SUPREME COURT OF QUEENSLAND

CITATION:	*Crowther v Sala* [2007] QCA 133
PARTIES:	**CLAIRE FRANCES CROWTHER** (applicant/appellant) **v** **ADRIAN SALA** (respondent)
FILE NO/S:	CA No 345 of 2006 DC No 4802 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 April 2007
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2007
JUDGES:	Williams JA, Muir and Philip McMurdo JJ Separate reasons for judgment of each member of the Court, Muir and Philip McMurdo JJ concurring as to the orders made, Williams JA dissenting
ORDER:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. The respondent to pay the applicant's costs of this application.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – OTHER IRREGULARITIES – where appellant charged under s 474.17(1) of the *Criminal Code* (Cth) – where section does not specify a fault element for offence – where legislation provides that recklessness is fault element if nothing is specified – whether fault element applies to intent that words be 'menacing' – whether findings on fault implicit in lower judgments – whether Court can draw inference from facts found below CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – MENS REA – STATUTORY OFFENCES – GENERALLY – where statute provides for strict liability offences – where statute provides for absolute liability offences – where statute explicitly provides that certain offences are strict liability or absolute

	liability offences – whether statute implicitly provides that other offences are strict liability or absolute liability offences
	Criminal Code (Cth), s 4.1, s 5.4, s 5.6, s 474.17
COUNSEL:	The appellant appeared on her own behalf J A Philips for the respondent
SOLICITORS:	The appellant appeared on her own behalf Commonwealth DPP for the respondent

[1] **WILLIAMS JA:** The applicant, Claire Frances Crowther, was charged in the Magistrates Court with a breach of s 474.17(1) of the Commonwealth *Criminal Code*. The charge read: "That on 26th day of August 2005 at Brisbane City in the State of Queensland one Claire Frances Crowther used a carriage service, namely a telephone line and did so in a way that reasonable persons would regard as being in all of the circumstances, menacing, harassing or offensive." She pleaded not guilty at trial and was represented by experienced defence counsel. For reasons which will be referred to in some detail subsequently Magistrate Ehrich found the charge proved and, without recording a conviction, dealt with her under s 19B(1) of the *Crimes Act 1914* (Cth).

[2] The applicant then appealed to the District Court pursuant to s 222 of the *Justices Act 1886* (Qld). That appeal was heard by Ryrie DCJ who, on 20 November 2006, dismissed the appeal and made no order as to costs. On the hearing of that appeal the applicant was represented by Senior Counsel experienced in the criminal law and a senior prosecutor from the Commonwealth Director of Public Prosecutions appeared for the respondent.

[3] The applicant now seeks leave to appeal from the decision of the District Court; leave is required pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld).

[4] For clarity's sake in dealing with proceedings in the Magistrates Court and the District Court I will always refer to Crowther as the applicant and the prosecutor as the respondent. Throughout I will refer to Mr Zhouand, to whom the telephone calls in question were made, as the complainant.

[5] In his reasons the Magistrate stated, correctly, that essentially the trial came down to a question of "credibility between the two parties", that is the applicant and the complainant. He then went on to say that the applicant admitted that she made the two telephone calls in question; they were made from her telephone. In consequence the Magistrate stated that he was satisfied beyond reasonable doubt that the applicant "used a carriage service and the carriage service was a telephone line".

[6] The Magistrate then went on to say that the second issue in the trial was whether or not the communication made was such "that reasonable persons would regard it as being in all the circumstances menacing, harassing or offensive". After discussing the meaning of each of those three terms he recorded that in the evidence of both the applicant and the complainant the complainant used the words "shot guns" and "up your arse". After referring in some more detail to the evidence of each of the applicant and the complainant the Magistrate accepted beyond reasonable doubt the

evidence of the complainant rather than of the applicant. That meant that he accepted the following evidence from the complainant:

> "8.30am, 26th August. Claire Crowther called and said she wants to know why she received a letter without an envelope from the Department… She said she wants me to tell her who delivered the letter without an envelope. She then said she will get a gun and shoot everybody, everyone, at the Institute. Every fucking one. I said that I have noted what you said and she replied that she will get a gun and shove it up my arse and fire it if I don't tell - let her know who hand delivered the letter without an envelope. She then hung [sic] up. Then 10 minutes later, 8.40 am, Claire Crowther called me and started to swear at me. She said words to the effect, 'fucking shoot everyone if I don't get the answer'. She kept repeating the phrase."

[7] As already noted it was not disputed at the trial by the applicant that she made two telephone calls a short time apart to the complainant on the day in question and at least said: "If you don't sort it out, I'll go over there and shove a fucking shot gun up their arse."

[8] The Magistrate then referred again to the fact that the test was an objective one and went on to say: "It seems to me that to threaten to do injury to persons at the TAFE and, indeed, to the complainant with a gun would constitute menacing in accordance with an objective test." He then referred to the contention of the applicant that she was only using "Australian colloquialisms" in using the words which she did and that in consequence the words used were not, objectively speaking, menacing, harassing or offensive. That submission was rejected by the Magistrate as indicated and he found that the words used were menacing.

[9] The Magistrate also said in the course of his findings that he preferred the evidence of the complainant to that of the applicant; the former had made notes of the conversation contemporaneously, whereas the statutory declaration made by the applicant was dated 2 September 2005. That was obviously a factor, but not the only factor, in the reasoning process of the Magistrate in preferring the evidence of the complainant.

[10] On the hearing of the appeal in the District Court counsel for the applicant sought to adduce fresh evidence, namely an affidavit of the applicant, pursuant to s 223(2) of the *Justices Act*. The reception of that evidence was the subject of a deal of argument and the question of admissibility was dealt with in the reasons of the District Court judge. It appears that no clear ruling was made on the admissibility of the affidavit, but the reasons indicate that the submissions on conviction made on behalf of the applicant were considered and evaluated in the light of the contents of the affidavit. The critical evidence in the affidavit was that on 26 August 2005 the applicant sent to her solicitors a document she called an "incident report" detailing her account of the conversation. It was subsequent to that that the statutory declaration dated 2 September 2005 was prepared. The submission made by Senior Counsel on behalf of the applicant before the District Court judge was that if the Magistrate had known that the applicant had made a contemporaneous recording of the conversation his conclusion on the issue of credibility could well have been different.

[11] The appeal also challenged the Magistrate's conclusion that the words in question were menacing. It was submitted that what was said was "hyperbole to reinforce Ms Crowther's insistence on being given information as to how the protocol had been breached." It was then submitted that what the applicant admitted she said she would do with the gun was an "anatomical impossibility".

[12] In consequence it was submitted that the Magistrate erred in finding that a reasonable person in all the circumstances would have regarded the words used as menacing.

[13] In her reasons for rejecting the appeal the District Court judge concluded that the Magistrate had not erred in making his findings on credibility, and that the findings he made would not have been affected by knowledge that the applicant had made some notes of the conversation on 26 August. As did the Magistrate, Ryrie DCJ considered the evidence of the applicant alone would have been sufficient to establish the offence.

[14] The District Court judge then went on to consider the second ground of appeal, namely that the Magistrate erred in finding that a reasonable person would in all the circumstances have regarded the words used as menacing. The judge concluded that even on the basis of the applicant's own statutory declaration the conclusion would be reached that a reasonable person would find the content of the calls made to be menacing. She expressly concluded that she could not "accept the submission that has been made that the calls were merely her use of Australian vernacular or that they would not be considered to be 'menacing' in all the circumstances." Again it is clear that the District Court judge applied an objective test in arriving at that conclusion.

[15] On the hearing of the application for leave to appeal to this Court the applicant appeared in person.

[16] In the course of argument in this Court reference was made to a passage in the evidence of the applicant before the Magistrate where she said under cross-examination: "I couldn't anticipate that that would offend anybody in the way I said it." That gave rise to a contention that she did not intend the words used to be menacing. It was at that point that a member of the court raised with the parties the provisions of the Commonwealth *Criminal Code* dealing with the "fault element" of an offence. Significantly in neither the Magistrates Court nor the District Court was express reference made to those provisions of the Commonwealth *Criminal Code*. In consequence it is necessary to refer to the relevant provisions of that *Code*.

[17] Chapter 2 deals with general principles of criminal responsibility and s 2.1 states that the "purpose of this Chapter is to codify the general principles of criminal responsibility under the laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence irrespective of how the offence is created." Section 2.2 makes it expressly clear that the Chapter applies to all offences against the *Code*. Relevantly Division 3 provides:

> "3.1 Elements
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> (1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

3.2 Establishing guilt in respect of offences

In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element."

[18] Division 4 then defines the physical elements for an offence. The physical element may be conduct, or a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs. For present purposes it is sufficient to say that "conduct" is then defined as meaning "an act", and "engaging in conduct" means to "do an act". Then it is provided in s 4.2 that conduct can only be a physical element if it is voluntary and conduct is only voluntary "if it is a product of the will of the person whose conduct it is".

[19] Then comes Division 5 which deals with fault elements; relevantly it provides:

"5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

…

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

…

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists

only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element."

[20] The offence in question is provided for by s 474.17 of the *Code* which is in the following terms:

"Using a carriage service to menace, harass or cause offence

(1) A person is guilty of an offence if:

(a) the person uses a carriage service; and

(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years."

[21] It is now necessary to consider the offence created by s 474.17 in the light of the provisions of Chapter 2. The first element of the offence is use of a "carriage service" as defined. That is clearly a physical element within s 4. There is no doubt on the evidence that the act of using the "carriage service", in this case the telephone, was a voluntary act on the part of the applicant. The next element of the offence relates to the way in which the carriage service was used – using the telephone in a particular way. Here that involved the uttering of certain words. The words uttered by the applicant were clearly voluntary.

[22] There was a dispute between the applicant and the complainant as to the words in fact used. There has been a finding by the Magistrate, upheld by the District Court judge, that the words used by the applicant were as stated in evidence by the complainant. On this application those are the words which should be taken to be the words uttered by the applicant. If for any reason those words were not taken to be the words uttered, the court would have to consider the uttered words as admitted by the applicant.

[23] In my opinion the uttering of words could constitute a physical element with respect to an offence alleged against s 474.17. There is no difficulty in concluding that there must be a fault element accompanying the uttering of the words. In this case the fault element for the physical elements using the telephone and uttering the words would be intention, and the evidence clearly establishes the applicant meant to use the telephone and utter words and in consequence s 5.2 is satisfied.

[24] Section 474.17 then goes on to provide that in order to constitute the offence in the context of this case the words used must be such that reasonable persons would regard them as being, in all the circumstances, menacing. The critical question becomes, in my view, whether there has to be a fault element for that element of the offence. As s 3.1(2) of the *Code* makes clear there may in certain cases be a fault element for some (but not all) physical elements of the offence.

[25] Clearly the subjective intent of the person uttering the words is not relevant. It is not difficult to envisage a situation where a person uttered certain words intending thereby to menace (threaten) the receiver, but applying the objective test reasonable

persons would not regard the words uttered as being menacing. Notwithstanding the subjective intent of the utterer no offence would be committed. To my mind that points to the conclusion that intention to menace is not an element of the offence created by s 474.17. If intention is not an element one could not rationally conclude that recklessness was an alternative element of the offence. One might categorise the conclusion of reasonable persons that the conduct was menacing as a "circumstance or result" for s 5.6(2), but that does not mean recklessness is the necessary fault element if otherwise the inference from the definition of the offence is that there is no fault element for that component of the offence.

[26] The only rational conclusion is that, by providing that the test is whether or not reasonable persons would regard the conduct as menacing, the legislature has impliedly provided that the only fault elements for the offence in the present context are with respect to the use of the carriage service and the uttering of the words. If the relevant physical and fault elements are established, and reasonable persons would in the circumstances regard the conduct in question as menacing, the offence is established.

[27] The Explanatory Memorandum to s 474.17 quoted by Philip McMurdo J in his reasons is a relevant, but not determinative consideration, in construing the provision. Ultimately the Court must construe the words of the provision and if the proper construction leads to a conclusion at odds with the Explanatory Memorandum the Court must apply the proper construction. In the present case the only conclusion I can reach on the words of the section is that a fault element has been excluded by necessary implication with respect to the element of the offence that reasonable persons would in the circumstances regard the conduct in question as menacing.

[28] Though in neither court below was there express reference to the general principles of criminal responsibility under the Commonwealth *Criminal Code*, the concentration was correctly on the question whether or not, applying an objective test, the court was satisfied beyond reasonable doubt that reasonable persons would, in all the circumstances, regard the words uttered over the telephone as being menacing. At each level it was held, whether or not that test was applied to the words attributed by the complainant to the applicant (the words found by the Magistrate to have been used) or the words admittedly used by the applicant, that test was satisfied.

[29] It follows that the applicant was properly found guilty of the offence charged. However, because the provisions of the Commonwealth *Criminal Code* as to criminal responsibility were not expressly adverted to in either of the judgments below leave to appeal should be granted. In the circumstances I would grant leave to appeal but dismiss the appeal.

[30] **MUIR J**: I agree with the reasons of Philip McMurdo J and with his proposed orders.

[31] **PHILIP MCMURDO J**: The applicant was tried in the Brisbane Magistrates Court for an offence against s 474.17(1) of the *Criminal Code* (Cth) of using a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. It was alleged that she had made threatening telephone calls to a public servant.

[32] On 28 November 2005, the Magistrate gave an ex tempore judgment finding her guilty. He then discharged her without recording a conviction upon her giving security by a recognizance of $1,000 to comply with a number of conditions including that she be of good behaviour for 12 months and that she undergo 12 months probation.

[33] She appealed to the District Court under s 222 of the *Justices Act 1886* (Qld). On 20 November 2006 Judge Ryrie dismissed her appeal. This is an application for leave to appeal from that judgment under s 118(3) of the *District Court of Queensland Act 1967*.

[34] The applicant was represented by counsel in both the Magistrates Court and the District Court. However she argued her own case in this Court. There are many arguments which she wishes to advance as to how the Magistrate and the District Court judge erred. In particular, she wishes to challenge the Magistrate's preference for the complainant's evidence to her evidence, to the extent that there was any conflict. Her proposed grounds of appeal do not involve any significant question of law or public interest which would warrant the grant of leave. Nor with one exception, do they demonstrate a clear error which in the interests of justice requires the grant of leave.

[35] The exception is her argument that she was found guilty without proof of the mental element of the offence, or what the Commonwealth *Criminal Code* calls the fault element.

The evidence

[36] The applicant was in a long-running dispute with the State of Queensland concerning the effect upon her residence of polluted air coming from the Yeronga TAFE. She had obtained injunctive relief in the Planning and Environment Court. But the dispute, and its consequent correspondence and litigation, had continued. In that litigation, in which the applicant was self-represented, a form of protocol was agreed between her and the Department of Employment and Training as to how she should be sent correspondence.

[37] On 25 August 2005, the applicant received a letter from the Department which she believed had been hand-delivered to her house, in breach of the protocol. As a result, she telephoned the complainant, Mr Zhouand. At the time he was employed in the Department as a legal officer. He had not met the applicant but they had spoken on the phone a few times. He had signed the letter.

[38] According to both his evidence and her own evidence, she strongly protested what she said was a breach of the protocol as well as the contents of the letter. It was also common ground that on the following morning, she again rang him and protested the hand delivery of the letter. He told her that he thought the letter had been sent through the mail and she became angry. According to his evidence she said in an angry voice "I'm going to get a gun and shoot everyone at the Institute, every fucken one", and she went on to say that "she was going to get a gun and shove it up my arse and fire it", after which she hung up. Then a few minutes later she rang him again. He said she "was just yelling and screaming on the phone saying 'I'm – fucken shoot everyone if I don't get the answer'. I'll fucken shoot everyone if I don't get the answer". He made notes of the conversations and called the police.

[39] She gave oral evidence before the Magistrate as well as tendering a statutory declaration which she had made shortly after the event. There was little difference, if any, between her account and that of the complainant as to what she had said in these two calls. She said she was annoyed and believed that he was lying to her and that she had said words to the effect of "if you don't sort it out, I'll go over there and shove a fucking shotgun up their arse". She agreed that in her call a few minutes later, she had again said "I'll shove a shotgun up their fucking arse". Not surprisingly, she was not sure of the exact words which she had used but she recalled words such as "shove a shotgun up their fucking arse. Shove a shotgun up their fucking arse and I'll shove one up yours too, bang. That's what I did".

The offence

[40] Section 474.17 provides in part as follows:

> "(1) A person is guilty of an offence if:
>
> (a) the person uses a carriage service; and
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> (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.
>
> Penalty: Imprisonment for 3 years."

[41] The first element of that offence, the use of a carriage service, was not disputed: it was the applicant's use of the telephone. And of course that there was no doubt that she intended to use the telephone.

[42] Then the prosecution had to prove the matter or matters in paragraph (b). This required at least the proof that reasonable persons would regard her conduct as being, in all the circumstances, menacing or offensive. (The prosecution did not allege "harassing"). That required an objective assessment of the likely impact of her conduct and the Magistrate correctly identified that this question was an objective one. He held that reasonable persons would not regard her words as offensive but they would regard them as menacing.

[43] But did paragraph (b) also require the proof of some state of mind of the applicant, or more precisely, a fault element under the *Criminal Code* (Cth)? Under that Code, an offence consists of physical elements and fault elements.[1] The law that creates the offence may provide that there is no fault element for one or more physical elements.[2] A physical element of an offence may be conduct, a result of conduct or a circumstance in which conduct, or a result of conduct, occurs.[3] The fact that reasonable persons would regard the way in which the telephone was used as menacing is a fact which is a physical element of this offence. The respondent characterised that physical element as either a circumstance or a result. The difference is immaterial to the present case but I would characterise it as a circumstance.

[44] In this Court the respondent conceded that this physical element has a corresponding fault element, because the law which creates the offence, s 474.17 of

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1 s 3.1(1)

2 s 3.1(2)

3 s 4.1(1)

the *Criminal Code*, does not provide otherwise. Unlike Williams JA, I think that the respondent's concession is correct.

[45] By s 5.6(2) if the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, then the corresponding fault element is recklessness. Under s 5.4(1) a person is reckless with respect to a circumstance if she is aware of a substantial risk that the circumstance exists and having regard to what is known to her, it is unjustifiable to take that risk. Similarly, a person is reckless with respect to a result if she is aware of a substantial risk that the result will occur and having regard to what is known to her, it is unjustifiable to take the risk.[4] By s 5.4(4) if recklessness is a fault element, then proof of intention, knowledge or recklessness will satisfy that element. A person has an intention with respect to a circumstance if she believes it exists or will exist[5] and with respect to a result if she means to bring it about or is aware that it will occur in the ordinary course of events.[6] Accordingly, if s 474.17 does not exclude the fault element for the circumstance described in s 474.17(1)(b), what had to be proved in this case was that the applicant was at least aware of a substantial risk that a reasonable person would regard her conduct as menacing and that it was unjustifiable to take that risk. That would require at least the proof that she realised that her words could be sensibly understood as a genuine threat.

[46] Where a fault element is not required, the *Code* requires the events to be categorised as one involving strict liability or alternatively, absolute liability. Strict liability is the subject of s 6.1 which provides in part as follows:

> "6.1. (1) If a law that creates an offence provides that the offence is an offence of strict liability:
> (a) there are no fault elements for any of the physical elements of the offence; and
> (b) the defence of mistake of fact under section 9.2 is available.
> (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
> (a) there are no fault elements for that physical element; and
> (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element."

Absolute liability is the subject of s 6.2 which provides in part:

> "6.2. (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
> (a) there are no fault elements for any of the physical elements of the offence; and
> (b) the defence of mistake of fact under section 9.2 is unavailable.
> (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
> (a) there are no fault elements for that physical element; and
> (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element."

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4 s 5.4(2)
5 s 5.2(2)
6 s 5.2(3)

The difference between the two categories is in the availability of the defence of mistake of fact. The present relevance of these provisions is that for an offence provision to exclude the requirement for a fault element for a physical element, it must also provide that strict liability applies to that physical element or that absolute liability applies to it. It must be possible to see that categorisation within the offence provision if it is to be interpreted as excluding the fault element. This makes it more difficult to interpret s 474.17(1)(b) as excluding, by implication, the fault element.

[47] In my view there is no implied exclusion of the fault element for paragraph (b) of s 474.17(1). What must be proved is that objectively viewed the conduct was menacing and that the defendant either intended that it be so or was reckless as to that fact. In each case both the physical and fault element must be proved. So an intention to menace would not suffice if the conduct, in all the circumstances, would not be regarded by reasonable persons as menacing.

[48] I am fortified in that view by the Explanatory Memorandum[7] which said this of the (proposed) s 474.17:

> "The existing offence in section 85ZE explicitly provides that the offending conduct, of using a carriage service, must be *intentional*. The reference to intention is not included in proposed section 474.17, because by application of the default fault elements of section 5.6 of the *Criminal Code* the fault element of intention will automatically apply to this physical element of conduct. This means that a person must intentionally use the carriage service to be found guilty of the offence.
>
> The fact that the use of the carriage service occurs in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive constitutes a circumstance in which the offending conduct must occur. By application of the default fault elements in section 5.6 of the *Criminal Code*, the fault element of *recklessness* will apply to a physical element of an offence that is a circumstance. 'Recklessness' as it applies to a circumstance is defined in section 5.4 of the *Criminal Code*."

The judgment below

[49] The Magistrate made no finding as to the fault element. His reasons make it clear that he did not consider it. The explanation for that is that the prosecution overlooked it, and did not attempt to prove it or bring it to the Magistrate's attention. In particular, in the brief cross-examination of the applicant, the prosecution did not challenge her evidence that she believed that her words were not used in a menacing or offensive way. Unassisted by legal argument then, the Magistrate addressed only the objective question, the physical element within paragraph (b) of s 474.17(1), but not the corresponding fault element.

[50] The same error affects the decision of the District Court judge. Her Honour concluded:

> "In all of the circumstances, particularly applying the Reasonable person test and, particularly in view of the fact that she made two

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[7] The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004*

> calls referring to the use of a gun which she says she would use, even on her own version of events, to shove up their collective arses, I therefore find the appeal dismissed and I make no order as to costs."

[51] In the hearing in this Court, counsel for the respondent (who had not appeared below) made two submissions as to why the absence of any express reference to the fault element within the judgments of the Magistrate or the judge should not matter now. First it was said to be implicit in the findings in each court that the fault element had been proved. That submission cannot be accepted. In each judgment, not only has the fault element not been mentioned but the reasons for judgment make it clear that the only question was that requiring the objective test, i.e. the physical element. Secondly, it was argued that if leave were granted, then on the hearing of the appeal, this Court could draw inferences from the facts found below,[8] and this Court would find the fault element proved by an inference drawn from the physical element. In other words it was argued that the only rational conclusion from the facts that she spoke these words and that objectively they were menacing is that she intended them to be menacing or was reckless about that.

[52] According to the applicant's evidence, there was not the required intention or recklessness. The Magistrate did not accept all of her evidence. But that does not mean that the fault element was thereby proved or that it was the only rational inference from what was proved. The problem in reasoning from the Magistrate's rejection of some of her evidence is that this essential issue was simply not being considered by anyone involved in the trial. Specifically, the Magistrate made no finding as to what the applicant had thought about her conduct as it occurred. Nor would it have been fair to the applicant for a finding adverse to her to be made, because there was no challenge to that aspect of her testimony. Then the District Court judge did not hear oral evidence from anyone, including the applicant, and although this was a s 222 appeal, her reasons were in terms of whether the Magistrate's findings should be disturbed. In these circumstances, it would be unfair to the applicant for this Court to make a finding which at the trial and on the s 222 appeal, the prosecution did not attempt to prove.

[53] The result is that the applicant did not have a fair trial and that was not corrected in the District Court. Leave to appeal should be granted and the appeal allowed. The respondent submitted that in that event, there should be a new trial ordered. I would not order a new trial: the applicant has served the period of probation which was ordered and no conviction had been recorded. I would order the respondent to pay the applicant's costs of this application.

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[8] *District Court of Queensland Act 1967*, s 119