SUPREME COURT OF QUEENSLAND

CITATION:	*Cannavan v Lettvale P/L* [2003] QCA 528
PARTIES:	**DAVID PATRICK CANNAVAN** (appellant/respondent) **v** **LETTVALE PTY LTD (TRADING AS GOOD VIBRATIONS ADULT WORLD)** ACN 089 960 234 (respondent/applicant)
FILE NO/S:	CA No 247 of 2003 DC No 4350 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2003
JUDGES:	de Jersey CJ, McPherson JA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed with costs to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where learned District Court judge upheld respondent's appeal against Magistrate's decision to dismiss charges – where learned District Court judge admitted evidence contrary to Magistrate's ruling – where applicant challenged constitutionality of relevant legislation before learned District Court judge – whether learned District Court judge was correct to uphold appeal – whether applicant should be granted leave to appeal decision of learned District Court judge *International Covenant on Civil and Political Rights* 1966, art 17 *Constitution* (Cth), s 51, s 92, s 99, s 109, s 122 *Classifications (Publications, Films and Computer Games) Act* 1995 (Cth) *Human Rights (Sexual Conduct) Act* 1994 (Cth), s 4 *Classification of Films Act* 1991 (Qld)

Classification of Publications Act 1991 (Qld)

COUNSEL: A J H Morris QC for the applicant
R V Hanson QC for the respondent

SOLICITORS: Nyst Lawyers for the applicant
C W Lohe, Crown Solicitor for the respondent

[1] **de JERSEY CJ**: This is an application for leave to appeal from a judgment of a learned District Court Judge who upheld the respondent's appeal against a Magistrate's decision to dismiss two charges brought against the applicant under the *Classification of Films Act* and the *Classification of Publications Act*. The first was of selling pornographic films and the second, selling pornographic literature, the transactions having been effected in each case in February 2001.

[2] The Magistrate dismissed the charges because he considered the respondent had not established beyond reasonable doubt that the applicant was the entity which sold the items to the respondent's agent, an investigating inspector Eldridge. The prosecution led four pieces of evidence in an endeavour to establish that it was the applicant: first, the applicant's being the lessee of the business premises where the sales were made; second, that the sale of so called "adult" merchandise, meaning in this context sexually oriented material, was a permissible use of the premises under the lease; third, the circumstance that the inspector obtained at the premises a business card including the words "adult world": the applicant traded as "Good Vibrations Adult World", and changed its named from Lettvale Pty Ltd to Adult World Pty Ltd, albeit subsequently to the transactions, on 10 April 2002; and fourth, that when the respondent's agent sought to speak with someone authorized to speak on behalf of the operating company, he was referred to a person who said he was Michael McGregor, and that person spoke with apparent authority, it being the fact a person with that name is the sole registered director and secretary of the applicant company and one of the guarantors of its financial obligations.

[3] As to the last of those matters, the Magistrate took the view that there was no acceptable evidence that the person spoken to was one and the same as the Michael McGregor registered as director and secretary of the applicant. As the Magistrate surmised, the Mr McGregor who was the director and secretary may have had a son of the same name, with no connection with the business, and it may have been the son who spoke with the inspector. This ignores ordinary experience; the disposal of such matters does not depend on remote possibilities. The Magistrate speculated impermissibly as to that and other possibilities divorced from the reality of what was established: that the inspector told a sales assistant he wished to speak with someone on behalf of the vendor, the inspector was referred to Mr McGregor, who answered to that name, which happened to be the name of the sole director and shareholder of the applicant and one of its guarantors, and spoke with apparent familiarity as to the applicant's involvement. As the learned District Court Judge held, that was enough to establish the authority of the person spoken to, to speak on the applicant company's behalf – and what Mr McGregor said implicated the applicant: he confirmed that the applicant operated the business at the shop.

[4] But as his Honour also held, the first three of those circumstances in any case combined to amount to a circumstantial case sufficient to warrant conviction, that is, to exclude beyond reasonable doubt any reasonable position consistent with

innocence. The issue is proof beyond reasonable doubt, not to a point of scientific certainty. It defies ordinary experience that if a sale is made at business premises, consistently with the business designated in the lease of the premises, the lessee should not ordinarily be accepted as the party responsible for carrying on the business and therefore the particular transaction, and especially so here, where the proffered business card potentially provided a further link to the applicant.

[5] The applicant now complains it elected not to call evidence following the Magistrate's exclusion of the evidence of Mr Eldridge as to Mr McGrath's admission; and submits if we took a different view on admissibility, the case should be remitted for rehearing. The presently significant point is that it was on the applicant's submission that the Magistrate excluded the evidence. There is no injustice now in holding the applicant to the consequence of that submission. In any event, as pointed out, the case against the applicant did not depend on the admissibility of that evidence.

[6] The applicant separately agitated challenges to the constitutionality of the relevant legislation. The learned Judge dismissed those challenges on the grounds advanced on behalf of the respondent. There is really no need to traverse those points again. It is sufficient to record that the Judge was plainly right to dismiss the challenge, which was discordant with well-established authority. With one exception Mr Morris QC, who appeared for the applicant, did not at the hearing of the appeal seek to develop the constitutional challenges because, as he acknowledged, the learned primary Judge was, as is this court, bound by authority to reject them. He did however, in his oral submissions, urge the view that the Queensland legislation is inconsistent with the Commonwealth *Human Rights (Sexual Conduct) Act* 1994. That Act provides (s 4(1)) that "sexual conduct involving only consenting adults acting in private is not to be subject … to any arbitrary interference with privacy …" The learned Judge held primarily that "the Commonwealth Act applies only to sexual conduct; the State acts deal with the sale of goods not sexual conduct; the Commonwealth and State Acts deal with different topics; there is no inconsistency." I agree with that. Prohibition on the sale of pornographic literature or films does not involve interference with the privacy of sexual conduct involving consenting adults acting in private. Were there any ambiguity attending the expression "sexual conduct", it would be eradicated by the explanatory memorandum, which says that "the term "sexual conduct" is intended to cover the physical expression of sexual desire. The term does not mean conduct which is incidental to sexual conduct such as the termination of pregnancy or the production or distribution of pornographic material."

[7] The penalty imposed, a fine amounting to 10 percent of the maximum amount which could have been imposed, was appropriate for a corporation engaged in the sale for commercial profit of prohibited goods.

[8] The application for leave to appeal primarily asserted a need for this court to supplement existing authority as to when a company will be bound by representations made by natural persons who may or may not be acting on the company's behalf. That body of law is clear, and there is no need to add to it. Likewise, the grounds on which the Judge relied in dismissing the constitutional challenge reflect binding authority which is clear in its application. That reality is probably reflected in some degree by the failure of any Attorney-General, notified of the proceedings, to seek to be joined.

[9] Those aspects aside, I would refuse leave to appeal because the decision of the learned Judge in allowing the appeal from the Magistrate was clearly right.

[10] I would order that the application be dismissed, with costs to be assessed.

[11] **McPHERSON JA:** The application for leave to appeal should be dismissed with costs for the reasons given by de Jersey CJ and McMurdo J.

[12] **McMURDO J:** I agree that the application for leave to appeal should be dismissed with costs.

[13] The applicant emphasised two issues which were said to warrant the grant of leave. The first involves evidence which the learned District Court judge held to be admissible, contrary to the Magistrate's ruling. The second involves an alleged invalidity of the State laws under which the applicant was convicted, said to arise from an inconsistency with the *Human Rights (Sexual Conduct) Act* 1994 (Cth).

[14] On the first of those issues, the Magistrate had excluded evidence of admissions by a Michael McGregor because, in his view, there was insufficient proof that this person was the same Michael McGregor who was the sole director and secretary of the applicant company. The learned District Court judge held that the evidence should have been admitted. But that conclusion was not essential to his Honour's judgment. It plainly appears that his Honour further concluded that the respondent had proved its case even absent that evidence. If leave were granted on this first issue, the applicant would have to challenge also that conclusion, which involves no point of principle or apparent error.

[15] The second issue concerns an alleged invalidity by operation of s 109 of the *Constitution*. The State laws against which the applicant offended are said to be inconsistent with s 4 of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) which provides as follows:

> "4(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights."

[16] Article 17 is in these terms:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

[17] The laws in question proscribe the sale of certain material. They do not proscribe any form of sexual conduct. The privacy of conduct which is otherwise lawful is relevantly affected, for example, by a law which makes it unlawful and which

provides for the detection, prosecution and punishment of those involved.[1] It was in that way that the privacy of some sexual conduct was regarded as relevantly affected by certain laws of Tasmania in violation of Article 17.[2] But the present case is not said to be of that kind. Instead the privacy of sexual conduct is said to be affected by these provisions somewhat less directly.

[18] It is argued that the proscription of the sale within Queensland of such material tends to result in its acquisition from outside Queensland, and that this can be achieved only with the loss of some privacy. The reason for that is said to be the alleged necessity for a person who, for example, orders this material by mail, to provide to the supplier details which identify him or her. But whether a person who purchases the material in that way enjoys less privacy than one who enters a shop such as the applicant's on Logan Road, is not established. At the hearing before the Magistrate, there was some cross examination of the respondent which is relevant to that factual question, but the question was by no means fully explored and it was not determined. If the factual foundation for the submission could be established, the submission should still be rejected. Even upon that premise, the laws in question would not have the requisite impact upon the privacy of sexual conduct. By proscribing the sale of this material, the laws do not make public anything which is private; nor do they authorise or require any action by which the privacy of such conduct is affected. They do not proscribe the use of the material, or require its use to be disclosed. In the case of the interstate purchaser which founds the applicant's argument, any impact upon the privacy of that person comes not from these laws but from his or her own decision to disclose personal information. In my view, this second issue involves no substantial ground of appeal.

[19] By his written outline of argument for the applicant, Mr Morris QC advanced four further constitutional arguments, although he chose to limit his oral argument to the points already discussed. Two of those submissions were discussed and rejected by the judge below. The first of them was an alleged invalidity of the *Classifications (Publications, Films and Computer Games) Act* 1995 (Cth) on the basis that there is no relevant head of legislative power arising from s 51 of the *Constitution*. It was argued that the Queensland legislation, which adopts classifications made under that Act, is ineffective because of the invalidity. His Honour held that there were two reasons for rejecting this submission: the first being that the Act was valid as an exercise of the power under s 122 and the second that the Queensland legislation can still be given effect in its reference to classifications under that Commonwealth Act, although the latter is invalid. No argument was addressed to this court as to why his Honour's reasoning was incorrect. Indeed the written argument, there being no oral argument on the point, did not address s 122.

[20] The second of these points was a submission that the same Commonwealth Act contravenes s 99 of the *Constitution* "because the classification system is applied with different consequences in different Australian States". His Honour rejected that submission because the differences result from differences between the State

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1 A separate question is then whether the interference is arbitrary.

2 In the views of the Human Rights Committee of the United Nations: *Toonen v Australia Communication* No 488/1992 and the Commonwealth Attorney-General in his second reading speech in relation to this Act: see *Human Rights (Sexual Conduct) Bill* 1994 (Cth): Second Reading, House of Representatives, 12 October 1994.

laws. Again the applicant's argument does not address why that reasoning is said to be incorrect.

[21] There are then two further points which his Honour did not determine because he was not asked to do so. They involve contentions that the Queensland legislation is invalid under s 92 of the *Constitution* and that it has "the propensity to interfere with the exercise of the implied constitutional right to freedom of communication". The applicant's counsel told his Honour that the applicant wanted those contentions noted, but no submissions would be made to the District Court because a judge of that court would be bound by authority to reject them. The authority to which counsel was referring was not cited to his Honour or in this court. It is not *Cole v Whitfield* (1988) 165 CLR 360, because Mr Morris QC told this court that the s 92 argument, whatever it is, is not inconsistent with anything there said. It suffices to say that the applicant has adopted a course by which no case as to the invalidity of the legislation upon these grounds has been revealed or demonstrated to be arguable.