SUPREME COURT OF QUEENSLAND

CITATION:	*Coleman v Kinbacher & Anor (Qld Police)* [2003] QCA 575
PARTIES:	**PATRICK JOHN COLEMAN** (appellant/applicant) v **CONSTABLE ANDREW KINBACHER (QLD POLICE)** (first respondent) **CONSTABLE ANTHONY MARINOV (QLD POLICE)** (second respondent)
FILE NO:	Appeal No 252 of 2003 DC No 373 of 2002 MAG No 17761 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	24 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	McMurdo P, Davies JA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused with costs to be assessed**
CATCHWORDS:	PROCEDURE - INFERIOR COURTS - QUEENSLAND - DISTRICT COURT - CRIMINAL JURISDICTION - APPEAL AND NEW TRIAL - APPEAL TO SUPREME COURT - where applicant charged with disorderly conduct - flag burning as a political protest - where violent resistance to arrest - s 7 of the *Vagrants, Gaming and Other Offences Act* 1931 (Qld) - whether conduct was protected by implied constitutional freedom to protest against a political decision - where arrest without warrant - s 198 *Police Powers and Responsibilities Act* 2000 (Qld) CRIMINAL TRIAL - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST CONVICTION - GROUNDS FOR INTERFERENCE - APPEAL BY CONVICTED PERSONS - whether applicant's conduct was a direct political protest which was constitutionally protected – whether applicant engaged in disorderly conduct in burning a sheet - whether applicant entitled to resist arrest - function of

particulars in a criminal trial

Criminal Code 1899 (Qld), s 23
Police Powers and Responsibilities Act 2000 (Qld), s 198
Vagrants, Gaming and Other Offences Act 1931 (Qld), s 7

Dare v Pulham (1982) 148 CLR 658, followed
Levy v The State of Victoria and Ors (1996-1997)189 CLR 579, followed
Melser v Police [1967] NZLR 379, considered
O'Connor v Police [1972] NZLR 437, considered
R v Saffron (1989) 17 NSWLR 395, considered
The Queen v Trifyllis (1998) QCA 416; CA No 358 of 1998, 11 December 1998 followed
Watson v Trenerry (1998) 100 A Crim R 408, followed

COUNSEL: No appearance by the applicant, the applicant's submissions were heard on the papers
No appearance for the respondents, the respondents submissions were heard on the papers

SOLICITORS: Applicant appeared on his own behalf
Queensland Police Service Solicitor for the respondents

[1] **McMURDO P:** I agree with Chesterman J that the application for leave to appeal should be refused with costs to be assessed.

[2] **DAVIES JA:** I agree with the reasons for judgment of Chesterman J and with the order he proposes.

[3] **CHESTERMAN J:** On 1 October 2002 the applicant was convicted of four offences which arose out of an incident on the previous Australia Day in Townsville. The hearing of the charges occurred over five days in July and August 2002. The charges were:

'1. That on the 26th day of January 2002 at Townsville one Patrick John COLEMAN in a public place namely River Side Park behaved in a Disorderly manner.

2. That on the 26th day of January 2002 at Townsville one Patrick John COLEMAN obstructed a Police Officer namely Andrew KINBACHER in the performance of the Officer's duties.

3. That on the 26th day of January 2002 at Townsville one Patrick John COLEMAN assaulted Anthony MARINOV with intent to Resist the lawful Arrest of the said Patrick John COLEMAN.

4. That on the 26th day of January 2002 at Townsville one Patrick John COLEMAN wilfully and unlawfully destroyed

one rear passenger side window and damaged one rear passenger side door the property of the Commissioner of the Police Service.'

[4] The Magistrate appears to have evaluated the evidence quite carefully. He made the following findings of fact:

'1. That a large number of people of all ages, including children, toddlers, teenagers, family groups and older people, attended the Australia Day celebrations at Riverside Park on 26th January, 2002. (Estimates given range from 1000 (Ms. McDermott) [*sic*] couple of thousand (Mr. Moriconi) to five thousand (Mr. Jackson) Ms. McDermott [*sic*] stated there were about a hundred people in her location, in sight and sound of the defendant.

2. That the defendant planned for it to be an occasion upon which he would make a dramatic form of protest against the Australian government in relation to its attitude to the persons held in detention centres.

3. That part of this protest was intended to include a burning of the Australian flag in public.

4. That the defendant in preparation for this activity, placed a quantity of two-stroke petrol in a bottle, and brought with him a brown bed sheet that had been soaked in water, as a safety measure.

5. That he also prior to coming to the park conducted a "trial burning" by cutting a small piece of the flag, and putting a light to same, although without the application of any petrol.

6. That after some preliminary vocal protest directed at Mr. Howard, the Prime Minister, (who was not present) and to some extent at Mr. Mooney, the Mayor, (who was present) the defendant made a statement to the effect that he was going to burn the flag he had with him.

7. That the defendant placed the flag upon the brown sheet that he had laid out on the ground, and sprinkled it with the petrol he brought with him.

8. That at the time he did this, a number of members of the public were on and about the park area, in his vicinity, but none in close proximity to him; that the nearest person would have been not closer that [*sic*] 5 metres from him.

9. That it was self-evident from the actions, and speech of the defendant, what he intended to do, and why he was in fact doing it.

10. That his actions were responsible for altering the happy festive mood of some of the persons present, and created a significant feeling of ill-will, if not aggression, and disgust, by some members of the public towards the defendant.

11. That some persons, at least, one of which was Helen McDermott [*sic*] felt some degree of concern, and unease as to precisely what the defendant was going to do after he lit the flag, some of that concern being because of the presence of a number of small children in the park that day; that Mrs. Bettenay was frightened and angry by the conduct of the defendant.

12. That about this time, as it became apparent the defendant was making preparations to carry out his stated intentions, the two police officers approached the defendant; that some of the onlookers became more vocal at this time.

13. That the defendant when he initially attempted to light the flag with the cigarette lighter, was unsuccessful, in that after a brief show of flame, the flame was extinguished.

14. That this act caused some mirth and laughter to occur in a section of the onlookers.

15. That officer Kinbacher spoke briefly to the defendant, and a number of times asking him, in effect, to "Please do not light the flag."

16. That the defendant ignored that request, stating it was not illegal to burn a flag, and continued to attempt to light the flag, and, after a number of attempts, was successful in doing so.

17. That as the flag ignited, and proceeded to burn, small pieces of it dropped to the sheet below, one or more of such drops causing flames to more or less spontaneously occur, when the burning pieces made contact with the sheet; that such flames were extinguished by Officer Marinov, and to some extent by the defendant, by their stamping upon them.

18. That the precise cause of that secondary fire has not been properly shown or proved to the court, although the presence of the petrol accelerant on either, or both, the flag itself, or upon the ground sheet appears to have been a causative factor.

19. That the brown sheet itself did not itself catch fire or substantially burn, with the possible exception of a small, circular hole, as clearly evident thereon; neither did the surrounding grass or vegetation catch fire.

> 20. That as the defendant lit the flag, and as the pieces of the flag dropped to the sheet, causing the secondary fire, Officer Kinbacher placed his hands upon the defendant advising him to the effect: "you are under arrest for disorderly conduct."
>
> 21. Thereafter the defendant, restated, in effect, that it was not unlawful to burn a flag, and proceeded to resist the actions of Kinbacher and Marinov in a most determined an [*sic*] violent fashion, as detailed in the evidence presented to the Court.'

[5] The Magistrate summarised his views on the evidence and submissions relating to the charge of behaving in a disorderly manner in these terms:

> 'The circumstances existing on that day was a family day of entertainment, with a view to celebrating Australia Day. It was a day on which some persons born outside of Australia were officially accepted as Queensland and Australian citizens, in some form of official ceremony involving the Mayor of Townsville. I have personally examined the flag which has dimensions of approx 130cm x 83cm. and the wooden pole, with pieces end to end measures approx. 240cm. In lighting a cloth item of that size, with the use of petrol accelerant, in an open park area with numerous members of the public in the general vicinity, (if not right next to him) including a number of children, the defendant has taken some risk. The flames that occurred unexpectedly on the sheet are some proof of that. Applying an objective test, I accept and find that conduct to have been provocative, disruptive and disturbing, and, in the manner he went about it, could be described as "a substantial breach of decorum". I find that behaviour to be disorderly.'

[6] Section 7 of the *Vagrants, Gaming and Other Offences Act* 1931 (Qld) ("VGO") relevantly provides:

> '7. Obscene, abusive language etc.
>
> (1) Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear –
>
> (e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;
>
> shall be liable to a penalty...'

[7] The applicant was arrested for disorderly conduct by Constable Kinbacher. The applicant's resistance to his arrest was violent. He struck a police officer in the stomach with some force and struggled strenuously to escape apprehension. When finally overcome, handcuffed and put in a police car he kicked out one of its windows.

[8] During the course of the trial particulars of the charge of behaving in a disorderly manner were asked for, and given. The particulars were:

> 'At about 4.50 pm on 26 January 2002 at Riverside Park it will be alleged that whilst setting alight a flag the ensuring fire spread out of control to a ground sheet and surrounding vegetation causing fear, danger of injury and disruption to members of the public.'

The Magistrate found that there was no satisfactory evidence that any vegetation caught fire. There was evidence that the sheet which the applicant had taken with him to suppress any fire that might result from his intended incineration of the flag, itself caught fire. The Magistrate, however, held that the fact that the blanket caught fire was an accident within the meaning of s 23 of the *Criminal Code* so that the applicant was not criminally responsible for that act. Nevertheless he thought the applicant's conduct was disorderly.

[9] The applicant appealed against his convictions to the District Court which, having heard the submissions to the parties on 16 June 2003, dismissed the appeal on 30 July 2003.

[10] The applicant's appeal to the District Court identified fifteen separate grounds of appeal. Many of them are general complaints about the outcome. Some took issue with particular findings of fact which did not appear to be critical. There appear to have been two strands to the attack on the Magistrate's judgment made in the District Court. The first was that the finding that the burning of the sheet was accidental meant that the charge of disorderly conduct as particularised had not been proved because an essential particular had not been established and/or because the remaining conduct could not be regarded as disorderly. As a consequence, it was said, the police officers present had no right to arrest the applicant because he had not engaged in disorderly conduct. He was therefore entitled to resist arrest and attempt to escape unlawful custody in the police car.

[11] The second strand was that the applicant's conduct was a 'direct and forceful political protest' which was constitutionally protected.

[12] The function of particulars in a criminal trial was discussed in a decision of this court, *The Queen v Trifyllis* (CA No 358 of 1998, delivered 11 December 1998) in which *R v Saffron* (1989) 17 NSWLR 395 was referred to with approval and it was noticed that 'the function of particulars is the same in criminal as in civil cases.' In *Saffron* Hunt A-JA said (455):

> 'The function of particulars in such a case is simply to relieve the other party of the need to investigate the issues of fact not identified by the particulars, or to show what will be put forward as constituting the case which has been pleaded … the relief which is granted to a party at the trial must in the end be founded on the pleadings and not upon any particulars which have been given of the matters alleged in those pleadings …'

Reference was also made to what the High Court has said in *Dare v Pulham* (1982) 148 CLR 658 at 664:

> '… Where there is no departure during the trial from the pleaded cause of action, a misconformity between the evidence and

> particulars earlier furnished will not disentitle a party to a verdict based upon the evidence …'

Part of that function is to give the opposing party a sufficiently clear statement of the case to allow him to meet it and to identify the issues for decision and thereby enable the relevance and admissibility of evidence to be determined. See *Dare* at 664.

[13] The applicant's point is that the burning of the ground sheet 'was an integral part of the particulars'. That part of the case was not proved against him in the sense that he was found not to be criminally responsible for that event. The consequence is, so the applicant contends, that 'an essential element' of the offence charged against him was not proved so that he should have been acquitted.

[14] The argument misunderstands the function of particulars and the nature of the charge brought against the applicant. If the facts proved by the prosecution establish beyond reasonable doubt all the elements of an offence then a conviction must follow even though the Crown may have furnished particulars not all of which were made out. If the facts proved against the applicant were sufficient in law to constitute disorderly conduct and they were within the description of the offence given by the particulars the applicant would have been rightly convicted. It would not matter that not all of the particularised actions were proved to have occurred or were acts for which the applicant was not criminally responsible.

[15] This was the approach taken by the District Court judge on appeal from the Magistrate. His Honour said:

> 'The particulars provided … though brief describe a single episode. … The events complained of would seem to have occurred within the space of seconds rather than minutes. It is transparently obvious that the events commenced with the igniting of the flag to which the contents of a flask of petrol had been previously applied. It may well be that the secondary fire to the ground sheet appeared to observers including the police officers as potentially more serious but the appellant could not have been in any doubt that part of the case against him involved the igniting of the flag itself. … In his own evidence he made reference to the secondary fire being unexpected and unforeseeable making particular reference to the wetness of the ground sheet which would seem to have raised a reasonable doubt in the mind of a Magistrate. In effect he was seeking to compartmentalise the episode to argue that the verdict was not able to be supported by the initial actions concerning which there was common ground. The appellant's own evidence was that he had come along intending to burn the flag and had provided himself in advance with the wherewithal to do so.

[16] The Magistrate had said:

> 'As to the above (particulars) it has been established, and (the applicant) admits that he lit the flag, and, I think it can be fairly stated, that it did spread, out of control to the ground sheet. There is no evidence of the fire spreading to any surrounding vegetation. There is some evidence to indicate some concern, fright, and anger, to some of the members of the public, particularly the females. Not,

> perhaps, because of any out of control fire, but due to what the defendant intended to do, i.e. light a fire. … Clearly then, some of the particulars have not been made out. This causes me some concern. On consideration, I am not satisfied that by itself is sufficient basis to dismiss the charge. … The particulars proved, and the findings made, must be considered, and examined, and a determination made as to whether the manner/behaviour could be considered to be disorderly. If this is found to be the case, then surely the offence would be made out.'

[17] This approach cannot be criticised. It is correct.

[18] The judge understood the applicant to be contending that s 7(1)(e) of the VGO was unconstitutional and he dealt with what he understood to be the submission in support of that contention. He rejected it by reference to the remarks of Brennan CJ in *Levy v The State of Victoria & Ors* (1996-1997) 189 CLR 579 at 595:

> 'A law which prohibits non-verbal conduct for a legitimate purpose other than the suppressing of its political message is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose. Such a law prohibiting or controlling the non-verbal conduct, if it be reasonable in extent, does not offend the constitutional implication.'

The applicant disavows any constitutional challenge to s 7(1)(e). It does not form part of his application for leave to appeal to this court. His point seems rather to be that because he was engaged in what he regarded as a political protest his right to communicate his criticisms of Government migration policy were protected by the Constitution and his conduct could not therefore be disorderly.

[19] The Magistrate said:

> 'It is really a balancing exercise that has to be performed – the unquestionable right of the defendant to make a peaceful protest, as opposed to the rights of other persons to enjoy a festive, family occasion, in a public park, free from disturbance, or concerns as to health and safety. … The crucial and significant facts … were … the actual decision … to burn the flag of that size, with the aid of an accelerant, at that particular time and place, that he did ignite, and the adverse affect his behaviour appeared to have on some of (the) public present at the time. I still find then, that the manner of the defendant could be fairly classified as disorderly. I consider the defendant has unfortunately made an error of judgment in choosing that time and place to make his particular protest.'

[20] The Magistrate considered this argument by reference to the relevant authorities, *O'Connor v Police* [1972] NZLR 379, in which Richmond J said '… The court has to apply an objective test to the conduct in question and determine as a matter of time, place and circumstances whether it was of a kind likely to cause serious annoyance or disturbance to some person or persons present', *Melser v Police* [1967] NZLR 437 in which Napier J remarked 'I have no doubt that these words 'disorderly behaviour' refer to any substantial breach of decorum which tends to disturb or interfere with the comfort of other people who may be in, or in the vicinity of, the street, or public place.' and *Watson v Trenerry* (1998) 100 A Crim R

408 in which Angel J quoted the judgment of McCarthy J in *Melser*: '… The right to protest against political decisions, is now accepted as a fundamental human right in any modern society which deserves to be called democratic … the right of protest, in particular, if exercised without restraint, may interfere with other people's rights of privacy and freedom from molestation. … Freedom of behaviour … is (not) absolute. The purposes of a democratic society are only made practicable by accepting some limitations on absolute individual freedoms. … This … is … elementary.'

[21] In particular the Magistrate noted the discussion in *Watson* concerning the relevance of the fact that the conduct in question which was alleged to be disorderly was, or was part of, a political protest. That clearly is a circumstance relevant to the decision whether the conduct complained of in a prosecution under s 7(1)(e) is disorderly as that term has been explained in the authorities.

[22] Having referred to the relevant legal principle, and the relevance of the point just mentioned, the Magistrate concluded from his review of the evidence that the charge had been made out.

[23] The applicant's contention that his conduct could not have been disorderly because it was an expression of political opinion or participation in a criticism of Government debate cannot be accepted. His motive for his conduct and the characterisation of it as 'political' are both irrelevant. Acts which the law makes criminal do not cease to have that character by reason that they are the expression of political opinion. The point is too obvious to need explanation. Where it otherwise the murder of a Prime Minister whose policies one despised would be a constitutionally protected act of political debate.

[24] The District Court judge took the same approach. Having reviewed the evidence and referred to some particular portions of it his Honour said:

> 'I have canvassed some portions of the prosecution evidence concerning the presence of members of the public and children because it was against the backdrop of such evidence that the Magistrate … approached the question of whether the (applicant's) actions in lighting the flag amounted to disorderly conduct. It was plainly open for the Magistrate to do so on the evidence. Far from being a finding which was unsupported … it seems … to have been quite compelling. I was provided with an extensive summary of the evidence … which … contains reference to a large volume of other evidence to similar effect.
>
> The concept of disorderly behaviour is in every case a matter of degree depending upon the relevant time, place and circumstances. The police have made no move to interfere with the (applicant) while he made anti-Government political statements. While the statements may have been unpalatable to some of the patrons of the event there is no suggestion that feelings had become so inflamed as to render likely a breach of the peace. Actually, there seems to have been some merriment at the failure of the (applicant) to light the flag at the first attempt. The objectionable feature of the conduct had very little to do with its political significance. It related to the lighting of a large piece of synthetic material to which petrol had been added in

> close proximity to larger numbers of people including young children. The circumstances were such as to arouse the apprehension of parents for the safety of their children.
>
> The Magistrate described the conduct of the (applicant) as "provocative, disruptive and disturbing, and … as a substantial breach of decorum". However he went on to describe the crucial and significant facts as being the actual decision by the (applicant) to burn a flag of that size, with the aid of an accelerant at that particular time and place … and the adverse effect his behaviour appeared to have on some of the public present.'

[25] The applicant's submissions as they relate to the conviction of a charge of behaving in a disorderly manner are without substance. They appear to misunderstand the law. It is apparent that the Magistrate paid careful attention to the evidence and applied to it the correct legal principles. In particular the Magistrate took account of the circumstance that the applicant was protesting against a policy of the Commonwealth Government. Having taken that circumstance into account, together with the other relevant circumstances, his Worship was convinced beyond reasonable doubt that the applicant's behaviour was disorderly. There was no error in his Worship's approach. The District Court judge reached the same conclusion having reviewed the evidence and having been satisfied that the correct legal principles had been identified and applied.

[26] The applicant's complaints that he was arrested unlawfully and was therefore entitled to resist and behaved reasonably in striking Constable Marinov and damaging the police car can be shortly disposed of.

[27] The point taken here seems to be that:

(a) The police officers considered the conduct disorderly only when the secondary fire commenced;

(b) The applicant has been found not to be criminally responsible for the second fire; therefore

(c) It follows, so the applicant submits, that he has been effectively acquitted of the act which was said to base the criminal liability and authorise the arrest;

(d) Therefore, it is submitted by the applicant, that the arrest was unlawful and the applicant's resistance, was lawful.

[28] The submissions by the applicant fundamentally misunderstand the law. It is not the law that an arrest is only lawful if ultimately the person arrested is found to be guilty of the alleged offence which was the basis of the arrest.

[29] Section 198 of the *Police Powers and Responsibilities Act* 2000 (Qld) provides:

> '**198 Arrest without warrant**
>
> (1) It is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is

committing an offence if it is reasonably necessary for 1 or more of the following reasons -

(a) to prevent the continuation or repetition of an offence or the commission of another offence;

…

(g) to preserve the safety or welfare of any person including the person arrested;

…'

[30] That section:

(a) Gives a power to arrest dependent upon a police officer forming the belief prescribed by the section;

(b) The existence of the power to arrest is distinct and independent from any ultimate determination of guilt;

(c) Provided the police officer holds the requisite belief and the power of arrest therefore arises, the arrest is lawful notwithstanding that there is ultimately an acquittal of the defendant of the offence for which he was arrested and the arrest is lawful even if the police officer's belief was founded upon some mistake of fact or law.

[31] The arresting officer Kinbacher had clearly formed the view:

(a) That the applicant had committed the offence of disorderly conduct;

(b) That he was going to repeat the offence; and

that state of mind was reasonably held given the applicant's conduct up to that point in time.

[32] On that basis the arrest was lawful. It was not rendered unlawful by the Magistrate ultimately having a reasonable doubt as to the applicant's criminal liability for the secondary fire. Indeed, even if he was acquitted of the charge of disorderly conduct the arrest was still lawful and he would be guilty of the other charges.

[33] There is no reason to doubt the correctness of the applicant's convictions or that the appeal to the District Court was properly dismissed. The application for leave to appeal raises no point of law for determination. I would refuse the application with costs to be assessed.