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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP90-SW02

03/479

IN THE MATTER OF an appeal against a decision of the
Broadcasting Standards Authority

BETWEEN MICHAEL HOOKER
Appellant

AND TV3 NETWORK SERVICES LIMITED
Respondent

Hearing: 12 March 2003

Appearances: Mr Hooker in Person
Ms Bradley for TV3
Mr Scott-Howman for Broadcasting Standards Authority

Judgment: 19 March 2003

JUDGMENT OF VENNING J

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MICHAEL HOOKER HC AK AP90-SW02 []

[1] The appellant Mr Hooker appeals from a decision of the Broadcasting Standards Authority ("the Authority"). The Authority's decision was delivered on 19 September 2002. It was in response to Mr Hooker's complaint to the authority concerning the broadcast of a film entitled "Scream" by TV3 Network Services Limited ("TV3") on 18 January 2002.

Background

[2] The background to the present appeal can be stated shortly. Following the showing of Scream by TV3, the appellant complained to TV3 by way of letter which carries a date of 9 March 2002. (It appears that date must be incorrect). TV3 replied by letter of 8 March. The appellant then referred his complaint to the Authority on 2 April 2002. After further correspondence between the appellant, the Authority and TV3, the Authority proceeded to determine the appellant's complaint and issued its decision on 19 September 2002.

The relevant provisions of the code

[3] Free-to-air television broadcasters, including TV3, have developed a Code of Broadcasting Practice pursuant to s 21 of the Broadcasting Act. In the complaint, the appellant alleged TV3 had breached the following five standards of the code:

- Standard 1 - Good taste and decency;
- Standard 2 - Law and order;
- Standard 7 - Programme classification;
- Standard 9 - Children's interests; and
- Standard 10 - Violence.

[4] In particular the appellant complained that TV3 had breached the following Guidelines of the Standards:

Standard 1 Good Taste and Decency

In the preparation and presentation of programmes, broadcasters are responsible for maintaining standards which are consistent with the observance of good taste and decency.

Guidelines

1a Broadcasters must take into consideration current norms of decency and taste in language and behaviour bearing in mind the context in which any language or behaviour occurs. Examples of context are the time of the broadcast, the type of programme, the target audience, the use of warnings and the programme's classification (see Appendix 1). The examples are not exhaustive.

...

Standard 2 Law and Order

In the preparation and presentation of programmes, broadcasters are responsible for maintaining standards which are consistent with the maintenance of law and order.

Guidelines

...

2e The realistic portrayal of anti-social behaviour, including violent and serious crime and the abuse of liquor and drugs, should not be shown in a way that glamorises these activities.

...

Standard 7 Programme Classification

Broadcasters are responsible for ensuring that programmes are appropriately classified and adequately display programme classification information, and that time-bands are adhered to.

Guidelines

7a Broadcasters should ensure that appropriate classification codes are established and observed (Appendix 1). Classification symbols should be displayed at the beginning of each programme and after each advertising break.

...

Standard 9 Children's Interests

During children's normally accepted viewing times (see Appendix 1), broadcasters are required, in the preparation and presentation of programmes, to consider the interests of child viewers.

Guidelines

9a Broadcasters should be mindful of the effect any programme or promo may have on children during their normally accepted viewing times – usually up to 8.30pm – and avoid screening material which would disturb or alarm them.

9b When scheduling AO material to commence at 8.30pm, broadcasters should exercise discretion to ensure that the content which led to the AO rating is not shown soon after the watershed.

9c Broadcasters should have regard to the fact that children tend to stay up later than usual on Friday and Saturday nights and during school and public holidays and, accordingly, special attention should be given to providing appropriate warnings during these periods.

...

9e Scenes and themes dealing with disturbing social and domestic friction or sequences in which people – especially children – or animals may be humiliated or badly treated, should be handled with care and sensitivity. All gratuitous material of this nature must be avoided and any scenes which are shown must pass the test of relevancy within the context of the programme. If thought likely to disturb children, the programme should be scheduled later in the evening.

9f "Scary" themes are not necessarily unsuitable for older children, but care should be taken to ensure that realistically menacing or horrifying imagery is not included.

...

Standard 10 Violence

In the preparation and presentation of programmes, broadcasters are required to exercise care and discretion when dealing with the issue of violence.

Guidelines

10a Broadcasters should ensure that any violence shown is not gratuitous and is justified by the context.

10b Broadcasters should be mindful of the cumulative effect of violent incidents and themes and should avoid any impression that violence is dominating a single programme, a programme series, or a line-up of programmes screened back-to-back.

...

10f When real or fictitious killings, including executions and assassinations, are shown, the coverage should not be explicit, prolonged, or repeated gratuitously.

...

[5] In the event the Authority in its decision of 19 September upheld the appellant's complaint that the broadcast of *Scream* on TV3 on 18 January 2002 at 8.30 p.m. breached Standard 9 of the Free-to-Air Television Code of Broadcasting Practice. It declined to uphold any other aspect of the complaint under Standards 1, 2, 7 and 10.

[6] The Authority's reasoning on its decision to uphold the appellant's complaint in relation to Standard 9 is as follows:

In the Authority's view, the half hour between 8.30 and 9.00pm is within the time period which is "soon after the watershed". Accordingly, the screening of this material [the killing of Drew Barrymore's character which occurred about 15 minutes into the AO timeband at 8.45pm] should have been avoided in terms of Guideline 9b to Standard 9. The Authority concludes that the broadcaster should have exercised its discretion to ensure that this material was not shown too soon after the watershed. As it did not do so, the Authority considers that the broadcaster did not adequately consider the interests of child viewers during their normally accepted viewing time and, accordingly, breached Standard 9 of the Television Code.

It however declined to make any orders under ss 13 or 16 of the Act.

Relevant principles

[7] Appeals against decisions of the Authority are to be heard and determined as if the decision appealed against had been made in the exercise of a discretion: s 18(4) of the Broadcasting Act 1989.

[8] The approach to be taken to such an appeal has been confirmed in the Court of Appeal in *Comalco New Zealand Limited v Broadcasting Standards Authority & Anor* (1995) 9 PRNZ 153:

Section 18(4) of the Broadcasting Act requires the Court to hear and determine an appeal "as if the decision or order appealed against had been

made in the exercise of a discretion". This means that the appeal should only be allowed if the Authority has proceeded on a wrong principle, given undue weight to some factor or insufficient weight to another, or is plainly wrong: *Fitzgerald v Beattie* [1976] 1 NZLR 265, 268 (CA).

(pp 161-162 per McKay J)

[9] The issues for this Court then are whether in declining the appellant's complaint under Standards 1, 2, 7 and 10 it can be said the Authority:

- Proceeded on a wrong principle;
- Gave undue weight to some factor;
- Gave insufficient weight to another;
- Was plainly wrong.

Preliminary issues

[10] At the request of the appellant I have viewed a copy of the film *Scream* as viewed by the Authority.

[11] At the outset of the hearing Mr Hooker objected to the Authority being heard at the appeal before me. Mr Hooker noted that the Authority had not filed its submissions within the timetable previously directed by the Court and submitted in the circumstances the Authority should not be heard. The Authority gave notice of its intention to appear at the hearing of this Appeal. An initial conference was scheduled for 17 October. The appellant and TV3 filed a memorandum confirming that by consent a number of directions could be made including one providing for the respondent and Authority to file submissions 14 days prior to the allocated hearing date. The Authority confirmed its agreement to those directions by its own memorandum for the pre-trial conference. Orders were made accordingly by Laurenson J on 15 October 2002. The Authority's submissions were filed on 7 March. This matter came on for hearing before me on 12 March. Despite Mr Hooker's objection I accepted the Authority's submissions. I did so for the following reasons and on the following conditions:

- The exact date for the fixture was only allocated at a call-through in the week prior.
- The Authority's submissions were largely procedural and explanatory as to the relevant provisions of the Act and process.
- To the extent that the Authority's submissions attempted to support the Authority's decision I declined to read those submissions.
- The contest on the merits of the appeal was really between the appellant and TV3.

[12] One last preliminary matter should be referred to. During the course of his submissions the appellant referred to some surveys and reports from AC Nielsen. That information was not before the Authority. Counsel for TV3 objected to it being admitted at this stage of the process. The Authority has powers of a Commission of Inquiry: s 12.

[13] On appeal this Court has all the rights the Authority had at the initial hearing: s 18(5). Mr Hooker submitted in the circumstances the Court could take into account that further information. I decline to do so. If the appellant wished to rely on that information he should have put it before the Authority. I am not prepared to consider it at this stage, particularly given the approach that is to be taken to appeals such as this.

Standard 1

[14] The appellant submitted that the Authority's determination that the broadcast did not go beyond current norms of taste and decency because it contained elements of satire/parody was plainly wrong. He referred to a survey conducted by Consumer Link Limited which for the reasons given I decline to take notice of as it was not referred to the Authority. He also referred to a critical review by a movie critic. He also submitted that there was a conflict between the findings under Standard 9 and Standard 1. Finally he submitted the Authority failed to take into account relevant

considerations, namely that the producer's films appealed to younger viewers and the characters were played by actors who had a particular following among younger viewers.

[15] As to the appellant's submissions the Authority was plainly wrong I note that the standard for the appellant to reach is a high one. In *Television New Zealand Ltd v Ministry of Agriculture* (AP89/95, unreported Wellington, 13 February 1997) McGechan J considered the phrase and said:

Was the Authority's decision "plainly wrong"? The word "plainly" means what it says: not "arguably wrong" or "debatable" or even "not the decision I would have reached myself", but plainly in error. That is an exacting requirement.

[16] Consideration of Standard 1, good taste and decency requires consideration of the film in the context of its broadcast. The examples of context to the guideline are:

- the time of broadcast;
- the type of programme;
- the target audience;
- the use of warnings in the programme's classification.

In the present case the film was shown at 8.30 p.m., the watershed. The film was of the horror film genre. It contained a warning about the content prior to its screening. It was classified AO. The Authority can hardly be criticised for failing to take into account matters that were not referred to it. Nor is the appellant's or a particular film critic's view of the film determinative. After taking account of relevant considerations the Authority decided on balance the film did not offend against Standard 1. It cannot be said that in reaching that conclusion it was plainly wrong or it failed to take into account relevant considerations particularly when they were not referred to it.

Standard 2

[17] The appellant submitted the Authority's decision that the broadcaster maintained in its programmes and their presentation, standards that are consistent with the maintenance of law and order was plainly wrong. In particular he submitted that the scene of two killers taking turns to stab each other represented scenes vividly and was therefore realistic and glamorised the portrayal of violence and serious crime. He noted there was a distinction to be made between glamorise and advocate.

[18] Having viewed the scene in question the Authority considered the scene depicted a falling out between two killers and that the violence was far fetched and farcical and could not be said to have glamorised the killer's behaviour as it does not advocate the behaviour shown.

[19] In my view the appellant has placed too much emphasis on a particular definition within the Concise English Dictionary for realistic as representing scenes vividly. The Oxford Dictionary includes the definition "characterised by artistic or literary realism, representing things as they really are". Further, having viewed the scene in question I agree with the Authority's interpretation of it. The scene does not display artistic realism. It is a spoof. It follows I do not find the Authority was plainly wrong.

Guideline 7

[20] The appellant submitted that TV3 breached Standard 7 by showing the film at 8.30 p.m. as the film contained realistic violence and horrific encounters and referred to the special note to Appendix 1 which suggested in such circumstances a designation such as "AO 9.30 p.m. or later" may be appropriate. The Authority considered that a special time designation was not warranted for the same reasons that led it to conclude Standard 1 was not breached, namely it considered the context timing of the broadcast, the nature of the broadcast horror film, the pre-broadcast warning and the AO rating. The special note to the appendix contemplates the Authority exercising a discretion. The Authority did so. While the appellant may

have considered 9.30 AO may have been more appropriate I am unable to say that the Authority was plainly wrong to reject the complaint on this ground.

Standard 10 – Violence

[21] The appellant submitted that the Authority proceeded on wrong legal principles in declining to uphold the complaint under Guideline 10a, 10b and 10f violence was expected. He submitted that the provision for audience expectations to be taken into consideration were not to be found in the Guideline and nor was there any foundation at law for the Authority to absolve TV3 of its statutory requirements to have regard to the Guidelines because violence may be fundamental to the storyline. Having viewed the film the finding that the violence was fundamental to the storyline was certainly open to the Authority. Further, in the context of the film the ongoing depictions of violence were part and parcel of the storyline and as the Authority put it were fundamental to the storyline. It cannot be said the Authority was plainly wrong in the conclusion it reached under Standard 10.

[22] The appellant also submitted in the alternative that the Authority failed to take into account the effect that censor editing had on the contextual integrity of the violence. He referred to the *McIlroy v TVNZ* (BSA 1997-082) where the Authority found:

... to delete such extremes removes the intended lampooning effect and results only in gratuitous violence. The Authority suggests that the censorship process in itself automatically renders the film unsuitable for television viewing.

Counsel for TV3 made the point that that submission had not been referred to the Authority. However, in any event such a finding must be a matter of degree in each particular case. Again, having viewed the film, I am satisfied it was open to the Authority to find that the editing in this case has not removed the “intended lampooning effect” resulting in gratuitous violence. I do not consider the appellant has made out a case under Standard 10.

Standard 9

[23] As noted the Authority upheld the appellant's complaint under Standard 9. Having considered all the circumstances of the complaint and taking into account the fact this was the first time the Authority had upheld a complaint measured against the new Standard 9 and the applicable Guidelines the Authority did not consider that an order under ss 13 and 16 of the Broadcasting Act was required. Again that was a finding that was open to it in the exercise of its discretion. It is not one that I am prepared to disturb.

General submissions

[24] The appellant then made a number of general submissions directed at the failure of the Authority to encourage TV3 to observe the Codes of Practice particularly in relation to the protection of children. Section 21 (1)(e)(i) notes that one of the functions of the Authority is:

To encourage the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by such broadcasters, in relation to—

- (i) The protection of children.

In addition the appellant referred to the United Nations Convention and the Rights of the Child Article 3 (1) and submitted that domestic legislation should be read in a way consistent with New Zealand international obligations: *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 269. He then concluded that it was far from the best interests of children that programmes dominated by violence and containing gratuitously repeated explicit executions and assassinations should be permitted to be broadcast on Free-to-Air television at all given its pervasiveness as a service available to the community at large let alone in the normally accepted viewing time.

[25] The last submission is no doubt a view that the appellant and a number of other members of the community genuinely would hold. A number of points have to be made about it, however.

[26] First the appellant's submission on this point proceeds on the basis that a programme that screens at 8.30 p.m. on Free-to-Air television is shown at a time which is a normally accepted viewing time for children. There is a tension between a broadcaster's desire to screen adults only films and the fact that children may watch television later in the evening. That tension has been addressed in the Standards by the broadcasters accepting that AO programmes containing adult themes and directed primarily at mature audiences may be screened after 8.30 p.m. until 5.00 a.m. and by the provision to Appendix 1 which notes that programmes containing stronger material or special elements which fall outside the AO Guidelines containing a greater degree of sexual activity, potentially offensive language, realistic violence, sexual violence, or horrific encounters, a designation such as AO 9.30 p.m. or later may be appropriate. The Code of Practice has, however, accepted as a watershed that from 8.30 p.m. on until 5.00 a.m. AO programmes may be shown, that is the watershed time. However, recognising the reality that 8.30 p.m. is to a degree an arbitrary time the Authority in this case considered that the killing of Drew Barrymore's character which occurred about 15 minutes into the AO timeband at 8.45 p.m. could be described as soon after the watershed and therefore in breach of Guideline 9b. The Authority considered that the half hour between 8.30 and 9.00 p.m. was within the time period soon after the watershed. That is not to shift the watershed to 9.00 p.m. but rather is a recognition of the practical situation that children may stay up later and watch television later on Friday and Saturday nights and during school holidays.

Conclusion

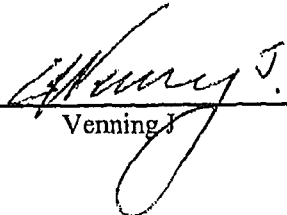
[27] In short the appellant has not satisfied the Court the Authority based any of its findings on an error of principle or failed to consider relevant considerations. Nor can it be said the Authority was plainly wrong. The fact that the appellant or for that matter even the Court may have taken a different view on certain aspects of the

Authority's finding does not make the Authority's view wrong. The appeal is dismissed.

Costs

[28] Although the appellant was unsuccessful before this Court, part at least of his original complaint was upheld by the Authority. I note that the Authority did not make any orders against TV3 in this case. In the circumstances and although this is the second unsuccessful appeal this appellant has brought before this Court I do not propose to make any order for costs. That may not necessarily be the position in the future.

Signed at Apw this 19th day of March 2003



Venning J