the Court of Appeal in this case[93] that the test of a reasonable person of the kind affected will break down if all the affected people are in reality likely to be unreasonable in their attitude, as might be expected, for example, when the conduct of a defendant who is a civil rights activist has aroused the anger of an audience of members of the Ku Klux Klan. I would have hoped, however, that my construct of a reasonable member of such an audience in such an extreme situation would be taken to be one who, regardless of his or her prejudices, is capable of exercising reasonable tolerance and self-control in the face of provocation from someone of a different persuasion.

[66] I continue to believe that the matter should be seen in terms of the reasonable affected person, which is an entirely objective test, because that is how, instinctively, a trial judge will actually approach it when confronted by the facts of a particular case. Cases of this kind are very fact specific. A test which does not appropriately factor in the nature of the actual audience is not realistic and does not seem to me to provide much help to those at the coal face. When a judge is asked to determine whether what has occurred has interfered to the requisite degree with the use of public space in particular circumstances, it seems to me that the judge must look at how a reasonable person affected by the behaviour would react and in doing so cannot ignore the collective nature of the persons who were present and affected. The reasonableness of the hypothetical person cannot be entirely divorced from

92 See *Brooker* at [59].
93 *Morse v R* [2009] NZCA 623, [2010] 2 NZLR 625 at [105].

those actually affected, however much that may appeal in theory. Tipping and McGrath JJ prefer in this connection to separate the objective test and its application. To the extent that my approach differs, it seems to me unlikely to produce a different result.

[67] In summary, I would define offensive behaviour as behaviour capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs, so that there is directly or indirectly (as discussed above) a disturbance of public order.

TIPPING J

[68] The central issue in this appeal concerns the meaning and application of the words "behaves in an offensive ... manner".[94] In considering the meaning of the crucial word "offensive", the Court should take into account its decisions in *Brooker v Police*[95] and *R v Hansen*.[96] The word offensive is capable of a continuum of meaning from the mild to the very serious. It is not in my view, in its statutory context, a word which has the potential for more than one distinct meaning.[97]

[69] I agree with the Chief Justice that the concept of offensiveness must be understood as involving a sufficient[98] disturbance of public order; but I do not agree that it carries the idea of conduct productive of disorder to the exclusion of ordinary notions of causing offence.[99] That would result in the word "offensive" having a materially different meaning from the words "offend" and "offended" in the same section. I consider it highly unlikely that Parliament meant to set up that distinction.

[70] For me the word "offensive", in context, means that to contravene s 4(1)(a) a person must behave in a manner that causes offence to those affected to such an

---

94 As found in s 4(1)(a) of the Summary Offences Act 1981.
95 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91. See in particular [59], [90]–[91] and [130]–[135].
96 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
97 Ibid, at [94].
98 See [71] below.
99 I agree with Blanchard and McGrath JJ as to what causing offence means in this context.

extent, or in such a manner, as disturbs public order. It cannot, however, be right that the unreasonable reactions of those who are affected by the behaviour can be invoked as indicative of a threat to public order. Hence those affected by the behaviour must be prepared to tolerate some degree of offence on account of the rights and freedoms being exercised by those responsible for the behaviour. It is only when the behaviour of those charged under s 4(1)(a) causes greater offence than those affected can be expected to tolerate that an offence under s 4(1)(a) will have been committed. And it is always necessary for the prosecution to demonstrate a sufficient disturbance of public order.

[71] In this context public order is sufficiently disturbed if the behaviour in question causes offence of such a kind or to such an extent that those affected are substantially inhibited in carrying out the purpose of their presence at the place where the impugned behaviour is taking place. Only if the effect of the behaviour reaches that level of interference with the activity in which those affected are engaged is it appropriate for the law to hold that their rights and interests should prevail over the right to freedom of expression of those whose behaviour is in contention. That is the appropriate touchstone.

[72] All relevant matters of time, place and circumstance must, however, be brought to account when applying the touchstone to the behaviour in question and thereby deciding whether the defendant's conduct is offensive in law. The application of the touchstone is contextual not abstract; but those affected are required, for the purpose of the necessary assessment, to be appropriately tolerant of the rights of others. Tolerance to the degree thought appropriate by the Court is the pivot on which the law reconciles the competing interests of public order and freedom of expression. A free and democratic society is justified in limiting freedom of expression at the point when public order is sufficiently disturbed.

[73] Essentially for the reasons given by the Chief Justice, I do not consider the Courts below applied the correct legal meaning to the concept of offensive behaviour. The crucial factor of impact on public order was absent from the analysis. Furthermore, certain evidence was admitted unchallenged. Had those involved appreciated the correct legal approach, that could not sensibly have

occurred. This feature of the proceeding in the District Court directly affected the general appeal to the High Court and indirectly the appeal to the Court of Appeal. In my opinion, therefore, the conviction entered against the appellant in the District Court cannot stand.

[74] The question becomes whether the case should be remitted to the District Court for rehearing on the correct legal basis or whether the conviction should simply be set aside without any further order. I favour the latter course. The proceedings have already been on foot for four years and have been heard by all four Courts in our hierarchy. It would, in these circumstances, be inappropriate to require the appellant to undergo a retrial. I would therefore allow the appeal and simply set aside the conviction.

McGRATH J

Introduction

[75] Each year in New Zealand 25 April is observed as Anzac Day. It is a day of national commemoration of those New Zealanders who died at war. Anzac Day also honours those who served overseas with the armed forces and returned. In many localities throughout New Zealand, commemorative activities on that day commence with a public service at dawn held at a local monument.

[76] Anzac Day is also an occasion when groups opposed to war exercise their democratic right to protest against government policies to deploy New Zealand's armed forces in overseas war zones. Such protests are often also directed at attitudes in the community perceived to be promoting or glorifying warfare. Protests are regularly held on Anzac Day in the vicinity of the same places in which the commemorative services are held.

[77] The context of this appeal is a protest held on Anzac Day 2007 in University grounds, across the road from the Cenotaph at Wellington, to coincide with the dawn service at that place. In the course of the protest, the appellant set alight a New Zealand flag. The District Court Judge found that this took place "in view of

and in the presence of members of the public who were in close proximity, and in attendance at the dawn service being celebrated on that occasion."[100] I infer from this finding that, while those closest to the event would have been immediate observers, many others in attendance would also have seen the flag alight. The appellant was immediately arrested, charged with offensive behaviour and was subsequently convicted of that offence. The issue in the appeal is whether her conduct in the circumstances in law amounted to the offence of offensive behaviour.

Background facts

[78] The Anzac Day dawn service in Wellington in 2007 was attended by some 5,000 people. They included former and current members of the armed forces, relations of those who had served at war, government officials and members of the general public, some of whom brought children.

[79] The appellant was one of between six to nine persons participating in the protest organised by a group known as Peace Action Wellington. The group had held protests at the Cenotaph on Anzac Day for the past five years. Previous protests had coincided with the 10:00 am service. Protestors laid wreaths and served free food.

[80] In 2007, Peace Action Wellington decided that its protest would be more effective in drawing attention to the continuing war in Afghanistan if it took place during the dawn ceremony. The appellant said in her evidence in the District Court that this was because the dawn ceremony was a more solemn event and more widely attended. Another protestor told the District Court that the protestors were there "to protest the nationalism and war mongering" that is associated with Anzac Day.

[81] The protestors assembled at dawn in a grassed area, across the road from the Cenotaph, forming part of the University's grounds. Their plan was to hand out leaflets and to disrupt the address to be given at the service by the first speaker, who was a former Secretary of Defence. Protestors would blow horns and burn the

[100] *Police v Morse* DC Wellington CRI-2007-085-2806, 23 November 2007 at [16].

New Zealand flag. Their broader purpose was to spark a more intensive political debate over the government policies deploying New Zealand forces overseas.

[82] The protest took place in accordance with the plan. As the official commenced speaking, two other protestors, one of whom was a Mr Rawnsley, blew loudly on horns. The result was that, at least in the vicinity of the University, the speaker could not be heard above the noise of protestors. At the same time, the appellant set alight a New Zealand flag which she was holding on a pole. This was in the sight of those gathered for the service, some of whom were in close proximity.[101] A police officer who saw her immediately intervened, throwing the burning flag to the ground. He arrested the appellant for offensive behaviour. Mr Rawnsley who had blown a horn, was also arrested following a brief altercation and later charged with resisting arrest.

Lower Court proceedings

[83] The appellant was charged in the District Court with offensive behaviour under s 4(1)(a) of the Summary Offences Act 1981. She pleaded not guilty. Evidence was given at the hearing of the reactions of persons present at the service to the appellant's actions. One witness said he had found the incident disturbing and "really offensive" because the service was a commemoration of sacrifice, not a celebration of war. He had taken his seven year old son and described him as "spooked" by the appellant's actions. Another witness was shocked and outraged that someone would burn the national flag at such a solemn event, describing the flag as "something that was dear to the hearts of people there that day". Other witnesses referred to the disturbance caused by the appellant's behaviour. One said that the protestors were lucky that they were on the other side of the fence and that the police were present. Otherwise, he thought, the crowd would have hurt them. Another witness saw a member of the public punch a protestor after the flag burning incident. This evidence was not the subject of cross-examination, nor otherwise contradicted, a matter I discuss later. The defence case was that the appellant had the right to protest in the manner she did despite these reactions.

[101] The District Court Judge's finding in *Morse* at [16].

[84] A police officer who gave evidence at the hearing said he was concerned at a likely breach of the peace resulting from the flag burning. Another said that several dozen members of the public who were in the vicinity of the protestors had become agitated and angry. The District Court Judge found that the police were concerned over a likely breach of the peace and that they had to act quickly given the nature, timing and circumstances of the incident.[102] Both the appellant and the other protestor were convicted on the charges they faced. Those convictions were upheld in the High Court.[103] The appellant's further appeal to the Court of Appeal was dismissed by a majority.[104]

Offensive behaviour provisions

[85] I commence with the provision creating the offence in the Summary Offences Act. The appellant was convicted of the offence of behaving in an offensive manner in a public place under s 4(1)(a) of that Act. Section 4(1) provides:

> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
>
> (b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
>
> (c) In or within hearing of a public place,—
>
> (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or
>
> (ii) Addresses any indecent or obscene words to any person.

[86] Section 4 is one of a group of sections headed "Offences Against Public Order" in the Act. Section 4(1)(a) is directed at offensive or disorderly behaviour, while s 4(1)(b) and (c) are directed at addressing or using words. The character of proscribed language is expressed differently and more precisely in s 4(1)(b) and (c)

---

102 At [12].
103 *Morse v Police* HC Wellington CRI-2007-485-153, 29 May 2008.
104 *Morse v R* [2009] NZCA 623, [2010] 2 NZLR 625.

than the broad expression of proscribed behaviour in s 4(1)(a). An offence under s 4(1)(a) must be committed in or within view of a public place. It is not disputed in this appeal that that requirement is met. The maximum penalty for an offence against s 4(1) is a fine of $1,000.

[87] In ascertaining the meaning of s 4(1)(a), the other provision in the 1981 Act directed at offensive behaviour provides contextual assistance. Section 3 reads:

> **3 Disorderly behaviour**
>
> Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.

[88] Section 3 also applies to behaviour in or within view of a public place. It is concerned solely with behaviour but includes inciting or encouraging behaviour of others. It is not concerned with offending by use of words. The section encompasses a wider scope of characteristics of offending behaviour than s 4(1)(a). These include riotous, offensive, threatening, insulting or disorderly behaviour, but an offence under s 3 is committed only in circumstances where such behaviour is likely to lead to violence against persons or property. The effect is to introduce an element akin to causing a breach of the peace in describing the standard of conduct that breaches the law. The section is clearly concerned only with behaviour of a more serious kind than s 4 addresses. Consequently, s 3 creates a significantly more serious offence. It carries a penalty of up to three months' imprisonment, or a fine of up to $2,000.[105]

Statutory history

[89] The statutory history of ss 3 and 4 offer further contextual assistance in interpreting s 4(1)(a). Since 1869 New Zealand statute law has had a broadly

[105] When introducing the Summary Offences Bill in 1981 the Minister of Justice contrasted ss 3 and 4, describing s 4 as "a minor offence of disorderly or offensive behaviour punishable only by a fine". See (16 June 1981) 437 NZPD 418.

expressed provision regulating speech and conduct in public places. The Vagrant Act 1866 Amendment Act 1869 made it an offence to use:[106]

> ... threatening abusive or insulting words or behaviour in any public street thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned ...

[90] In 1924, amending legislation omitted from the offence provision the element of a breach of the peace.[107] As well, the characteristics of offending conduct were broadened. "Disorderly", "riotous" and "offensive" behaviour were added. Speech was dealt with separately. The 1924 amending legislation accordingly made liable a person who in the stipulated public place:[108]

> ... behaves in a riotous, offensive, threatening, insulting or disorderly manner, or uses any threatening, abusive or insulting words or strikes or fights with any other person.

[91] The Police Offences Act 1927 was a consolidating statute. The relevant provision was not amended until 1960, when striking or fighting was removed[109] and addressed in a separate section which carried a higher maximum penalty.[110] Passages in Hansard confirm that this was to address perceived contemporary problems with "hooliganism" and "juvenile delinquency".[111]

[92] The 1960 amendments also gave the police a power to arrest without warrant those who had committed, or where there was good cause to suspect they had committed, an offence under s 3D.[112] The effect of this new provision was to facilitate control of protesting conduct by the police.[113] The Police Offences Act 1927 was repealed and replaced by the Summary Offences Act. Sections 3 and 4 are the current relevant provisions in that Act.

[93] The statutory history confirms what the context of ss 3 and 4 has indicated in relation to the meaning of s 4(1). Since 1924, Parliament has described separately

---

106 Section 4 of the Vagrant Act 1866 Amendment Act 1869.
107 Section 2 of the Police Offences Amendment Act 1924.
108 Section 3(ee) of the Police Offences Act 1908 (as amended in 1924).
109 Section 3D of the Police Offences Act 1927 (as amended in 1960).
110 Section 3B of the Police Offences Act 1927 (as amended in 1960).
111 (20-21 October 1960) 325 NZPD 3179–3198.
112 Section 2(1) of the Police Offences Amendment Act (No 2) 1960.
113 K J Keith "The Right to Protest" in K J Keith (ed) *Essays on Human Rights* (Sweet & Maxwell (NZ) Ltd, Wellington, 1968) 49 at 62.

the sorts of behaviour and speech it is prohibiting in public places. It has thereby brought some precision to an area of statute law in which offences have traditionally been expressed in broad terms. This pattern of separate prescription of the characteristics of conduct and speech that give rise to offences was judicially recognised in 1965:[114]

> Originally it was only behaviour that was threatening or abusive or insulting that was punishable and the use only of threatening, abusive or insulting words. As time went on the categories of behaviour were increased to include also (as are now included) riotous, offensive or disorderly behaviour; but the Legislature never altered the categories of words the use of which was punishable. They remained throughout threatening, abusive or insulting words. If Parliament had intended that the use of offensive words should be made punishable it would surely have said so. The fact that the Legislature refrained from increasing the categories of words when it expressly increased the categories of behaviour is in my view of the utmost significance and clearly shows that in the context of s. 3D (1) it did not regard the use of words as being within the concept of behaviour.

[94] It follows that the characteristics of conduct and speech that give rise to the offence of disorderly behaviour and other offences under ss 3 and 4(1) and 4(2) have been carefully chosen. The term "offensive behaviour" in s 4(1)(a) accordingly is not to be read as synonymous for other specific characteristics that give rise to an offence in relation to use of words but not behaviour.

[95] The statutory history also indicates that Parliament at various times has recognised degrees of gravity in the public order offences and provided accordingly in legislation. Section 4(1) offences are less serious than those under s 3. In particular, they proscribe behaviour of a kind that may not necessarily lead to violence against persons or property.

Court decisions on offensive behaviour

[96] I turn now to the meaning that the courts have given to language in New Zealand and Australian statutes creating the offence of offensive behaviour. The omission of any requirement related to potential violence means that s 4(1)(a) is

---

[114] In *MacDonald v Police* [1965] NZLR 733 (HC) at 735–736 per Barrowclough CJ. See also T J McBride "The Policeman's Friend: s 3D of the Police Offences Act 1927" (1971) 6 VUWLR 31 at 33.

expressed very broadly on its literal meaning: "behaves in an offensive or disorderly manner". But the courts have long recognised that the text of broadly expressed provisions in statutes prohibiting offensive conduct must be read as requiring a considerable degree of offensiveness in the impact of the conduct. The offensive impact must be sufficient to warrant application of the criminal law. This is irrespective of whether or not the conduct is politically motivated.

[97] The ordinary meaning given by the courts to "behaves in an offensive manner" in the context of summary offence provisions reflects this approach. In 1951 the Supreme Court of Victoria in the context of a political protest held that the words "behaves in an offensive manner" in the Police Offences Act 1928 (Vic) required that for behaviour to be offensive it: [115]

> [M]ust ... be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.

[98] That meaning came to be commonly applied in Australia. In 1966 in *Ball v McIntyre*,[116] the Supreme Court of the Australian Capital Territory applied it in the context of a demonstration against the Vietnam war. Kerr J referred to the word "offensive" in the public order context as carrying "the idea of behaviour likely to arouse significant emotional reaction".[117] This reaction had to be more than the mere consequence of a different position or political issue.[118] In relation to the objective aspect Kerr J said:[119]

> I recognize that different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that a so-called reasonable man is reasonably tolerant and understanding, and reasonably contemporary in his reactions.

[99] The Australian meaning was adopted in New Zealand by the High Court in 1991 in relation to offensive behaviour under s 4(1)(a) in *Ceramalus v Police*.[120]

---

115 *Worcester v Smith* [1951] VLR 316 (SC) at 318 per O'Bryan J.
116 *Ball v McIntyre* (1966) 9 FLR 237 (ACTSC).
117 At 243.
118 At 244. In *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1 Gleeson CJ referred favourably to this approach at [13].
119 At 245.
120 *Ceramalus v Police* (1991) 7 CRNZ 678 (HC) at 683 per Tompkins J.

The following year, in *O'Brien v Police*,[121] the High Court pointed out the significance of the reactions of those affected by the behaviour. Blanchard J expressed the test reflected in the earlier decisions as follows:[122]

> ... legally offensive behaviour by a defendant is behaviour in or within view of a public place which would be considered by an ordinary and reasonable New Zealander to be such as would in its context wound the feelings of, or arouse real anger or resentment or disgust or outrage in the mind of the type of person actually subjected to it. So, if the "victim" is an elderly person or someone else obviously more susceptible of being wounded in their feelings or angered, made resentful, disgusted or outraged, a less tolerant attitude will be taken. The fact that such a reaction by the "victim" may not have been intended will not prevent the defendant's behaviour from being offensive, though it is a factor to be taken into account.

[100] The need to recognise the nature and characteristics of those who are affected by the behaviour in question is important. But it is in *applying* the standard to ascertain whether behaviour is offensive that all relevant matters of time, place and circumstance are to be taken into account. The characteristics of those actually subjected to the behaviour in issue are part of those circumstances. As Blanchard J points out, taking the nature of those present and their actual reactions into account in applying the standard is necessary if the assessment of the behaviour is to be realistic. This accommodation of the subjective element in applying the standard does not detract from its objective nature as a means of evaluating the person's behaviour.

[101] The Australian meaning is also consistent with s 4 being one of the "Offences Against Public Order".[123] This context indicates the public order purpose of s 4, which is to protect reasonable community expectations of enjoyment of tranquillity and security from unduly disruptive behaviour in public places. Whether conduct sufficiently interferes with such expectations of being free of disturbances from disruptive behaviour in a public place to require application of the criminal law is a question of fact which turns on what McLachlin J has described as:[124]

---

121 *O'Brien v Police* HC Auckland AP 219/92, 12 October 1992 per Blanchard J.

122 These observations in *O'Brien* were endorsed in similar terms by Blanchard J in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [55].

123 The heading to ss 3–8 of the Summary Offences Act.

124 *R v Lohnes* [1992] 1 SCR 167 at 175.

> ... the degree and intensity of the activity complained of, and on the degree and nature of the "peace" which should be expected to prevail in the particular public place at the particular time.

[102] While I am of the view that whether behaviour is offensive is to be ascertained having regard to the statutory public order purpose, I agree with Tipping J that the offence does not carry the idea of conduct productive of disorder to the exclusion of ordinary notions of causing offence. Nothing in the context or statutory history suggests otherwise.

[103] It is for the court in each case to decide whether, in the circumstances, the intensity of proved offensive aspects of the defendant's behaviour amounts to interference with the use by others of the public place to the extent that the conduct should be classed as offensive behaviour in terms of s 4(1)(a). To amount to the offence it must involve a serious interference with the standards reflected in those community expectations. That degree of interference must go beyond what a society respectful of democratic values is reasonably expected to tolerate.[125] Section 4(1)(a) must be applied accordingly and I turn to that question.

Was the degree of interference tolerable?

[104] The conduct of the appellant, which resulted in her conviction on a charge of offensive behaviour, consisted of burning a flag in the course of a group protest. Her actions were clearly behaviour in a public place in terms of s 4(1)(a). Whether the appellant's behaviour was offensive turns on an objective assessment of whether its effect was offensive to a degree that was intolerable.

[105] Burning the national flag in the course of a protest is expressive conduct, which is protected by the right to freedom of expression affirmed by s 14 of the New Zealand Bill of Rights Act 1990. The facts of this case accordingly raise the further question of whether the ordinary meaning of offensive behaviour under s 4(1)(a) of the Summary Offences Act is consistent with the appellant's right to freedom of expression. If it is, the ordinary meaning applies. If it is not, under s 6 of the Bill of Rights Act, it will become necessary to consider whether there is an

[125] *Brooker* at [89] per Tipping J and at [120] and [146] per McGrath J.

alternative meaning available for the language of s 4(1)(a) which is consistent with the Bill of Rights Act. If such a meaning is available, s 6 requires that it be preferred.

[106] It must be borne in mind that under s 5 of the Bill of Rights Act, all rights and freedoms may be made subject to such reasonable limits prescribed by law as can be justified in a free and democratic society. In order to be such a limit on freedom of expression, proscribed offensive behaviour must be confined to sufficiently serious and reprehensible interferences with rights of others. Such conduct is objectively intolerable. The court's analysis must assess the impact of the exercise of the right in the circumstances, as well as the importance of other interests affected. Consideration must also be given to whether there are other methods of addressing the conflict with free speech rights than the offence provision in question or its ordinary meaning.

[107] To this end, a balancing of the conflicting interests must be undertaken by the court as a basis for reaching a reasoned conclusion on whether the summary offence of offensive behaviour is a justified limitation on freedom of speech.[126]

[108] On the one hand, the right to freedom of expression arises in this case in the course of the appellant's participation in a protest. Protests against war are often directed at the political policies and decisions which have led to the government's deployment of armed forces in overseas conflicts but, as already recognised, may also be directed against attitudes in the community seen as promoting or glorifying war. The Anzac Day protest was directed at both concerns, although the timing of the appellant's actions, in conjunction with creating noise to disrupt the speaker, who had been Secretary of Defence, suggests a particular focus in the protest on governmental actions. Protest against government policies is an aspect of freedom of speech which is of particular importance in our society, as is the right to protest in an effective way. It is legitimate for those wishing to protest to make choices based on time, place and circumstance as to the most effective manner of doing so.

---

[126] As decided in *Brooker v Police* at [59], [90]–[91], [130]–[135] and [274]–[277]. This is recognised by the Court of Appeal in *Morse* at [23]–[25].

[109] The appellant obviously regarded her actions, in conjunction with those of the other protestors, as the most effective way of conveying their message to the government, media and members of the public present and at large. The appellant's part in this activity was to ignite the flag but the impact of her conduct must be weighed in that wider context.

[110] On the other hand, members of the public are entitled to enjoy tranquillity and security in public places. They also enjoy rights protected by the Bill of Rights Act, in particular, the right to freedom of peaceful assembly.[127] That right, which is usually claimed by those engaged in political protest, complements other civil rights under the Bill of Rights Act, including freedom of expression. Freedom of assembly is not limited to gatherings for the purpose of protest. It extends to formal and informal assemblies in participation in community life.[128] Gatherings for purposes that are ostensibly less political are also important to citizens for forming opinions and, ultimately, for participating in the democratic process.[129]

[111] The time and place chosen by those organising the protest, and by the appellant to burn the national flag, coincided with the Anzac Day dawn service at the Cenotaph. This is the time and place of the main annual public commemoration in Wellington of those who, while serving in the New Zealand armed forces, died at war. It is a solemn public occasion at which those participating have a special desire to enjoy the values of tranquillity and security against disruptive behaviour. They also have a protected right to assemble for the commemorative purpose, although that must be reconciled with the appellant's rights.

[112] The appellant set alight the flag in the course of a protest which had, until that point, been unremarkable. Demonstrators were communicating their anti-war message by holding placards and handing out pamphlets. At the point when the principal speaker at the service was commencing his address, protestors blew on horns and in that context the appellant lit the flag.

---

[127] Section 16 of the New Zealand Bill of Rights Act 1990.

[128] Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 348.

[129] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2005) at 445.

[113] The impact of her conduct on those gathered for a commemorative purpose in the public place is relevant in deciding whether it amounts to objectively offensive behaviour. The Courts below decided that persons present at the service experienced emotional reactions to the appellant's conduct that demonstrated that they found it offensive. For those persons, the solemnity of the service of commemoration, part of which was the address by the guest speaker, was seriously disrupted. For them also, the national flag was symbolic of those who had died and their sacrifice. One person present felt shocked and outraged that someone would burn the flag at such a solemn event and thought it outrageous to act in that way, targeting a symbol so dear to those present for the occasion. Some of those present at the service were accompanied by their children, one of whom, aged seven years, was "spooked" by the appellant's actions, which I take to mean he was frightened. Others were angry and disturbed by them, in particular, because of when and where they occurred. One witness, however, thought the behaviour was merely childish and poor public relations. Overall, these reactions were of a nature and intensity that indicate that the persons present who gave evidence found the appellant's behaviour offensive in the ordinary sense.

[114] Those gathered for the services were assembling for an annual occasion. As it was neither practical nor realistic to expect them to gather for their purpose at a different time or place, they could not avoid receiving the appellant's message. Conversely, it was open to the appellant and others to protest in the way they did at a time and place that did not disrupt the solemnity of and enjoyment of the dawn service by those gathered for that purpose. That would not, of course, have achieved the impact for their protest that they sought. But protesting in the manner that the appellant did on a different occasion was a practicable method of demonstration that would not give offence to the public to anywhere near the same degree.

[115] The District Court Judge held that burning the New Zealand flag in the circumstances was an act capable of evoking wounded feelings, real anger, resentment and outrage. He concluded that the appellant's action in burning the flag constituted offensive behaviour and that, in the balancing exercise, it was not protected by the Bill of Rights Act. It was clear that numerous persons were strongly offended to the extent that the appellant's actions on the day had wounded

their feelings and aroused anger, resentment, disgust and outrage in their minds. The flag was not alight for long but a significant number of those present saw that it had clearly been set alight and it was that event, in the context of the occasion, which caused them offence.[130]

[116] In the High Court, Miller J upheld the District Court Judge's decision. He considered that the issue was whether a reasonable person would think the behaviour offensive in that it would wound feelings or arouse real anger, resentment, disgust or outrage. Miller J decided that the views expressed by the witnesses concerning the appellant's conduct were reasonable. He agreed with the District Court Judge's conclusion that it involved offensive behaviour. In reaching that conclusion, the Judge had balanced the competing interests appropriately. While the protest was genuinely directed at political decisions, in burning the flag as part of the protestors' strategy the appellant went too far.

[117] These decisions demonstrate that the appellant's behaviour was capable of being offensive in the general sense. However, in order for s 4(1)(a) to be a justified limitation on rights affirmed in the Bill of Rights Act, the conduct must interfere with the use of a public place by others to an extent that goes beyond what a democratic society is expected to tolerate. Therefore, the effect of the appellant's actions on public order must also be assessed. A constable may arrest and take into custody "[a]ny person whom he finds disturbing the public peace".[131] The statutory provision giving that authority is the successor of that first enacted in 1960. This power is given to enable the police to maintain control in public places. Care is required by the police when exercising this power in the context of behaviour during a protest. It must be reasonable to terminate the arrested person's participation in the protest having regard to the statutory test of requirement of a disturbance of the public peace. The courts, however, must at the same time recognise that the police have both a power and a duty to bring under control disturbances to the public peace. On the other hand, a court must always scrutinise the circumstances carefully in considering whether an arrest which ends participation in a protest is justified.

---

130 At [23]–[25].
131 Section 315(2)(a) of the Crimes Act 1961. See also s 42(2) of that Act.

[118] In the present case, it was the setting alight of the flag in full public view and the impact that had on the audience which gave rise to a situation which the District Court Judge concluded was one requiring the police to act. The Judge accepted the evidence of the officer who arrested Mr Rawnsley that he had intervened because he perceived a need to bring the situation under control. The evidence of the officer who arrested the appellant was that, at the time of her arrest, several dozen people in the vicinity of the University building were agitated and angry with the protestors. The Judge also found that the officers who dealt with the appellant and Mr Rawnsley had to act quickly given the nature, timing and circumstances of the protest. The actions of the appellant said to give rise to offensive behaviour were completed once the audience observed that the appellant was burning the flag and had reacted to that circumstance. At that point the evidence I have discussed indicates a situation existed potentially involving a disturbance of the public order. The short duration of the behaviour concerned was due to the police intervention. It cannot bear strongly on whether or not it was offensive in terms of s 4(1)(a).

[119] The manner in which the proceedings in the District Court were conducted, however, must now be addressed. Because of the way that the parties conducted the case in the District Court, the Judge did not directly address the effect that the appellant's conduct had on public order. The Judge accordingly determined that the appellant's behaviour was "offensive" in terms of s 4(1)(a) without regard to that question. The appellant's defence centred on freedom of expression, particularly political speech, protected and affirmed by s 14 of the Bill of Rights Act which, she argued, prevailed over s 4(1)(a). As a result, the proceedings in the District Court and High Court were framed as a clash between freedom of expression and the rights of those assembled at the dawn service, without regard being had to the necessary public order dimension. Likewise, in the Court of Appeal, Arnold J, who delivered the principal majority judgment, made a finding based on the evidence that, even though it was not required to establish "offensive behaviour" under s 4(1)(a), the appellant's conduct did have a tendency to disrupt public order.[132] For the reasons I have given, and which are closely similar to those given by Blanchard and

[132] At [43].

Tipping JJ, I consider this is an erroneous view of what is required to establish offensive behaviour under s 4. As a result of the approach taken, most of the evidence against the appellant was never the subject of cross-examination. While the appellant was given the opportunity to challenge the evidence in terms of witnesses' views about the offensiveness of the conduct in the ordinary sense, she was not given a similar opportunity in relation to what they said concerning public order. The appellant did not contest the contents of the evidence in general. I have concluded that it may not be safe to rely on it as proof of a state of affairs that was not in issue when it was presented. Therefore, I concede that had the correct test been adopted by the District Court, it is likely that the appellant's defence at the hearing would have been conducted differently, with the evidence concerning disorder which I have discussed subject to challenge by cross-examination. In the circumstances it would be unfair to the appellant to rely on that evidence.

[120] Accordingly I would allow the appeal against conviction.

ANDERSON J

[121] Expressive behaviour may comprise only words, oral or written (verbal expression), or it may be wholly or partly non-verbal (behavioural expression).

[122] Section 4(1)(b) and (c) and section 4(2) of the Summary Offences Act 1981 proscribe verbal expression in a public place, or, in the case of certain words, within hearing of a public place, if specified features occur such as intent to threaten, alarm, insult or offend; if the words are actually threatening or insulting and are addressed recklessly as to whether another person is alarmed or insulted; or if the words are indecent or obscene.

[123] In my opinion there is no logical reason why a behavioural expression which does not have those same specified features should be regarded as proscribed by s 4(1)(a). That is to say, behavioural expression that is not intended to threaten, alarm, insult or offend, and is not actually insulting or offensive, nor indecent or obscene, should not be held criminal merely because it wounds another's feelings, even grievously.

[124] I agree with the other members of the Court that behaviour that is proscribed by s 4 must be such as has a bearing on public order. The section falls within that part of the Act concerned with public order in respect of conduct in public spaces. Whilst it might be apprehended that it does go to the question of public order if a person using a public place is deliberately insulted by another, freedom of expression, both verbal and behavioural, is protected by s 14 of the New Zealand Bill of Rights Act 1990. So s 4 of the Summary Offences Act must be interpreted in light of ss 5, 6, and 14 of the New Zealand Bill of Rights Act, notwithstanding that in ordinary speech insulting or offensive language is language which reasonably does or would be expected to wound feelings. Further, reference in s 4 to threatening and alarming persons indicates that the legislation is concerned with public circumstances of more significance than courtesies or private upset. This view is reinforced by the legislative antecedents of s 4, as discussed in the Chief Justice's reasons.

[125] Expressive or other behaviour bearing on public order in various ways is captured by a number of the provisions of the Summary Offences Act: for example s 3 (behaviour likely to cause violence against persons or property); s 5A (disorderly assembly); s 7 (fighting); ss 12 and 13 (acts or things endangering safety); and the various offences resembling nuisance described in ss 32 to 38, including, perhaps relevantly in a case similar to the present, s 37 (unreasonably disrupting a meeting, congregation or audience). Therefore s 4(1)(a) must be intended to prohibit behaviour which differs either in nature or degree from such behaviours as those.

[126] In respect of one's behaviour in a public place, public order may be affected in two broad ways depending on the circumstances, which must include what others, present and acting complicitly, are doing. I make that observation because I think it was too narrow an approach by the prosecutor to focus on the conduct regarding the flag instead of taking into account the overall conduct of the protestors and the nature of the Anzac Day commemoration and congregation.

[127] First, behaviour in a public place, viewed objectively, may have a reasonable propensity or likelihood to dissuade others from enjoying their right to use that place, whether by entering it or remaining in it. This is an interference with

another's legal right to enjoy a public amenity. Second, although not necessarily dissuading others from entering or remaining in that place, viewed objectively, it may have a reasonable propensity or likelihood to cause violence against persons or property to start or continue. Sometimes the behaviour may affect some in the first way and/or some in the second. It is the propensity or likelihood in the particular circumstances which is crucial.

[128] Having regard to these various matters I am of the opinion that for behavioural or verbal expression to be an offence by virtue of s 4(1) or (2) of the Summary Offences Act it must have the public order propensity or likelihood noted first in [127], or a propensity, albeit less than likelihood (because that is captured by ss 3 and 5A) noted second above.

[129] If, for example, a disruption to a meeting or congregation, whether or not in commemoration of Anzac Day, had either or both of the effects discussed in [127], s 37 might be inappropriate because of the nature and/or degree of the disruptive behaviour. In the circumstances, it may have gone beyond mere disruption and affected public order so that ss 3, 4, or 5A could properly be invoked.

[130] As do the other members of the Court, I am of the view that the trial was not guided by correct legal principles and I would allow the appeal. I think a retrial is inappropriate in this case.

Solicitors:
Crown Law Office, Wellington for Respondent