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Hopkinson v Police - [2004] 3 NZLR 704

High Court Wellington
CRI 2004-485-23

18 May; 23 July 2004
France J

Criminal law -- Offences -- Flag burning -- Whether flag burning protest dishonoured the flag -- Flags, Emblems, and Names Protection Act 1981, s 11(1)(b).

Constitutional law -- New Zealand Bill of Rights Act 1990 -- Relationship between freedom of expression and flag protection legislation -- Meaning of "dishonour" -- New Zealand Bill of Rights Act 1990, s 6.

The accused was protesting in Parliament grounds against Australian support of United States action in Iraq. At the time of the protest the Australian Prime Minister was visiting. As part of the protest the accused attached a New Zealand flag upside down to a pole, doused it in kerosene and lit it. The flag was consumed in a fireball. The singed pole was extinguished. No member of the public was harmed.

The accused was convicted of destroying the New Zealand flag with the intention of dishonouring it under s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981.

Held:

1 The

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conduct of the appellant fell within the natural meaning of "dishonour" under the Flags, Emblems, and Names Protection Act 1981. The prohibition of this conduct amounted to a prima facie breach of the right to freedom of expression. While the objective of preserving the flag as a symbol of national unity and preventing breaches of the peace were legitimate, s 11 of the Flags, Emblems, and Names Protection Act 1981 was not a proportional and rational way to protect that interest (see paras [39], [41], [50], [77]).

Texas v Johnson 491 US 397; 105 L Ed 2d 342 (1989) referred to.

HKSAR v Ng Kung-Siu (1999) 8 BHRC 244; 3 HKLRD 907 referred to.

Board of Education v Barnette 319 US 624; 87 L Ed 1628 (1943) referred to.

2 Given the fact that on its natural and ordinary meaning s 11 of the Flags, Emblems, and Names Protection Act 1981 was not a justified limit on freedom of speech, s 6 of the New Zealand Bill of Rights Act required the Court to determine whether s 11 could be read consistently with the rights protected. This was possible as "dishonour" in s 11(1)(b) could be read as requiring "vilification" of the flag. This interpretation was adopted. The conduct of the

appellant did not amount to vilifying the flag (see para [81]).
Appeal allowed.

Observations:

(i) The five-step approach outlined by the Court of Appeal in *Moonen* was not a prescriptive one and other approaches were available in Bill of Rights cases. In the present case it was appropriate to consider whether the conduct of the appellant fell within the natural meaning of the statute, then to ask whether there is prima facie inconsistency with the New Zealand Bill of Rights Act and if so to determine whether the limit imposed is a justifiable one. If it is not then it must be determined whether the statute can be read consistently with the New Zealand Bill of Rights Act and if it cannot then the natural meaning must prevail on the basis that s 4 of the New Zealand Bill of Rights Act applies (see paras [27], [28]).

Moonen v Film and Literature Board of Review [2002] 2 NZLR 754 (CA) referred to.

Other cases mentioned in judgment

Lange v Atkinson and Australian Consolidated Press New Zealand Ltd [1997] 2 NZLR 22.

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA).

US v Eichman 496 US 310; 110 L Ed 2d 287 (1990).

Application from conviction

This was an appeal by Paul Barry Hopkinson from conviction in the District Court for destroying the New Zealand flag with the intention of dishonouring it under s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981.

A Shaw for Hopkinson.

C Mander for the Crown.

Cur adv vult

FRANCE J.

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Introduction

[1] After a defended hearing, Paul Hopkinson was convicted on 6 November 2003 of an offence against s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981 of destroying the New Zealand flag with the intention of dishonouring it. On 12 February 2004, Mr Hopkinson was convicted and fined \$600 and ordered to pay Court costs of \$130.

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[2] The charge followed a protest in Parliament grounds at the New Zealand Government's hosting of the Australian Prime Minister against the background of Australia's support of the United States in its war against Iraq.

[3] The appellant appeals against conviction and sentence. The appeal raises questions about the effect of the New Zealand Bill of Rights Act 1990 and, in particular, the appellant's right to freedom of expression and of peaceful assembly under ss 14 and 16 of that Act, on the offence provision in s 11(1)(b) of the Flags, Emblems, and Names Protection Act.

Facts

[4] The facts are set out in the decision of the District Court delivered on 6 November 2003. The District Court Judge notes that on 10 March 2003 a crowd, estimated on various accounts at between 500 and 1000 people, marched through downtown Wellington and assembled in Parliament grounds to protest at the New Zealand Government hosting the Australian Prime Minister, Mr Howard, to lunch given Australia's support of America in the war against Iraq.

[5] Observing that there was general agreement on the facts, the Judge noted that the appellant was one of the organisers of the protest. His evidence was that he had several political points to make on the occasion of Mr Howard's visit including the New Zealand Government's involvement in pre-war sanctions against Iraq, and the government welcome to Mr Howard when he supported the American invasion of Iraq.

[6] The Judge notes that flag burning as a form of protest was discussed by the appellant with others. By arrangement he bought a New Zealand flag and took that with him. The flag was attached to a pole upside down as a sign of distress. The Judge noted that this is a legitimate distress signal in nautical circles but the appellant said he hung the flag in this way to demonstrate the flag was in distress because of what the Government was doing. Another protester, Mr McNeill, arrived by arrangement with a similar-sized Australian flag and another protester had a smaller New Zealand flag. The arrangements were made to burn the flags. Essentially, kerosene was poured on the flags to soak them and then the flags were lit. The appellant said the small flag was lit first. The appellant and Mr McNeill, side by side, held the poles out in front of them horizontally and with the tips together. Another protester, Mr Phillips, with a cigarette lighter supplied by Mr Hopkinson lit the flags. Immediately following ignition, Messrs Hopkinson and McNeill raised the flags vertically with their hands at the bottom of the poles at about chin height.

[7] The Judge notes that the result was "quite spectacular" with a brief fireball about 1 - 2m across followed by a brief column of flame about 2m high, with a tower of black smoke above. The flags were consumed almost immediately and the singed ends of the poles were extinguished on the grass.

[8] No member of the public was harmed.

Statutory scheme

(i) The New Zealand Bill of Rights Act 1990

[9] For present purposes, the relevant provisions are ss 4, 5, 6, 14 and 16 of the Bill of Rights. Sections 14 and 16 protect the substantive rights involved, that is, the right to freedom of expression (s 14) and the right to freedom of peaceful assembly (s 16).

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[10] Section 4 of the Bill of Rights provides that the Court cannot hold any provision of an enactment to be impliedly repealed or revoked or to be in any way invalid or ineffective, or to decline to apply any provision of an enactment, "by reason only that the provision is inconsistent with any provision" of the Bill of Rights.

[11] Section 5 sets out the extent to which rights in the Bill of Rights may be limited, that is, only by such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[12] Section 6 directs an interpretation consistent with the Bill of Rights to be preferred and applies "wherever an enactment can be given a meaning that is consistent with the rights and freedoms" in the Bill of Rights.

(ii) The Flags, Emblems, and Names Protection Act 1981

[13] Section 11, the offence provision, provides first, in subs (1), that it is an offence to:

- (a) without lawful authority, alter[s] the New Zealand flag by the placement thereon of any letter, emblem, or representation.

[14] Secondly, in terms of s 11(1)(b), every person commits an offence who:

in or within view of any public place, uses, displays, destroys, or damages the New Zealand flag in any manner with the intention of dishonouring it.

[15] For the purposes of s 11, the New Zealand flag means any flag of the design depicted in the Schedule to the Act or any other design that so closely resembles it as to be likely to cause any person to believe that it is the design depicted in the Schedule.

[16] Section 11(3) provides in any prosecution for an offence against this section the onus of proving that any alteration of the New Zealand flag was lawfully authorised shall be on the defendant.

[17] Prosecutions under s 11 require the consent of the Attorney-General (s 25).

Grounds of appeal

[18] The points on appeal state the following grounds:

- (a) The entire structure of the District Court's analysis is wrong and led to major misdirections of law.
 - (b) The Judge misinterpreted the mental element of the offence, namely, the words "with the intention of dishonouring it".
 - (c) The findings of fact cannot justify the inference that "one of [the appellant's] intentions was to disrespect the New Zealand flag".
 - (d) The finding that the mental element of the offence was proved is unreasonable or cannot be supported having regard to the evidence.
 - (e) The Judge erred in ruling that "the prohibition on flag burning with the intention of dishonouring it is justifiable in a free and democratic society". In relation to this, the appellant via the points of appeal seeks a declaration or indication that s 11(1)(b) of the 1981 Act is inconsistent with the appellant's rights under ss 14 and 16 of the Bill of Rights, and does not constitute a justified limitation in terms of s 5 of that Act. A declaration or indication is also sought that the section breaches the appellant's rights under arts 19(2) and 21 of the International Covenant on Civil and Political Rights and is not justified under art 19(3) or art 21.
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- (f) As a tentative point, the appellant contends that the decision of the Attorney-General to consent to the laying of the information was unlawful and/or unreasonable. This matter was not pressed at the hearing of the appeal.
 - (g) The sentence is manifestly excessive.

Approach to Bill of Rights

(i) The appellant's submissions

[19] The appellant submits that the District Court Judge wrongly approached *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 and misinterpreted the mental element. The appellant argues that while the District Court Judge purported to apply *Moonen*, he did not do so essentially because he started with a consideration of s 11(1)(b) and not with a consideration of the rights involved. The overall submission is that the Judge has not adopted a rights-centred approach.

[20] In this context, the appellant emphasises the importance of freedom of expression and particularly that of political expression with reference, for example, to the following observation of Elias J (as she then was) in *Lange v Atkinson and Australian Consolidated Press New Zealand Ltd* [1997] 2 NZLR 22 at p 46:

"In a system of representative democracy, the transcendent public interest in the development and encouragement of political discussion extends to every member of the community."

[21] The appellant submits that however offensive, shocking, obnoxious, upsetting and challenging the appellant's actions may appear in the eyes of some or even the majority of New Zealanders, his act of burning the flag was symbolic political speech in a free and democratic society fully protected by ss 14 and 16 of the Bill of Rights.

[22] The error in approach to s 6 of the Bill of Rights, the appellant says, is that the Judge has treated s 11(1)(b) as only having one meaning when, in fact, it is susceptible of a broad range of tenable meanings. Although not explicit, the appellant says that the District Court Judge appears to have adopted the meaning of "disrespecting" as equating with "dishonouring".

[23] The appellant submits that the Court should interpret "dishonouring" in its sense of "defiling" and imputing an active and lively sense of shaming and/or a deliberate act of callousness. Examples of such conduct might include intentionally urinating on the ashes of the flag or knowingly blowing one's nose on it.

(ii) Submissions for the respondent

[24] The submission for the respondent is that an analysis of the statutory scheme leads to the conclusion that there is only one tenable meaning of "dishonour", that is, being to deliberately treat it with "disrespect" or "to treat without honour or respect". Accordingly, it is submitted that the District Court Judge has correctly approached the Bill of Rights.

[25] By passing the Flags, Emblems, and Names Protection Act, it is submitted that Parliament expressly recognised the flag to be the symbol of the New Zealand Government and people. The respondent argues that the statute is legislative acknowledgment of the esteem and respect with which the flag is to be held. Its significance is as a symbol of statehood and the allegiance of New Zealand citizens to their country.

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[26] The submission is that in passing s 11, the intention was to give a wide protection to the flag from persons who might otherwise abuse or vandalise it. Section 11(1)(b) created a new offence. Paragraph (a) of that subsection made it an offence to alter the flag by various ways. The precursor to para (a) was s 5(4) of the Shipping and Seamen Act 1952. It is submitted that it is apparent that in enacting s 11(1)(a) Parliament sought to widen that offence provision by replacing the term "defaces" with the word "alters".

(iii) Discussion

[27] To the extent to which there is criticism of the use of s 11(1)(b) as the starting point, I do not accept the appellant's submission. The Court of Appeal in *Moonen* made it clear that its five-step approach to interpretation in terms of s 6 of the Bill of Rights was not a prescriptive one. That was clear enough in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 but was further emphasised in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754. The Court of Appeal in the later *Moonen* case resisted the invitation to revisit the five-step approach but emphasised the approach was not prescriptive: " 'May' means may. . . Other approaches are open" (para [15]). The issue is whether, whatever process was used, the Court interpreted the offence provision consistently with the Bill of Rights so as to give effect to the rights in question.

[28] The approach I take is to consider, first, whether the conduct of the appellant falls within the natural or applied meaning of s 11(1)(b), and in particular that of "dishonour". Then, to ask whether the prohibition of that conduct is prima facie inconsistent with the Bill of Rights. If it is, is it a justified limit? If not, the next step is to ask whether the section can be read consistently. If it can, it should be read in that way. If it cannot, then the natural or applied meaning has to be given effect to but on the basis that s 4 of the New Zealand Bill of Rights applies.

Does conduct fall within natural meaning?

[29] Under this head, it is appropriate to consider the appellant's arguments that the factual findings do not justify the inference that one of the appellant's intentions was to disrespect the flag, and the reasonableness of the finding as to the mental element (grounds (c) and (d) in the points on appeal, para [18] above). The appellant says that the Court below does not explicitly state from which findings of fact the Judge drew the inference that "one of [the appellant's] intentions was to disrespect the New Zealand flag" (para [24] of the District Court judgment).

[30] The appellant submits that none of the findings of fact whether taken singly or in combination entitled the Court to draw this inference. Or, it is said, the Court's conclusion was not a reasonable one.

[31] The appellant also observed that there are many ways of destroying the flag. Burning a flag is in fact the only honourable way of destroying it according to flag etiquette. In that regard, the appellant refers to the provisions of the US Flag Code (4 USCS § 8; August 12 1998, PL 105-225, § 2(a) 112 Stat 1497) as illustrative of internationally

accepted practice in the destruction of flags.

[32] It is further submitted that to hold that the mere act of burning the flag can give rise to an intention of dishonouring it is to engage in a form of *res ipsa loquitur* reasoning that is inappropriate in the context of a criminal statute.

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[33] The Crown submission is that the learned District Court Judge was entitled to make the finding that at least one of the appellant's intentions was to disrespect the flag. Alternatively, it is submitted that whether the wider concept of "disrespect" or concepts of "shaming", "impugning", or "vilifying" are applicable to the term as used in the section, the act of intentionally burning the flag provides a sufficient basis from which the requisite intention can be drawn.

[34] The submission is that it is beyond dispute that the appellant and his fellow protesters did not agree with the foreign policies of the respective countries. Both flags were soaked in kerosene, held aloft and incinerated. This took place in the grounds of Parliament. This was a deliberate act intended to be seen in direct opposition or contrast to the respect, esteem, and pride ordinarily to be shown towards a nation's flag.

[35] The District Court Judge used the *Concise Oxford Dictionary* (7th ed) definition of "dishonour" meaning "a state of shame or disgrace; discredit"; "something that causes dishonour"; and "to treat without honour or respect". Consideration of the meaning of the word "dishonour" arose in the context of determining whether or not the prosecution had established the requisite intention for the offence. In deciding that, the Court took into account the following uncontested circumstances:

- "o This was a political protest to coincide with the Australian Prime Minister's visit.
- o [The appellant] was one of the organisers.
- o The protest was a lengthy process. The protesters had assembled earlier and marched through downtown Wellington arriving at Parliament grounds about midday. The process actively proceeded until and after the departure of Mr Howard, about 2.40 pm. The [flag] burning occurred at about 1.13 pm.
- o Preparations by [the appellant] and others were made the day before to burn the New Zealand flag. The protest involved a large crowd; incessant chanting; the use of loudhailers; the banging of pots and the ringing of bells; speeches; pantomimes; a strong TV media presence; and a strong police presence" (para [21]).

[36] The Judge also took into account the appellant's evidence, namely:

- "o He is an active member of a number of political protest groups.
- o His political objective regarding this protest is already noted.
- o His attaching of the New Zealand flag upside down as a sign of distress, the distress here intended to be a political statement, that is, the flag was in distress because of what the New Zealand Government was doing. Under cross-examination he said it was not his intention to dishonour the flag. He burned it to show the Government was disrespecting it. It was a political action to make people think.
- o He accepted that the intensity of the fire was intended to, and did, catch people's attention and that the action drew attention to him. He also accepted that others, apart from the flag burning party would not have known what he intended." (para [22]).

[37] In general terms, the Judge found the appellant to be an honest and reliable witness but said he was left with "considerable disquiet" over the issue of what was really in his mind at the relevant time. In that regard the Judge found the appellant to be less than convincing. The Judge continued at para [23]:

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"I accept that his intentions may well have been as he claimed but find that they were not all of them. He knew that he should not burn the flag although unaware of the specific provisions of s 11. I record that I cannot escape the sense that he is now attempting to rationalise his way in a circuitous manner around what he now understands to be the mental element."

[38] The Judge's conclusion was as follows at para [24]:

"[24] For those reasons, and against the background of the factual circumstances as I have found them to be, I reject his evidence that he did not intend to dishonour or disrespect the flag. I draw the inference that one of his intentions was to disrespect the New Zealand flag. That is to say, that by demonstrating such disrespect for the flag, he sought to add weight to the effects of the protest by deliberately undertaking an action which he knew would create attention."

[39] On this first step, I agree with the District Court Judge. The findings of fact were plainly open to the Judge. Viewing the circumstances in their totality there was more than just burning the flag. The appellant may well have had a higher purpose as he saw it but his means of achieving that purpose - his intention - was to dishonour the flag giving "dishonour" its natural meaning.

[40] I also agree with the Judge's approach to the transcript of conversation between a talkback radio host and the appellant on 11 March 2003 (the day after the protest). The appellant submits the Judge should have given the transcript more weight. As the respondent says, the Judge was correct in limiting the weight to be given to the transcript. It was not sworn evidence and contained editorial comment from the talkback host. Further, there are passages in the transcript which support the Judge's conclusion on intention. For example, when asked why he burnt the New Zealand flag, the appellant said "because I believe . . . it stands for imperialism". Further, that the flag does not "represent us".

Prima facie inconsistent?

[41] There cannot be any doubt that prohibition of the appellant's conduct is prima facie a breach of his right to freedom of expression. The scope of the right is broad and it is well established that it includes non-verbal conduct such as flag burning (see, for example, Rishworth et al, *The New Zealand Bill of Rights* (Oxford, 2003) pp 313 - 314).

[42] The next question is, therefore, whether prohibition of this conduct is a justified limit on the freedom of expression.

A justified limit?

[43] This question involves a consideration of the objective of s 11(1)(b) and whether or not the use of a criminal sanction is a rational means of achieving the objective bearing in mind the need to infringe on rights in as minimal a way as possible. The Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 put the test as follows at para [18]:

"... it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack

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a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved. . . ."

[44] The appellant is critical of the District Court Judge's failure to embark on this sort of balancing exercise even though the Judge said s 11(1)(b) was a justified limit (ground (e) in the points on appeal). On the Judge's analysis, however, it was not necessary to bring s 5 to bear on the matter because he considered "dishonour" had just the one meaning and the appellant's conduct came within it. The Judge's comment about s 5 was just that, a comment.

(i) Legitimacy of objective

[45] As to the objective of s 11(1)(b), the 1981 Act has its genesis in regulations made under the Colonial Defence Act 1865. These regulations made provision for the recognised ensign of the colony. (See discussion in Carr (ed) *Flags of the World* (1956) at 103.) Since 1901, it has been an offence to deface the flag. The New Zealand Ensign Act 1901 established the blue ensign of the Royal Naval Reserve having on its fly the Southern Cross as the recognised flag of New Zealand for the specified purposes. In terms of s 4, it was an offence to deface the ensign "by placing any sign, representation, or letter thereon". The Shipping and Seamen Act 1908 repeated that offence provision and it was again continued in the Shipping and Seamen Act 1952. (W A Glue, *The New Zealand Ensign* (1965) at 10 discusses the early history of a national flag in New Zealand. Glue refers to the addition to the New Zealand Ensign Bill of a preamble in the course of the Bill's passage through the House. The Prime Minister, Glue notes, said the preamble was intended to make it "understandable for future generations" why it was deemed desirable to pass the legislation "at this stage of our history".)

[46] The 1981 Act states in its long title that it is an Act;

... to declare the New Zealand ensign to be the New Zealand flag and to make provision relating to its use and to the use of certain other flags, and to make better provision for the protection of certain names and emblems of Royal, national, international, commercial, or other significance.

[47] To achieve that purpose, s 5 of the 1981 Act declares the New Zealand ensign as the New Zealand flag. Section 5(2) provides that the New Zealand flag shall be the symbol of the realm, government, and people of New Zealand. In terms of s 5(3) the New Zealand flag:

- (a) Shall be the national flag of New Zealand for general use on land within New Zealand and, where appropriate for international purposes, overseas.

[48] Then, as noted above, there are the offence provisions in s 11. Of those provisions, in the second reading debate on the Bill the responsible Minister stated:

"Because of the flag's intrinsic importance to almost every New Zealander, the Government has included the offence provisions in clause 11. However no information on those offences can be laid without the consent of the Attorney-General" (441 *New Zealand Parliamentary Debates*, 1981 at p 3990).

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[49] Against this legislative background, the objective of s 11(1)(b) must be to protect and preserve the flag as an emblem of national significance. The respondent submits that s 11 also seeks to protect those members of the public who may be offended by the physical use or actions towards the flag resulting from a person's intention to dishonour it. The legislative scheme suggests to me a focus more on preservation of the flag per se and, of course, in the present case there is no evidence of others being offended by what occurred. Both objectives, on the respondent's analysis, would meet the s 5 test.

[50] The appellant contends that the stated objective has little weight and is of relatively little importance in New Zealand's contemporary, multicultural and pluralistic society. I do not accept that submission. I believe the objective

remains an important one. In *Texas v Johnson* 491 US 397 (1989) at p 414 the United States Supreme Court ruled that the Texas flag-burning legislation was unconstitutional, but did consider that the state's aims of preserving the flag as a symbol of national unity and preventing breaches of the peace were legitimate ones.

[51] There is also support for this conclusion in the fact that other democratic countries have found it necessary to legislate in this area. Attached as appendix A is material from the Australian parliamentary website on the legislative position in other jurisdictions.

(ii) Proportionality/rationality

[52] Noting that the onus of showing s 5 is met is on the respondent, the appellant submits there is no rational connection between s 11(1)(b) and the objective. Banning expressions against an institution in order to protect the institution (or symbol) is described by the appellant as an outdated and logically invalid concept. Even if there is a rational connection, a blanket ban is disproportionate.

[53] The respondent on the other hand, makes the following points in support of the submission the prohibition is a justified limit:

- (a) Section 11 restricts only physical action in relation to the flag.
- (b) A person can say what he or she likes about the flag as indeed the appellant here did.
- (c) Successive Parliaments have not sought to amend the prohibition.
- (d) The values of representative democracy and tolerance may apply equally to those who when using a symbol like the flag go too far and risk inciting violence and disorder in response.

[54] In terms of the proportionality/rationality aspects of s 5, the two conflicting approaches are reflected in the majority and minority approaches in the American jurisprudence and, as well, in the jurisprudence from Hong Kong. (See also the discussion of the German experience in P E Quint, "The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany" (1992) 15 Hastings Int'l & Comp L Rev 613. Counsel advised me there was no equivalent Canadian case and my own researches have not found one. That is consistent with the material in appendix A which says there is no Canadian legislation on the topic.)

[55] The United States Supreme Court by a majority (5:4) in *Texas v Johnson* concluded that the conviction of a protester for burning the American flag as part of a political demonstration violated the First Amendment protection of free speech.

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[56] *Texas v Johnson* dealt with a provision in the Texas Penal Code which makes it an offence to "intentionally or knowingly desecrate" a state or national flag. "Desecrate" means:

"s 42.09 . . . (b) . . . deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his actions."

[57] In this particular case, Mr Johnson at the end of a demonstration unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protesters chanted "America, the red, white, and blue, we spit on you". After the demonstrators dispersed, a witness to the flag burning collected the flag remains and buried them. No one was physically injured or threatened with injury although several witnesses testified that they had been seriously

offended by the flag burning.

[58] Brennan J delivered the opinion of the Court. The test Brennan J applied was whether the State of Texas had asserted an interest in support of Mr Johnson's conviction that was unrelated to the suppression of expression. The conclusion was that in that case Mr Johnson's political expression was restricted because of the content of the message that he conveyed and so the state's asserted interest in preserving the special symbolic character of the flag was to be subjected to the "most exacting scrutiny".

[59] Brennan J restated the "bedrock" principle underlying the First Amendment's protection of free speech, namely, that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. As noted above, the majority did not doubt the legitimate interests of the government in making efforts to preserve the flag. However, that was not to say that it may criminally punish a person for burning a flag as a means of political protest. Brennan J said that the way to preserve the flag's special role is not to punish those who feel differently about these matters but to persuade them that they are wrong.

[60] In a concurring decision, Kennedy J noted that the hard fact was that sometimes Courts must make decisions that Judges do not like but make them because they are right in a sense that the law and the constitution as the Judge sees them, compel the result.

[61] Chief Justice Rehnquist, with whom White and O'Connor JJ joined, dissented. The Chief Justice emphasised the unique position of the American flag as a symbol of the American nation. He saw that uniqueness as justifying a governmental prohibition against flag burning in the way that Mr Johnson had done.

[62] The Chief Justice then reviewed the history of the flag and its symbolism. He concluded that the American flag throughout more than 200 years of history has come to be the "visible symbol" embodying the American nation. The flag was not simply another idea or point of view competing for recognition in the marketplace of ideas. The Chief Justice also placed some emphasis on the fact that to deny Mr Johnson this form of speech was to deny him one of many means of "symbolic speech". Flag burning, he said is "the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others".

[63] Accordingly, in enacting this statute, the government was seen as simply recognising as a fact the profound regard for the American flag created by its history.

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[64] Stevens J in dissent also referred to the flag as a symbol of more than nationhood and national unity but also signifying the "ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas".

[65] The trivial burden the statute imposed on free speech by requiring that an available, alternative mode of expression including uttering words critical of the flag was available was relevant. (For an illustration of the numerous articles on *Texas v Johnson* see D R Fine, "Symbolic expression and the Rehnquist Court: The Lessons of the Peculiar Passions of Flag Burning" (1991) 22 U Tol L Rev 777; G R Schermerhorn, "When the Smoke clears: Government Regulation of the Expressive Use of National Symbols as addressed in *Texas v Johnson*: An Alternative Method of Analysis would be nice" (1990) 67 University of Detroit Law Review 581; and Tribe, *American Constitutional Law* (2nd ed) ch 12.)

[66] The United States Supreme Court took the same approach in *US v Eichman* 496 US 310 (1990). There, by a majority, the Court ruled unconstitutional the Flag Protection Act 1989 enacted after *Texas v Johnson* which imposes criminal penalties against anyone who knowingly "mutilates, defaces, physically defiles, burns, maintains upon the floor or ground, or tramples" upon a flag of the United States.

[67] In *HKSAR v Ng Kung-Siu* (1999) 8 BHRC 244, the Court of Final Appeal in Hong Kong upheld an equivalent provision in the National Flag and National Emblem Ordinance and in the Regional Flag Ordinance.

[68] The provision in issue in the National Flag Ordinance made it an offence to desecrate the national flag by "publicly and wilfully burning, mutilating, scrawling on, defiling or trampling upon it". The Regional Flag Ordinance is in similar terms.

[69] In that case there was a public demonstration. The national and regional flags had been extensively defaced. As to the national flag, a circular portion of the centre had been cut out. Black ink had been daubed over the large yellow five-pointed star and the star itself had been punctured. Similar damage appeared on the reverse side. Further, the Chinese character "shame" had been written in black ink on the four small stars and on the reverse side a black cross had been daubed on the lowest of the four small stars.

[70] On the regional flag, one section had been torn off obliterating a portion of part of the design. A black cross had been drawn across that design. Three of the remaining four red stars had black crosses daubed over them. The Chinese character "shame" was written on the flag in black ink as was part of a Chinese character which had been rendered illegible by the tear in the flag. Similar damage appeared on the reverse side.

[71] It was accepted in that case that flag desecration is a form of non-verbal speech or expression. The restriction on flag desecration was therefore a breach of expression although the Chief Justice observed it was a limited restriction on that right. The Court, like the United States Supreme Court, accepted that there were legitimate societal and community interests in protecting the flags. In the circumstances, where Hong Kong has a new constitutional order, the Court considered it was necessary to protect the societal interests by means of a criminal sanction. In reaching that conclusion, the Court analysed the concept of public order which is an exception to free speech in the International Covenant on Civil and Political Rights. The Chief Justice continued:

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"It is important to recognise that the concept of public order (ordre public) is not limited to public order in terms of law and order. . . . The relevant concept is wider than the common law notion of law and order."

[72] Further, the Chief Justice at p 257 considered:

"First, the concept [of public order] is an imprecise and elusive one. Its boundaries cannot be precisely defined. Secondly, the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples include: prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection etc). Thirdly, the concept must remain the function of time, place and circumstances. . . .

In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order (ordre public). As I have pointed out, the national flag is the unique symbol of the one country, the People's Republic of China, and the regional flag is the unique symbol of the HKSAR as an inalienable part of the People's Republic of China under the principle of 'one country, two systems'. These legitimate interests form part of the general welfare and the interests of collectivity as a whole."

[73] On this part of the s 5 test it is obvious that there is room for differing views. The United States Supreme Court, for example, was divided on the issue and the dissenting judgments in *Texas v Johnson* and the Hong Kong decision show the arguments for the view that prohibition of such conduct is a justified limit. As the Court of Appeal observed in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at para [18]:

". . . Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise."

[74] In exercising that judgment, it is pertinent that the limitation is a confined one. As the respondent put it, other

forms of speech relating to the flag are not affected. As illustrated by the other parts of the protest of which the appellant was a participant, political views were expressed.

[75] On the other hand, the ban in relation to destruction is a blanket one. The matter also needs to be considered against my perception that New Zealand has reached a level of maturity in which staunch criticism is regarded as acceptable. There may well be strong reactions to such criticism but there is an acceptance of the ability to make it.

[76] Obviously, the flag is important. However, even in the United States where the flag is such a dominant symbol, the majority concluded its protection did not warrant the interference of the criminal law. Freedom of expression comes at a cost in the sense that one must accept the ability to say and act in a way that annoys or upsets. Further, as Jackson J stated in *Board of Education v Barnette* 319 US 624 (1943) at p 642:

"... freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

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[77] Freedom of expression is not without some limits. But in the end I have concluded that the rational connection part of the s 5 test is not met here so that the prohibition on this appellant's conduct was not a justified limit on his free speech.

Ability to read consistently?

[78] The District Court concluded that s 6 did not assist the appellant who was aggrieved at the government and "deliberately sought to startle in order to draw attention to his cause." (para [28]). The Judge saw the matter as one of striking the balance and concluded as follows at para [30]:

"[30] Adopting the approach suggested in *Moonen* (before) at p 16 paras 17 and 18, I hold that the mental element in s 11(1)(b) requiring proof is susceptible of only one interpretation, and is unaffected, here, by the (commonplace) fact that the [appellant] also had other intentions. Given the New Zealand flag is New Zealand's national symbol, and it is flown and used by all manner of New Zealanders and others in all kinds of circumstances, if the legislature had intended there should be deemed to be no intention to dishonour or to disrespect where the act of flag burning constituted symbolic political speech, then it would have said so in plain terms. If the Act creates a limit on the right to free expression at all, then it must be of minimal effect given that this is, apparently, the first prosecution of its kind in over twenty years since the Act came into effect. In my assessment the prohibition on flag burning with the intention of dishonouring it is justifiable in a free and democratic society."

[79] As noted above, the appellant submits that the application of s 6 of the Bill of Rights necessitated the Court adopting a definition of "dishonour" as equating with "defiling". The appellant as an example, refers to *Black's Law Dictionary* (5th ed, 1979) p 421 which defines "dishonour" as follows:

"Dishonour . . . as respects the flag, to deface or defile, imputing a lively sense of shaming or an equivalent acquiescent callousness. *State v Schleuter*, 127 NJL 496, 23 A 2d 249, 251."

[80] The respondent's submission is that the Judge was correct that "dishonour" in the 1981 Act had the one meaning, that is, to treat without honour or disrespect. The appellant's suggested meanings are, the respondent says, examples or instances of a form of dishonour or disrespect and not a true alternative to or substitute for "dishonour".

[81] Looking at the statutory scheme as a whole, there is some support for the respondent's view that there is just the one tenable meaning, namely, that adopted by the District Court Judge. However, the better view is that the statute does allow of the narrower meaning of "vilify". If that meaning is adopted, as s 6 of the Bill of Rights demands that it must, I

consider s 11(1)(b) can be read consistently with the Bill of Rights. However, I do not accept the respondent's submission that the appellant's conduct would fall foul of this narrower definition of "dishonour", that is, one limited to dishonour in the sense of vilifying. That would have required some additional action on the appellant's part beyond a symbolic burning of the flag. My decision is of course confined to this particular appellant's conduct. What other conduct may come within this narrower interpretation of "dishonour" is a matter for a different case.

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[82] On this basis, that is, that the prohibition on the appellant's conduct is not a justified limit on the right to freedom of expression and does not come within the proper Bill of Rights consistent interpretation of s 11(1)(b), the appellant's conviction cannot stand.

Declaration of inconsistency

[83] It is not necessary therefore to consider the appellant's argument for a declaration of inconsistency. I note this issue was not raised in the notice of appeal. If it was to be seriously considered, it should have been expressly addressed in the notice and the notice of appeal should have been served on the Solicitor-General.

Appeal against sentence

[84] In the circumstances, I do not need to consider the appeal against sentence.

Result

[85] The appellant's appeal against conviction is accordingly allowed. The conviction is quashed.

Appendix A

Overseas flag desecration laws

(Taken from <http://www.aph.gov.au/library/pubs/>

[bd/2003-04/04bd042.htm#Appendix](http://www.aph.gov.au/library/pubs/bd/2003-04/04bd042.htm#Appendix))

Austria

Penal code prohibits those who in a malicious manner and at a public occasion or a function open to the public, insults, brings into contempt or belittles the flag displayed for official purposes or the national or state anthems of the Austrian Republic or its sStates. The penalty is imprisonment of up to six months or a fine of up to 360 times the fixed daily rate.

Canada

Canada currently has no legislation but there have been attempts (in 2001 and 2002) by private members to introduce flag burning legislation.

China

Under the criminal code the penalty for insulting the national flag is up to three years' imprisonment. An extract from an unofficial translation of the code reads:

Chinese Criminal Code. Article 299. Whoever purposely insults the national flag, national emblem of the PRC in a public place

with such methods as burning, destroying, scribbling, soiling, and trampling is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprived of political rights.

Hong Kong

Hong Kong's National Flag and National Emblem Ordinance, ch 2401, s 7 states:

Protection of national flag and emblem

A person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.

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France

The website includes an excerpt from the *London Times*, which states that France passed a law in 2003 which makes it an offence to insult the national flag or anthem. The penalty is a fine or up to six months' imprisonment.

Germany

Section 90(a) of the Criminal Code (Strafgesetzbuch, StGB) states as follows:

- 90. Disparagement of the State and its Symbol** -- (1) Whoever publicly, in a meeting or through the dissemination of writings (Section 11, subsection (3)):
1. insults or maliciously maligns the Federal Republic of Germany or one of its Lands or its constitutional order; or
 2. disparages the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its Lands,
- shall be punished with imprisonment for not more than three years or a fine.
- (2) Whoever removes, destroys, damages, renders unusable or unrecognizable, or commits insulting mischief upon a publicly displayed flag of the Federal Republic of Germany or one of its Lands or a national emblem installed by a public authority of the Federal Republic of Germany or one of its Lands shall be similarly punished. An attempt shall be punishable.
- (3) The punishment shall be imprisonment for not more than five years or a fine if the perpetrator by the act intentionally gives support to efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles.

India

Section 2 of the Prevention of Insults to National Honour Act of 1971 provides for a maximum jail term of three years and a fine:

2 Insults to Indian National Flag and Constitution of India. --

Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend, to three years, or with fine, or with both.

Italy

The Italian penal code makes it an offence for anyone to publicly insult or vilify the national flag or other emblem of the state. This is punishable by imprisonment from one to three years.

Japan

There is no law against damaging the Japanese flag, however there are laws that prevent the burning of foreign flags as this may be offensive to the foreign country.

Portugal

The Portuguese penal code makes it an offence for:

Anyone who by words, gesture, in writing or by any other means of public communication, desecrates the Republic, national flag or the national anthem the symbols or emblems of the Portuguese sovereignty, or in any

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other way fails to pay them their due respect, shall be punished with a prison sentence of up to 2 years or with a pecuniary penalty of up to 240 days.

Norway

There is no law relating to the desecration of Norway's own flag but there is a law protecting the flag or national coat of arms of a foreign country.

Turkey

The website states that information from guides, written for travellers to Turkey, state that it is against the law to insult the Turkish nation in any way. This includes defacing or destroying Turkish currency or the national flag and insulting the founder, Ataturk, or the president of the Republic of Turkey. Appeal allowed.

Solicitors for Hopkinson: *Sladden Cochrane & Co* (Wellington).

Solicitors for the Crown: *Crown Solicitor* (Wellington).

Reported by: Duncan Webb, Barrister

---- End of Request ----

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