Lib No: 960309C

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE FULL COURT (WA)
CORAM	:	KENNEDY J MURRAY J SCOTT J
HEARD	:	8, 29 FEBRUARY 1996
DELIVERED	:	12 JUNE 1996
FILE NO/S	:	APPEAL FUL 92 of 1994 APPEAL FUL 89 of 1995
BETWEEN	:	LONERGAN PTY LTD Appellant AND THE COMMISSIONER OF THE POLICE FOR THE STATE OF WESTERN AUSTRALIA Respondent

Representation:

Counsel:

Appellant	:	Mr W S Martin and Mr P Laskaris
Respondent	:	Ms J H Smith

Solicitors:

Appellant	:	Frichot & Frichot
Respondent	:	State Crown Solicitor

Library Number : 960309C

SCOTT J:

In these matters, Appeals No 89 of 1995 and 92 of 1994 were heard together. The appeals related to complaints brought under s95(4) of the *Liquor Licensing Act 1988 (WA)* having disciplinary consequences under s96 of that Act.

In Appeal No 92 of 1994 there were three complaints as follows:

"1 On 28 May 1993 at His Lordship's Larder, 2 Mouat Street, Fremantle, the Licensee contravened a condition of the licence; contrary to s95(4)(e)(i) of the *Liquor Licensing Act 1988*.

The following are particulars in support of the ground of complaint:

(a) His Lordship's Larder is subject to a hotel licence (No 601-0168-5).

(b) That licence is subject to the following specified condition:

> The Licensee or Manager, or an employee or agent of the Licensee or Manager, shall not cause, suffer or permit any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises.

(c) On Friday 28 May 1993 the Licensee breached this condition by suffering Jennifer Anne Jones, a person engaged to undertake an activity on the licensed premises, namely to serve liquor, to be immodestly dressed while undertaking that activity."

2 The second complaint was in similar terms relating to 23 July 1993 and concerned one, Kerry Lianne Metcalf.

3 The third complaint related to 23 July 1993 alleged a breach of condition by suffering Simone Frances Hosgood, a person engaged to perform entertainment on the licensed premises, to be immodestly dressed while on the licensed premises.

The second two complaints in Appeal No 89 of 1995 again relate to two different dates. The complaints alleged:

> "1 On 24 February 1994 at His Lordship's Larder, 2 Mouat Street, Fremantle, the Licensee contravened a condition of the licence; contrary to Section 95(4)(e)(i) of the *Liquor Licensing Act 1988*.
>
> The following are particulars in support of the ground of complaint:
>
> (a) His Lordship's Larder is subject to a hotel licence (No 601-0168-5).
>
> (b) That licence is subject to the following specified condition:
>
> > The Licensee or Manager, or an employee or agent of the Licensee or Manager, shall not cause, suffer or permit any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises.
>
> (c) On Thursday 24 February 1994 the Licensee breached this condition by suffering Libby Joy Robbson, a person engaged to undertake an activity on the licensed premises, namely to serve liquor, to be immodestly dressed while undertaking that activity."

2 The second complaint related to 27 March 1994 and referred to one, Donna Marie Howson, but was otherwise in similar terms.

In each case, after appearing before the Liquor Licensing Court, the appellant was held to have breached licence conditions in respect of each of the complaints alleged.

As the facts giving rise to the complaints were, for practical purposes, very similar, the two sets of appeals were heard together.

The grounds of appeal in relation to each matter are also in similar form as will be revealed later in these reasons and the issues on the first appeal merge into the second.

Dealing firstly then with appeal No 92 of 1994, the grounds of appeal are:

"1 The Court erred in law in holding that condition 1(d) of the hotel licence was valid.

2 The Court erred in law in that the Court misconstrued condition 1(d) of the hotel licence in holding that on the facts as found by the Court that condition 1(d) of the hotel licence was contravened.

2A The Court erred in law by failing to hold that there was no evidence to the effect that the Licensee knew of the matters giving rise to the complaint and therefore no basis in law upon which the Court could find that the Licensee had suffered those matters to occur.

3 The Court erred in law in holding that exposure of the top part of the body constitutes immodest dress because the conduct of the women concerned was degrading to those women and to those patrons of the licensed premises who observed it for the purposes of determining whether a breach of condition 1(d) of the hotel licence took place on the licensed premises on 28 May and 23 July, 1993 when the Court should have applied the criterion of whether the manner of dress of the women in question caused offence to those present.

3A The Court erred in law in holding that the conduct of the women in question constituted immodest dress by

applying a general policy to the effect that the exposure of the female breast on licensed premises was always immodest or indecent, without giving proper consideration to the circumstances to [sic] that exposure and in particular whether in those circumstances, offence was caused to any person present on the licensed premises.

4 The Court erred in law in that the Court misconstrued condition 1(d) of the hotel licence by holding that on the facts as found by the Court the momentary rearrangement of clothing as a form of entertainment constituted suffering the relevant staff member to be immodestly or indecently dressed.

5 The Court erred in law in not permitting the Appellant (Respondent Licensee) to call evidence from patrons on the licensed premises on 28 May and 23 July 1993 as to their observations of what occurred and their own perceptions of and reactions to the conduct they witnessed.

6 The Court erred in law in misconstruing condition 1(d) of the hotel licence in that on the facts as found by the Court the women in question were not immodestly or indecently dressed and the Licensee could not therefore be found to be in breach of condition 1(d). Rather, the women in question were, on the facts as found by the Court, providing entertainment in the form of a momentary rearrangement of their clothing which cannot, as a matter of law, constitute a breach of condition 1(d) properly construed."

The first ground of appeal attacks the validity of the condition 1(d) of the hotel licence. The argument advanced by senior counsel for the appellant was that the condition set out in para (b) of the complaint was not a valid condition. The condition of the licence as set out in the complaint was a condition imposed upon the appellant's licence by way of notice in the *Government Gazette* of 17 January 1992 at 299. The notice purports to apply to all holders of hotel licences (including tavern licences and hotel restricted

licences, liquor store licences, restaurant licences, wholesale licenses, producers licences, club licences (including club restricted licences) and special facility licences in force.

The relevant condition imposed in each licence was:

> "1 The licensee or manager, or an employee or agent of the licensee or manager shall not -
>
> (d) cause, suffer or permit any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises;"

The appellant challenges that condition imposed upon the licence in that way and argues that the condition, insofar as it purports to attach itself to all licences, is invalid.

The starting point of that argument is to be found in s64 of the *Liquor Licensing Act 1988* which relevantly provides:

> "(1) Subject to this Act, in relation to any licence, or to any permit, the licensing authority may at its discretion impose conditions-
>
> (a) in addition to the conditions specifically imposed by this Act; or
>
> (b) in such a manner as to make more restrictive a condition specifically imposed by this Act,
>
> ..."

Section 64(2) is not relevant but s64(3) provides:

> "(3) Without derogating from the generality of the discretion conferred on the licensing authority, the licensing authority may impose conditions which it considers desirable in order to -
>
> ...

(g) prohibit the provision of entertainment, or limit the kind of entertainment that may be provided, on, or in an area under the control of the licensee adjacent to, the licensed premises;"

Section 31, which is relevant also to this problem, provides:

"**Licenses, generally**

(1) In this Act-

...

(6) Any term or condition applicable to a licence or permit-

(a) unless imposed by this Act, shall on the grant of the licence or the issue of the permit be included in or endorsed thereon; and

(b) if thereafter imposed, varied (otherwise than pursuant to subsection (4)), or cancelled, shall be evidenced -

(i) by a notice setting out particulars of the term or condition concerned, which shall, unless subsection (7)(a) applies, refer to the licence to which it relates and be served on the licensee; or

(ii) by being endorsed on it or included in a revised version,

as the Director may require.

(7) A notice for the purposes of subsection (4) or (6) -

(a) which is published in the *Gazette* and is (whether or not subject to specified exceptions) of general application, or to apply generally to licences of a specified class, is not required to refer to the particular licence to which it relates or to be served on the licensee; but

(b) shall be signed personally by the Director."

The argument advanced by counsel for the appellant is that s64 does not authorise any act of a legislative character such as the imposition of general conditions applicable to every licence but only empowers the director to impose conditions that relate to individual particular licences. Counsel submitted that s31 was not the source of power to impose the condition but the section specifying the way in which the power sourced in s64 is to be exercised. Expressed that way, the argument is that the relevant source of the power of the director is to be found in s64.

As counsel for the appellant conceded, that argument runs into the difficulty that s31(7) of the *Liquor Licensing Act* clearly and expressly refers to notices of general application, or to licenses of a specified class and the subsection expressly says that it is not required to refer to the particular licence to which it relates.

Counsel for the appellant drew the distinction between conditions which are imposed by the Act itself and conditions imposed pursuant to the Act such as those imposed by the director under the powers referred to. There are clear examples of conditions imposed by the Act in ss99 and 106.

In this context, it is necessary to take into account the provisions of s63 of the *Liquor Licensing Act* which provides:

> "The licensing authority may, of its own motion or on the application of the licensee -
>
> ...
>
> (e) vary, in such a manner as to become more restrictive, a term fixed or a condition specifically imposed by this Act in relation to the licence,
>
> but is not otherwise empowered to vary or cancel a term specifically fixed or a condition specifically imposed by this Act, as distinct from pursuant to this Act, in relation to licences of that class or permits of that kind, except in relation to such provisions or circumstances as may be prescribed."

It is therefore argued that the licensing authority had no power to impose the condition sought to be imposed by the *Government Gazette* of 17 January 1992 in cl 3(1)(d) set out earlier in these reasons.

Counsel then argued that the particular powers referred to in s64(3) of the *Liquor Licensing Act* are directed towards individual licences and not to particular classes of licences.

It is therefore submitted that by imposing conditions which applied to licences generally as distinct from particular licences, the Director was imposing conditions which were legislative in nature and not conditions which the director was empowered to impose. Counsel argued that because there is authority to delegate this power, as can be seen by s15 of the Act, then it is highly unlikely that the power to be exercised by the director was intended to be a legislative one. There is clear authority that Parliament does not intend the delegation of legislative power. See s42 of the *Interpretation Act 1984* (WA).

Having taken those arguments into account, I have reached the conclusion that the power to impose conditions on general classes of licences in the manner that occurred in this case is not legislative in nature. Counsel for the appellant found support in the argument that he was putting to us in the case of ***R v Windsor Licensing Justices, ex parte Hotes*** [1983] 1 WLR 685; [1983] 2 All ER 551. That case involved the renewal of a licence for a store which sold, amongst other things, liquor. Prior to renewal of the relevant policy, the justices had decided that in future they would grant off licences to multiple stores only if they operated a separate, fully supervised area for the sale of intoxicating liquor with its own checkout, ie, as a shop within a shop. The applicant in that case did not have separate premises and ultimately refused to comply with the requirement. An appeal succeeded because the

justices had not exercised their discretion in the individual case and had not made any decision in relation to the particular applicant's shop.

A recitation of those facts is sufficient to indicate the distinction between that case and this. In this case, the condition referred to in the *Government Gazette* set out earlier in these reasons was not a condition requiring the licensee to take any positive steps to do anything. It was a condition which was designed to prevent illegal or inappropriate activities within the licensed premises.

The distinction is well illustrated in the judgment of Lord Justice Slade where he says at 557:

> "It is therefore well established that licensing justices must exercise their discretion in each case that comes before them and cannot properly determine an application simply by reference to a preordained policy relating to applications of a particular class, without reference to the particular facts of the application before them."

In this case this was not an application to renew a licence nor was it an application for a new licence. The *Government Gazette* notice set out earlier in these reasons simply imposed new or varied conditions upon the existing licence during the term of its operation.

Counsel for the applicant also relied upon ***Buttery v Muirhead*** [1970] SASR 334 which involved the application for a retail store licence in a residential area.

Dealing with that application, Zelling J said at 350:

> "The discretionary power given by s61 does not, in my opinion, affect the standard of proof laid down by s47. It is a power enabling the Court, after being satisfied that a licence should be granted, to mould the terms of the licence so as to fit the particular circumstances of the case before it. "

I note in passing there is power vested in the director of liquor licensing under s24(1) and (2) of the *Liquor Licensing Act* to refer questions of

substantial importance to the Liquor Licensing Court. In this case, the director apparently did not do so but simply imposed the condition of his own motion.

For my part, I can find nothing in the case of ***Buttery v Muirhead*** which assists the appellant's argument. That case did not involve the imposition of a new condition on a licence already existing but was concerned with the imposition of a condition on a licence granted for the first time.

The appellant finally submits that, for the director to have power to impose conditions in respect of all licences generally would grant the director a wider power than exists in the court. It is said that such a construction is contrary to s7(3) of the Act (and I note in passing that the submission is also supported by s24(1) and (2) to which I referred earlier) that such a power would be contrary to the hierarchy of the Act.

It is not necessary to repeat the provisions of s7 of the *Liquor Licensing Act* here but suffice it to say that in summary it sets out the licensing authority as comprising -

(a) the Liquor Licensing Court; and

(b) the director of Liquor Licensing.

Subsection (3) makes it clear that the director is subservient to the court and that he is not to impose any condition which is inconsistent with a condition imposed by the court or which the court has refused to impose.

Notwithstanding that provision and that argument, which I accept, in my view, the condition imposed by the *Government Gazette* set out earlier in these reasons was not legislative in nature but the imposition of a condition within the power of the director. I am also of the view that the director had power to impose such a condition in relation to a range of licences without imposing the condition on each individual licence. I would therefore reject grounds 1 and 2 of the grounds of appeal.

I turn now to ground 3 of the grounds of appeal set out earlier in these reasons. To consider that ground of appeal it is necessary to examine the facts of each of these complaints. The facts are conveniently set out in the judgment of his Honour Judge Greaves in the Court below. It would appear that in relation to the complaint in respect of 24 February 1994, the woman named in the complaint exposed her breasts on two occasions whilst the bar manager was present in the bar. On his Honour's finding, on the first occasion the woman did so at the toss of a coin.

In respect of the complaint relating to 27 March 1994, the facts were that the woman concerned exposed her breasts, again at the toss of a coin, whilst the bar manager was present in the bar.

The evidence generally reveals that on the dates in question in the complaints, skimpy barmaids were employed at the bar of "His Lordship's Larder" in Fremantle. As I understand the evidence, the patron would flip a $2 coin and then, if the barmaid called correctly, she would keep the coin. If the barmaid called incorrectly, she would expose her breasts.

It was the learned Judge's finding that, although there were suggestions in the evidence that the licensee had caused instructions to be given to the women not to expose their breasts, the instruction was generally ignored and likely to be ignored as it was a commonplace occurrence in the hotel.

The second statement of complaint related to an incident in the saloon bar of the same hotel on Friday, 23 July 1993. The statement of particulars of that complaint indicate that, at about 7:05 pm, the barmaid concerned lay on a ramp with her head towards the bar wearing a black body suit with gold sparkles. She pulled the body suit down to expose her breasts to a crowd of patrons for about 20 seconds. A short while later, the barmaid again lay on the ramp and pulled the bodysuit down to expose her breasts to a crowd of patrons for about 30 seconds. She then got down from the ramp and left the bar area.

She returned a short time later, wearing a T-shirt that was cut off just below her breasts and with a sticker stuck across her breasts just below her nipples. She then lay on her back and allowed a male patron to remove the sticker with his teeth. Whilst he did this, her breasts were exposed to the crowd of patrons.

In dealing with that ground of appeal, it is firstly to be noticed that the condition imposed upon the licence set out earlier in these reasons, directs itself to the dress of the person engaged in the activity or performing the entertainment. It is of importance to note that in each case the complaint alleges that the licensee suffered the named barmaid to be "immodestly or indecently dressed".

The question that thus arises is whether indeed the complaint was made out. Both the particulars of the complaint and the evidence had little to do with the manner of dress of the barmaids concerned. In each case it was not her manner of dress but rather her behaviour, whilst acting as a barmaid, that attracted the attention of the police.

It is to be noted, as his Honour the Judge below found, that the barmaids were employed at the hotel to act as "skimpy barmaids" by which I take it to mean, that they were scantily clad. The substance of the complaint, however, did not relate to the manner of dress but to the conduct to which I have referred earlier in these reasons.

It is to be noted that the complaint did not allege that the appellant breached the conditions by reason of the barmaids concerned taking part in, or performing any activity or entertainment on the licensed premises in a lewd or indecent manner as could have been alleged had the breach been particularised as a breach of para 1(e) of the permit as amended by the *Government Gazette* of 17 January 1992.

In my opinion, it was not the manner of dress (nor indeed undress) of the barmaids that constituted the alleged conduct involving a breach of the

conditions of the licence in each of these cases, but the behaviour of the barmaids in exposing themselves as particularised in these complaints that constituted the alleged breach of the conditions of the licence. That, however, was not the substance of the complaint. In my opinion, that is no mere technicality. The condition which the complaint alleged was breached relates to the manner of dress of the person engaged to undertake an activity on the licensed premises. Had the complaint related to the employment of "skimpy" barmaids, then the complaint would have been relevant to the behaviour allegedly giving rise to the breach. In the circumstances, however, in my opinion, the complaint was inappropriately expressed as the manner of dress was not the focus of the behaviour in question. It was not the manner of dress that was in issue but rather the behaviour of the barmaids on each of the occasions in question. For these reasons, I would uphold the second ground of appeal.

That is sufficient to dispose of this appeal but in case the matter should go further I will deal briefly with the remaining grounds of the appeal.

Ground 2A alleges that the Court erred in law by failing to hold that there was no evidence to the effect that the licensee knew of the matters giving rise to the complaint and therefore no basis in law upon which the court could find that the licensee had suffered those matters to occur.

In relation to that matter, each of the parties agreed that the leading authority is ***Douglas-Brown v Commissioner of Police***, unreported; FCt SCt of WA Library No 950012; 16 January 1995 and in particular the judgment of Kennedy J at 8:

> "In my opinion, in the context of the condition in question in this case, actual knowledge, or at least constructive knowledge, must be found to have been present on his part before the appellant could properly be said to 'suffer' something to be done. Constructive knowledge in this context means either shutting one's

> eyes to the obvious, or failing to do something or doing something, not caring whether a contravention takes place or not - see *James & Son v Smee* [1955] 1 QB 78 at 91; *Piro v Boorman* [1958] SASR 226 at 230; *Brown v Julius* [1959] Qd R 385 and *Csomor v Habermin* [1960] VR 153 at 156; *Earl v Jakus* [1961] VR 143 at 146; *Grey's Haulage Co Ltd v Arnold* [1966] 1 WLR 534 at 536-537; and *R v Sanewski* [1987] 1 Qd R 374 at 378.

In relation to this aspect of the case, Greaves J accepted that on the two occasions involved in appeal No 89 of 1995, the approved manager of the premises, Mr Douglas Packer, was not present at the time of either alleged breach. His Honour held that the case for the complainant was based upon Mr Packer having constructive knowledge that the events complained of might occur. His Honour referred back to the complaints that had been dealt with in appeal No 92 of 1994 which were, of course, heard prior to the complaints in appeal No 89 of 1995 and his Honour held that those matters were relevant in considering the state of mind of the licensee at the time of engaging the services of the two women concerned in the complaints the subject of appeal No 89 of 1995. In that respect, his Honour said:

> "While relevant, this evidence alone would not in my opinion be sufficient weight to establish constructive knowledge in the licensee and I take into account its potential for prejudice."

His Honour then went on to consider the other evidence and ultimately concluded:

> "The evidence in this case leads me firmly to the conclusion that the licensee engaged each of the women as skimpy barmaids not caring whether the contravention of the entertainment condition occurred or not. The licensee engaged each of the women knowing that she might voluntarily expose her breasts at the toss of a coin. The evidence is sufficient in my opinion to establish on the balance of probabilities that the licensee by its approved manager and bar managers shut its eyes to the obvious."

Whilst there was evidence before the learned trial Judge that Mr Packer had instructed the barmaids not to behave as they did, there was nonetheless

evidence which justified the conclusion to which his Honour came, particularly in the light of the earlier convictions which were proved in evidence. I am not persuaded that there is any merit in this ground of appeal.

Ground 3 and 3A attack the learned trial Judge's finding that the exposing of the female breasts in the circumstances revealed in this case was immodest or indecent.

The starting point of examining this area of the law is ***Crowe v Graham*** (1969-1970) 121 CLR 375 in the judgment of Windeyer J at 395:

> "The question still is - Does the publication, by reason of the extent to which and the manner in which it deals with sexual matters, transgress the generally accepted bounds of decency? That is a question of fact to be decided by the tribunal of fact. It is to be answered by reading the publication. Common sense and a sense of decency must supply the answer. Only within very narrow limits is evidence beyond the publication itself necessary or admissible. Evidence of what has been published in other books or writings is not admissible. The court has to determine whether the publication before it is obscene having regard to the persons, classes of persons and age groups to whom or amongst whom the matter was published."

Windeyer J went on to consider the relevance of the circumstances in which the obscene material was published. In the same case, Barwick CJ also considered the context in which the material was published. He said at 379:

> "In resolving such a question the manner and occasion of placing the matter before others as well as the significance of the matter itself must be considered and might in some circumstances be critical in resolving the question. Here, for example, sexual matters were referred to in the issues of the magazine in a way which might pass muster in a tap room or smoke concert but which, displayed in print to the reader of the magazine, could, in my opinion, be held to offend the modesty of the ordinary man."

One of the critical factors therefore, that the court needs to consider, is the circumstances in which these events took place.

In ***Cullen v Meckelenberg*** [1977] WAR 1 Brinsden J said at 5:

> "In many cases of wilful exposure the circumstances in which the exposure takes place speak sufficiently loudly for a court applying its understanding of the contemporary standards of propriety to conclude that the exposure was obscene, notwithstanding there being no evidence of offence taken, whereas in other cases the circumstances of the exposure may be more neutral, requiring some evidence of offence taken, before a court could safely find obscenity. Evidence of offence taken would not be accepted as evidence of community standards but as evidence of an ingredient of the offence of wilful and obscene exposure. Indeed there may well be cases in which evidence of offence taken does not support a finding of obscenity by reason of it being from people of 'special susceptibilities over and above those of the average member of the community'."

In these cases, the finding of the trial Judge was:

> "Two witnesses gave evidence for the licensee, Gavin Coleman and Garry Beecham. Mr Coleman did not see the events complained of, although he was present. He said that he had seen women expose their breasts so many times that he had become immune to it, so that it caused him no offence. He said that he had seen such an occurrence at His Lordship's Larder previously and had seen staff tell the women concerned not to expose their breasts. Mr Beecham was present at the premises on 27 March 1994 when he saw the woman concerned expose her breasts. He was not offended. He said that to his knowledge such an event might have happened two or three times a week at these premises."

His Honour ultimately concluded that the facts complained of constituted "immodest dress".

It is difficult to equate the behaviour of barmaids in a hotel with either the publication referred to in ***Crowe v Graham*** *(supra)* or a stage performance such as was being considered in ***Cullen v Meckelenberg*** *(supra)*. This case involved the behaviour of a barmaid at a time when alcohol was being served to patrons. In the absence of any evidence that anybody was offended by this

conduct, it is difficult to say in the context of a case such as this, that the dress was "immodest" or "indecent". Constable Neil Craig Cavan gave evidence that he noticed this behaviour through the window of the hotel on 24 February 1994. However, he expressed no view one way or the other as to whether he found the behaviour offensive and there was no evidence called on that aspect of the matter. It is difficult, therefore, to see any basis upon which his Honour could properly conclude that the manner of dress in these cases was immodest.

In view of the fact that I have already decided that this appeal should be allowed on the basis that the behaviour concerned was not in breach of the condition of the licence alleged, it is unnecessary for me to express any concluded view as to whether the manner of dress of the barmaids in the course of these events could properly be described as "immodest". Suffice it to say, however, that in the absence of any evidence, particularly in the context of a case such as this where the behaviour is said to have occurred in a bar of an hotel, I would have difficulty in concluding that the manner of dress could properly be described as "immodest" or "indecent". However, I express no concluded view on the matter.

Ground 4 of the appeal has already been dealt with under ground 2. Ground 5, set out earlier in these reasons, challenges his Honour's refusal to permit evidence to be called from the patrons. Whether or not such evidence is admissible is, on the authorities, a matter to be considered on a case by case basis. There are clearly cases where it can properly be said that the behaviour is so gross that evidence of offence being taken is unnecessary.

In ***Keft v Fraser***, unreported; SCt of WA; Library No 6251, Burt CJ considered an appeal against a conviction for using obscene language in the Perth Concert Hall contrary to s59 of the *Police Act*. Again, it is to be noted that the case focused upon the concept of obscenity which is different to the

allegation of being immodestly or indecently dressed raised in this case. His Honour said at 10:

> "The idea of a 'public place' as used in the statute is not simply geographical. It is assumed to contain human beings with ears. And so regard all public places are not the same. If it be a place where people of all kind are assembled such as, to take a local example, the Hay Street Mall at high noon, then the use of the words complained of here, if uttered for all to hear, could, I think, be fairly described as being obscene and to use such words in that way and in that place and at that time could fairly I think be described as being disorderly conduct."

Again, his Honour emphasised the necessity of looking at the behaviour in the context in which it occurred.

The question here is whether his Honour was wrong in law in refusing to permit the appellant to call evidence from patrons who were present on the evening. In appeal No 92 of 1994 at 69, Mr Laskaris indicated to Greaves J that his instructions were that "my client wants to call evidence with respect to community attitude".

His Honour, however, ruled that the evidence sought to be adduced was neither relevant nor admissible.

No doubt there are cases where that is so. As Brinsden J said in ***Cullen v Meckelenberg*** *(supra)* at 5:

> "In many cases of wilful exposure, the circumstances in which the exposure takes place speaks sufficiently loudly for a court applying its understanding of the contemporary standards of propriety to conclude that the exposure was obscene, notwithstanding there being no evidence of offence taken, whereas in other cases the circumstances of the exposure may be more neutral, requiring some evidence of offence taken before a court could safely find obscenity. Evidence of offence taken would not be accepted as evidence of community standards but as evidence of an ingredient of the offence of wilful and obscene exposure. Indeed there may well be cases in which evidence of offence taken does not support a finding of obscenity by reason of

it being from people of 'special susceptibilities over and above those of the average member of the community'."

In my opinion, this case was one where evidence of offence taken (if there was any) was relevant to the question of whether or not the barmaids' dress or state of dress could properly be said to be "immodest" or "indecent". The evidence sought to be adduced by counsel for the appellant was such that on the particular facts of this case, the court would have been assisted by evidence as to the reaction, if any, of the patrons. The circumstances of this case were such that, in my opinion, the court should have permitted the evidence to establish whether or not offence had been taken before the court could properly have concluded that the manner of dress was "immodest" or "indecent". Had this ground of appeal been central to the case, I would have ordered a re-trial so that that evidence could be heard. However, in view of the conclusion that I have reached, being that the complaint was inappropriate, it is unnecessary to pursue that path.

Ground 6 of the grounds of appeal has already been considered in relation to the other grounds of appeal which have been dealt with in these reasons.

In the circumstances, therefore, I would allow the appeal and set aside the decision of the learned trial Judge. I would not order a retrial.

Lib No: 960309S

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BETWEEN	:	LONERGAN PTY LTD Appellant (Respondent) AND THE COMMISSIONER OF POLICE FOR THE STATE OF WESTERN AUSTRALIA Respondent (Complainant) **- and -**
FILE NO/S	:	APPEAL FUL 89 of 1995
BETWEEN	:	LONERGAN PTY LTD Appellant (Respondent) AND THE COMMISSIONER OF POLICE FOR THE STATE OF WESTERN AUSTRALIA Respondent (Complainant)

JUDGMENT -

KENNEDY J:

I would dismiss these appeals, and I publish my reasons. Murray J is unable to be present this afternoon, but I am authorised by him to publish his reasons in which he would dismiss the appeals.

SCOTT J:

I would allow the appeals and set aside the decision of the learned Judge, and I would not order a retrial.