MULHALL -v- BARKER [2010] WASC 359 (7 December 2010)

Last Updated: 8 December 2010

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CRIMINAL

CITATION : MULHALL -v- BARKER [2010] WASC 359

CORAM : HALL J

HEARD : 11 NOVEMBER 2010

DELIVERED : 7 DECEMBER 2010

FILE NO/S : SJA 1079 of 2010

BETWEEN : AARON GREGORY MULHALL

Appellant

AND

SIMON CHARLES BARKER

Respondent

ON APPEAL FROM:

Jurisdiction : MAGISTRATES COURT OF WESTERN AUSTRALIA

Coram : MAGISTRATE K M TAVENER

File No : PE 25214 of 2010

Catchwords:
Criminal law - Racial harassment - Engaging in conduct likely to harass - Defence of acting reasonably and in good faith - Section 80G Criminal Code - Whether prosecution bears onus of disproving defence - Whether an exception to liability - Accused bears onus of proving defence in s 80G on balance of probabilities

Legislation:
Criminal Code (WA), s 26, s 27, s 80A, s 80B, s 80G, s 215, s 321
Interpretation Act 1984 (WA), s 18, s 19
Misuse of Drugs Act 1981 (WA), s 8A, s 37

Result:
Appeal allowed
Acquittal set aside
Matter remitted to Magistrates Court

Category: A

Representation:

Counsel:

Appellant : Ms S H Linton

Respondent : Mr T F Percy QC & Mr S Nigam

Solicitors:

Appellant : Director of Public Prosecutions (WA)

Respondent : S C Nigam & Co

Case(s) referred to in judgment(s):

Beckwith v The Queen (1976) 135 CLR 569

Bropho v Human Rights and Equal Opportunity Commission [2004] FCAFC 16; (2004) 135 FCR 105

Director of Public Prosecutions (WA) v GTR [2008] WASCA 187; (2008) 38 WAR 307

Director of Public Prosecutions v United Telecasters Sydney Ltd [1990] HCA 5; (1990) 168 CLR 594

Dowling v Bowie [1952] HCA 63; (1952) 86 CLR 136

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

HALL J:

Introduction

1 On 5 July 2010 the respondent, Mr Simon Barker, appeared in the Perth Magistrates Court on a charge of engaging in conduct, otherwise than in private, likely to harass a racial group contrary to s 80B of the *Criminal Code* (WA) (the Code). Mr Barker entered a plea of not guilty and the matter proceeded to hearing.

2 The facts were not in substantial dispute. It was alleged that between 1 March and 21 September 2009 Mr Barker had been responsible for the production of a music video film clip (video clip). The video clip was a visual representation of a song entitled 'My Name is Flabba, Babba, Wabba, Jabba, Nyoongah'. The song was a setting of different lyrics to music originally performed by a well known rap artist. The video clip depicted two males wearing dark face paint and black wigs engaging in various unlawful activities and being pursued by other men dressed as police officers. The video clip had been made available by Mr Barker to the general public on the internet.

3 At the trial on 5 July 2010 the prosecution called the investigating officer who produced a copy of the video clip and a transcript of the lyrics. A search warrant video was also produced. Mr Barker elected to give evidence on his own behalf and also called three character witnesses.

4 There was no dispute that Mr Barker had produced the video clip and uploaded it onto the internet. The issues at trial were whether the conduct was likely to harass a racial group and whether the respondent had a lawful excuse pursuant to s 80G of the Code.

5 At the conclusion of the trial the magistrate reserved his decision. On 12 July 2010 the magistrate delivered his decision and gave oral reasons. His Honour acquitted Mr Barker of the charge. The prosecution now appeals against that acquittal on the basis that it is said that the magistrate made an error of law.

Magistrate's reasons

6 The magistrate commenced his reasons by noting that the relevant provisions of the Code in question had not been previously considered by a court. His Honour noted that ch XI of the Code provided for offences ranging from conduct intended to incite racial animosity through to conduct likely to racially harass people. His Honour made reference to the Second Reading speech of the Criminal Code Amendment (Racial Vilification) Bill 2004, which introduced the relevant provisions into the Code. His Honour referred to the legislation as seeking to find a balance between providing protection from vilification on the basis of race with the need to not constrain free speech.

7 Having referred to the content of the video clip, the magistrate noted that Mr Barker had given evidence that the video clip was intended to be humorous and to draw attention to social issues that Aboriginal people face. His Honour said that he was not persuaded that the video clip sought to critically address issues such as drug use, alcoholism and other matters. He did, however, accept Mr Barker's testimony that he saw it as a business opportunity and that the video clip was, to a degree, a parody.

8 His Honour then stated that the charge required only that the court be satisfied that the conduct was likely to harass a racial group; in this case people of Aboriginal descent. He identified the key issue as being whether the material was likely to harass. His Honour noted that 'to harass' is defined in s 76 of the Code to include 'to threaten, to seriously and substantially abuse or to severely ridicule'. His Honour then said:

Watching the video without further explanation one could form the view it is likely to severely ridicule a racial group. That is simply sitting down, seeing it for the first time as it was played in court, looking at the words that were used, looking at the actions of the players, that is the people depicted in the video.

An Aboriginal person, as I've mentioned, not being aware of the nature of the video, or that it was intended to be a parody, would probably be offended. However, I come back to the position that no-one was actually offended, or there's certainly no evidence of that. I also note that the legislation does not qualify the word 'likely', as it says, 'likely to harass' with such words as 'reasonable'. It's simply 'likely to harass'. The test is still an objective one unaffected by the intentions of the person doing the act.

The concept of likely to offend is somewhat elastic. That, again, depends on one's point of view. However, this particular video simply has words that are offensive, and I understand Mr Barker initially took the view, when he heard the words, that they were offensive, but he intended to make a parody of the words by the act of filming it in the manner in which he did.

Under the legislation defences are provided by way of section 80G. *The prosecution must negate the offences that are stated. In particular they must negate that the accused's conduct was engaged in reasonably, and in good faith, in the performance, exhibition or distribution of an artistic work. The act speaks in terms of a defence being proved by way of balance of probability, or at least an evidentiary burden which then must be negated.*

In any event I take the view that the prosecution must negate the defence that's provided for under section 80G. Here the defence is primarily, if not solely, raised by the testimony of Mr Barker. As to whether this video is an artistic work that too is not an absolute consideration, rather it's an elastic concept, but it must involve the application of skill and the use of human imagination. Mr Barker is a professional filmmaker, and I accept that his submissions that the

video had production qualities that at least another filmmaker would appreciate. So it is an artistic work for the purposes of the legislation.

In this case, and as I've said, an objective observer sitting down and watching that video for the first time, and in particular a member of a racial group, namely, people of Aboriginal descent, in my view would be offended. However, that fact alone does not constitute a want of reasonableness or a lack of good faith. I emphasise that Mr Barker did not produce the video for racist purposes, or in a way that associated with racist purposes. Had he done so he would have been seen to be not to be acting reasonably and not in good faith.

So one of the matters to take into account in considering those two matters of reasonableness and good faith, is the purpose for which the video was produced. I accept, as I have said, that Mr Barker produced it for a number of reasons. To use his words, 'A parody of the words of a song.' To parody the content of the song and, at the same time, raise those issues of the difficulties faced by Aboriginal people (ts 4 - 5). (emphasis added)

Ground of appeal

9 There is one ground of appeal:

The learned magistrate erred in law in concluding that, once the defence was raised pursuant to s 80G of the Criminal Code 1913 (WA), the onus rested upon the prosecution to negate the defence beyond reasonable doubt rather than upon the accused to establish on the balance of probabilities.

10 Leave to appeal was granted by Jenkins J on 20 August 2010.

Chapter XI of the Criminal Code

11 **Chapter XI** as a chapter dealing with racial harassment and incitement to racial hatred was first inserted by s 3 of the *Criminal Code Amendment (Racial Harassment and Incitement to Racial Hatred) Act 1990* (WA). Further amendments, including the introduction of the provisions which are at issue in this case occurred in 2004.

12 In the present case Mr Barker was charged with an offence under s 80B, which reads as follows:

80B. Conduct likely to racially harass

Any person who engages in any conduct, otherwise than in private, that is likely to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of $12 000.

13 **Chapter XI** contains a number of other offences relating to conduct or possession of material which is either intended to, or likely to, incite racial animosity or racially harass. Relevantly, s 80A is in similar terms to s 80B other than it creates an offence of engaging in conduct by which a person intends to harass a racial group (rather than it merely being likely

that the conduct would harass a racial group). The intentional offence under s 80A, as might be expected, carries a significantly higher maximum penalty.

14 Section 80B appears to be a strict liability offence. Liability would be established on proof that a person engaged in conduct that was objectively likely to harass a racial group. There is no requirement that the prosecution prove that any such harassment was intended. If harassment was intended then the more serious s 80A offence would be committed. It is readily apparent that s 80B was intended to impose liability for conduct that was likely to harass even though this result was not intended.

15 Section 80G(1) provides for a defence to a charge under s 80B and reads as follows:

80G. Defences

(1) It is a defence to a charge under section 78 or 80B to prove that the accused person's conduct was engaged in reasonably and in good faith -

(a) in the performance, exhibition or distribution of an artistic work;

(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for -

(i) any genuine academic, artistic, religious or scientific purpose; or

(ii) any purpose that is in the public interest;

or

(c) in making or publishing a fair and accurate report or analysis of any event or matter of public interest.

16 The fact that the defence is contained in a separate and distinct provision suggests that absent proof of the matters referred to in s 80G(1) and assuming the elements of s 80B are otherwise proven, an offence would be established. The use of the words 'to prove' in s 80G(1) clearly imply that one party bears the onus of proving the matters that are referred to. This cannot logically be a reference to the prosecution as the matters in s 80G are exculpatory. Accordingly, on a plain reading of s 80G, the party that bears the onus of proving any of the defences is the defendant.

17 This interpretation is consistent with authority. In ***Dowling v Bowie*** [1952] HCA 63; (1952) 86 CLR 136 Dixon CJ said:

The argument treats the case as governed by the common law doctrine that where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. The common law rule distinguishes between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law places upon the party asserting that the liability has been incurred the burden of negativing the existence of facts bringing the case within the exception or qualification: see ***Barritt v Baker*** [1948] VLR 491, 495. The distinction has been criticised as unreal and illusory and as, at best, depending on nothing but the form in

which the legislation may be cast and not upon its substantial meaning or effect. The question, however, where in such cases the burden of proof lies may be determined in accordance with common law principle upon considerations of substance and not of form. A qualification or exception to a general principle of liability may express an exculpation, excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it (139 - 140).

18 Where a statute creates a defence which is of the nature of an exception to be proven by the defendant, that burden may be discharged upon the balance of probabilities. In such instances, the imposing of a burden upon the accused to prove a defence is not limited to express statements to that effect; it may arise from necessary implication of the words used. In ***Director of Public Prosecutions v United Telecasters Sydney Ltd*** [1990] HCA 5; (1990) 168 CLR 594 Brennan, Dawson and Gaudron JJ said:

The rule laid down in ***Woolmington v Director of Public Prosecutions*** [1935] AC 412, 481, that the burden of proving every element of an offence charged rests at all times upon the prosecution, was expressed to be 'subject to ... the defence of insanity and subject also to any statutory exception'. It is made clear in ***Reg v Edwards*** [1975] QB 27 and ***Reg v Hunt*** [1987] AC 352 that the statutory exceptions referred to are not confined to those which expressly cast the burden of proof upon the accused (see eg *Crimes Act 1900* (NSW) s 417), but extend to cases in which an intention to do so is necessarily implied. Such cases will ordinarily occur where an offence created by statute is subjected to a proviso or exception which, by reason of the manner in which it is expressed or its subject matter, discloses a legislative intention to impose upon the accused the ultimate burden of bringing himself within it. That burden may, of course, be discharged upon the balance of probabilities. Whilst it is convenient to speak in terms of provisos or exceptions, the legislative intent cannot be ascertained as a mere matter of form. The Court of Appeal in ***Reg v Edwards*** [1975] QB 40 viewed the statutory exceptions as limited to:

'Offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.'

In ***Reg v Hunt*** [1987] AC 375 even this formulation was said by the House of Lords not to be exhaustive. Each case must turn upon the construction of the particular enactment (600 - 601).

19 In my view, it is clear from a reading of s 80G and its place within the context of ch XI of the Code that it is intended to contain defences, the burden of which falls upon the defendant to prove on the balance of probabilities. In coming to that conclusion I have had regard to the fact that s 80B is in its terms clearly a strict liability offence which does not burden the prosecution with any obligation to prove intent on the part of the defendant. The fact that s 80B and s 80G are contained in distinct and separate provisions supports the interpretation that s 80G is in the nature of an exception which the defence must prove. The wording of s 80G and in particular the use of the words 'it is a defence' and 'to prove' is also consistent with this interpretation. It is also relevant that the defence in s 80G(1) includes reference to the concept of good faith. This concept includes both subjective and objective elements. Insofar as it has a subjective quality it is more obviously amenable to proof by the defendant.

20 On the hearing of this appeal it was argued on behalf of the respondent that other provisions contained in West Australian statutes unambiguously cast a burden on an accused person to prove a defence. An example of this is s 37 of the *Misuse of Drugs Act 1981* (WA) which provides in relation to exemptions, excuses and qualifications that 'the burden of proving any such matter lies on the person seeking to avail himself thereof'. The wording of s 80G was also contrasted with another provision enacted in 2004 (that is, in the same year in which s 80G was enacted). That provision was s 8A of the *Misuse of Drugs Act* in which the wording used is 'it is a defence for the person to prove'. It was submitted that this wording sits uncomfortably with s 80G and to the extent that s 80G is ambiguous, any ambiguity should be resolved in favour of the subject where the statute is penal.

21 One of the principal difficulties with this argument is that there has been no set form of words utilised by the legislature when enacting a defence for which the burden falls on the accused. For example, the insanity defence in s 27 of the Code makes no reference to the onus being on the defendant or to the burden of proof and yet it has long been accepted that given the presumption of sanity in s 26 and the wording of s 27, the necessary implication is that the burden of proving insanity must fall upon an accused person and falls to be discharged on the balance of probabilities. In other sections, such as s 215 of the Code, the onus of proving a defence clearly is placed upon the defendant by use of the words 'the proof of which lies on him or her'. Further, there are provisions in the Code which more closely mirror the wording of s 80G, for example, s 321(9), s 321(10), s 321(11) and s 321(13) which use the words 'it is a defence' and 'to prove' without specifically stating that the party with the obligation to do the proving is the accused.

22 Counsel for the respondent submitted that the words 'to prove' might only refer to an evidential burden on the accused. That is, that if the accused were able to point to some evidence that raised the s 80G defence it would then be for the prosecution to disprove the defence beyond reasonable doubt. This process is, undoubtedly correct for issues such as self defence or honest and reasonable mistake of fact, but the wording of s 80G does not lend itself to that interpretation. The section speaks of a person being excused of liability where one of the defences is proved. That is, it is not simply a matter of the issue being raised, but that it must be positively proved. Furthermore, what is sometimes described as an evidential burden is not, properly understood, an obligation 'to prove' anything. It is simply a recognition that some issues will only arise where there is evidence in that regard. Thus use of the words 'to prove' is not consistent with a mere evidential onus on the defence.

23 In my view, no conclusion can be drawn from the fact that the legislature has not expressly stated that the onus of proving the defence is on the accused nor that s 80G does not refer to the standard of proof being on the balance of probabilities. In this regard I note that the magistrate (somewhat inconsistently) referred to the Act speaking in terms of the balance of probabilities, but this appears to be clearly wrong. The interpretation of s 80G is to be determined by its wording and in the context of the Code. The section should be given a meaning that will give effect to the purpose or object of the legislation as can be deduced from this context: s 18 *Interpretation Act 1984* (WA); ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ); ***Director of Public Prosecutions (WA) v GTR*** [2008] WASCA 187; (2008) 38 WAR 307 [15] (Steytler P & Buss JA).

24 In my view there is no ambiguity in s 80G which would require any recourse to a conclusion which favoured the subject. In any event in ***Beckwith v The Queen*** (1976) 135 CLR 569, Gibbs J stated:

The rule formerly accepted that statutes creating offences are to be strictly construed has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences but the rule is perhaps one of last resort (576).

25 Furthermore, even if there was ambiguity, reference to Parliament's intention may be had: s 19 *Interpretation Act 1984* (WA). The Second Reading speech of the Criminal Code Amendment (Racial Vilification) Bill 2004 makes it clear that s 80B was intended to be a strict liability offence:

This Bill addresses the deficiencies that have been identified in the current provisions in a number of important ways. A two-tiered approach is proposed for each type of offence. The first tier in each case is an offence requiring intent to be established with a higher maximum penalty. The second tier is a strict liability offence in which it can be established that the conduct in question is likely to have the effect described, and alternative verdicts are available. This approach means that an offence can still be established, even if the intent of the accused person cannot be proved, and remedies a limitation of the current provisions. These secondary offences have lesser penalties due to the lack of intent but appropriately reflect their seriousness. (The Honourable Dr G Gallop (Hansard, Wednesday 18 August 2004))

26 This description of the 'second tier' offences, one of which would become s 80B, is quite inconsistent with any requirement on the part of the prosecution to disprove good faith or reasonableness. In my view, seen in this light, the purpose of the s 80G defences are to mitigate the possible harsh consequences of the s 80B offence by allowing those who act reasonably and in good faith in one of the respects referred to, to seek to prove that for that reason their conduct should not attract criminal sanction.

Conclusion

27 In these circumstances it is clear that the magistrate erred in finding that the prosecution bore the onus of negating the defences in s 80G beyond reasonable doubt. There was no such onus upon the prosecution. Indeed, the onus of establishing that the conduct was engaged in reasonably and in good faith in the performance, exhibition or distribution of an artistic work lay upon the accused and had to be established on the balance of probabilities. That error was a fundamental one as this case significantly turned upon the s 80G defence.

28 Whilst the learned magistrate made findings that appeared to be based upon his assessment of Mr Barker's evidence, it is not apparent whether in relying upon that evidence his Honour was concluding that the prosecution had not excluded a reasonable possibility of the conduct being engaged in reasonably and in good faith. Indeed, given his approach to s 80G, he must have been proceeding on the basis of such a low threshold. It is not apparent that he would have reached the same conclusion had he properly applied the onus and burden of proof in relation to the defence. Accordingly, this appeal must be allowed.

29 Given that the error in reasoning occurred at the conclusion of the trial and did not affect any of the evidence, it would not be necessary for there to be a retrial. I have given consideration to whether the question of liability could be determined by me on this appeal. However, any assessment of liability depends upon an assessment of good faith which in turn could be influenced by the credibility of the accused. Questions of good faith are determined not only on objective assessment of what an accused person has done but on their subjective approach to the issues: ***Bropho v Human Rights and Equal Opportunity Commission*** [2004] FCAFC 16; (2004) 135 FCR 105 [95] - [96] (French J). The magistrate had the opportunity to hear and see the accused giving evidence. He is, thus, in a far better position to assess whether the defence has been proven to the requisite standard. In these circumstances the appropriate course is to remit the matter back to the magistrate who heard the evidence, to be determined according to law.