



P.O.Box 412365 • Craighall • Tel (011) 325-5755 • Fax (011) 325-5736 • e-mail: bccsa@nabsa.co.za
No 2 Albury Park • Magalieszicht Ave • Dunkeld West • 2196 • www.bccsa.co.za

CASE NUMBER: 03/2012

DATE OF HEARING: 23 FEBRUARY 2012

P KOEKEMOER

COMPLAINANT

vs

JACARANDA 94.2 FM

RESPONDENT

TRIBUNAL: **PROF KOBUS VAN ROOYEN SC (CHAIRPERSON)**
 DR LYNDA GILFILLAN
 MS GIUSEPPINA HARPER
 ADV BOITUMELO MMUSINYANE

Complainant: The Complainant was invited but could not attend.

For the Respondent: Mr JD Crawford, Legal Representative accompanied by Mr Neil Johnson: Jacaranda Programme Manager and Mr Rian van Heerden: the Presenter.

Incitement to unlawful conduct – mere expression of an opinion does not amount to incitement. Koekemoer vs Jacaranda 94.2 FM, Case no: 03/2012(BCTSA).

SUMMARY

The mere expression of the view that aged people in a hospital should have the freedom of choice to use an illegal drug such as crack does not amount to incitement in law. The opinion is, accordingly, not forbidden. When a presenter expresses a view such as this on radio, he is acting within the confines of the law. The complaint was dismissed.

JUDGMENT

JCW VAN ROOYEN SC

[1] A complaint was received regarding a statement made by presenter Rian van Heerden during his morning show on Jacaranda 94.2, a radio station that falls under our jurisdiction. I referred the matter to a Tribunal so that this matter could be resolved together with three other matters where the radio station was also a respondent.

[2] The complaint reads as follows:

“12th of January 2012 at 07:00, Rian van Heerden (morning show host). During my drive to work this morning, I turned on the radio and heard the following: “*I feel, if you want to Smokel if you want to drink; if you want to use crack...whatever makes you happy.*”

The statement came after the discussion of a old man drinking Whiskey in the hospital. In reference to the discussion before saying the above, I can kind of understand what Rian was trying to say – but ‘promoting’ the use of a drug on radio is not acceptable.”

[3] The Respondent contended that the off-the-cuff statement was made in jest and that it was not intended to promote or incite anyone to commit a criminal act.

EVALUATION

[4] The Broadcasting Code provides as follows in clause 4:

“Broadcasting service licensees must not broadcast material which, judged within context,

- (a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole;
- or
- (b) sanctions, promotes or glamorises violence or unlawful conduct.”

In *National Commissioner v e-tv*¹ it was held by the Tribunal of the Commission that the phrase “sanctions, promotes or glamorises violence” means that there must be an *incitement* to violence as interpreted by the Appellate Division. The Tribunal stated the following:

¹ BCCSA Case 5/2010

“The purpose of the inquiry is whether the broadcast, judged in context, “sanctions, promotes or glamorises violence”.² In this regard, see *S v Nkosiyana*³ where Holmes JA states that “an inciter is one who reaches and seeks to influence the mind of another” – a test that excludes the reaction of the person who is sought to be incited. Although the learned Judge of Appeal said this within the context of a criminal prosecution, we are of the opinion that it is equally applicable to the language in clause 14(ii). The test is whether the news insert “sanctions, promotes or glamorises violence”, without any reference to its effect. In contrast section 1(1)(b) of the Intimidation Act requires that either fear results from the uttering or publication or, that it might reasonably be expected that the natural and probable consequences thereof would be that a person who fears for his or her safety or that of others.”

- [5] The presenter suggested that elderly persons who find themselves in the last stages of their lives in a hospital should enjoy freedom of choice regarding certain matters. He stated that if the elderly wish to drink whiskey in hospital, they should be permitted to enjoy this in their old age. That, at least, was the presenter’s view. No reasonable person would interpret this as a serious attempt to promote the consumption of whiskey where the person is indeed not permitted to consume alcohol. There was no suggestion in the presenter’s statement that whiskey should be given to such patients without their consent.
- [6] In so far as “crack” (a form of cocaine) is concerned, the presenter was once again expressing a rather flippant opinion. Of course, the opinion here is more problematic than in the case of whiskey, since the distribution, possession and consumption of crack is prohibited by law. Crack is, indeed, widely regarded as being an extremely dangerous drug. However, the view expressed was lighthearted and clearly amounted to hyperbole. I have no doubt that what was said in regard to violence in the *Nkosiyana* and e.tv judgments will also be applicable to matters concerning unlawful conduct, which has been added to the new 2011 Code. Therefore, judged according to the new Code, the presenter’s statement did not in any way amount to incitement to unlawful conduct. He merely expressed a view that promoted the notion of freedom of choice in the last stages of an elderly hospital-patient’s life. By law, it is permissible to hold such a view, and to express it. It is the incitement which is forbidden, not the view per se. And “incitement” has a limited meaning in law, as held in *Nkosiyana*.

² The clause does not include “incites” but the preceding words already include incitement.

³ 1966(4) SA 655(A) at 659 per Holmes AJ.

The complaint is accordingly not upheld.

A handwritten signature in black ink, reading "J. C. W. van Rooyen". The signature is written in a cursive style with a large initial 'J'.

**PROF KOBUS VAN ROOYEN SC
CHAIRPERSON**

Commissioners Gilfillan, Harper and Mmusinyane concurred with the judgment of the Chairperson.