IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
[2019] EWHC 3094 (Admin)

No. CO/1016/2019

Royal Courts of Justice
Thursday, 31 October 2019

Before:

LORD JUSTICE COULSON
MRS JUSTICE CHEEMA-GRUBB DBE

B E T W E E N :

ALISON CHABLOZ — Applicant

- and -

CROWN PROSECUTION SERVICE — Respondent

MR A DAVIES (instructed by TV Edwards) appeared on behalf of the Applicant.

MR J MULHOLLAND QC (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE COULSON:

1. Background

1 On 25 May 2018 at Westminster Magistrates' Court, the applicant, Miss Alison Chabloz, was convicted of three offences under section 127(1)(a) and (b) of the Communications Act 2003. She appealed her convictions to Southwark Crown Court, but on 13 February 2019 her appeal was dismissed by His Honour Judge Hehir and Mrs Meena Rego JP. Judge Hehir produced a detailed written ruling explaining that decision, which was dated 11 February.

2 After that, things got into something of a procedural muddle. The applicant sought to appeal by way of case stated, and initially it appears that (without seeking submissions from the respondent) the judge thought this was the appropriate procedure. An appeal by way of case stated was commenced in March 2019. However, following a hearing in May concerned with how the matter should proceed, the judge refused to state a case and indicated that the proper course was for the applicant to seek permission to judicially review the written ruling in accordance with the practice set out in *Sunworld Limited v Hammersmith and Fulham LBC* [2000] 1 WLR 2102. No such application has ever formally been made, although written grounds for judicial review were produced in September 2019.

3 The confusion has not stopped there. There were a number of defects in the original application to appeal by way of case stated: for example, the respondent to the appeal was originally Southwark Crown Court, and the CPS was not served. By an order made by the Administrative Court of its own initiative on 27 March 2019, which sought to remedy some of these errors, the CPS was substituted as the respondent.

4 On 19 August 2019, Sir Wyn Williams made appropriately tart comments about how this case had "become a procedural nightmare", and indicated the need for one overarching hearing to deal with all issues. He set out directions for the parties to follow to achieve that. The parties have not complied with all those directions.

5 However, at the hearing today, namely 31 October 2019, both parties were anxious for the court to go ahead to deal with the substantive issues. We have accepted that invitation on the following basis. We treat the application before us as an application for judicial review in accordance with *Sunworld*, because there was a written ruling which we think obviated the need for the more cumbersome "case stated" mechanism. We waived the need for an acknowledgement of service, even though it would have been helpful to see how the CPS put their case at an earlier stage. We extended the necessary time for both parties following the failure to comply with all of the directions of Sir Wyn Williams. Finally, we ruled that, although this is an application for judicial review and the respondent would usually therefore be the court (with the CPS as an interested party), the respondent can remain the CPS because of the written consent of HMCTS.

2. The issues

6 Section 127(1) of the Communications Act 2003 states as follows:

> "(1) A person is guilty of an offence if he—
>
> (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
>
> (b) causes any such message or matter to be so sent."

7 The first two charges against the applicant in the present case were that on or about 28 September 2016, contrary to section 127(1)(b), she had caused to be sent by means of a public electronic communications network, namely the internet, a message or matter that was grossly offensive, being a hyperlink on her blog to two performances of her antisemitic songs entitled "Nemo's Antisemitic Universe" and "(((Survivors)))". These songs had been performed by the applicant four days earlier at a meeting of a right-wing organisation called the London Forum at the Grosvenor Hotel in London. The performances had been video-recorded and then uploaded onto YouTube.

8 The applicant had not been involved in the uploading, but she had a free account with wordpress.com and had been allocated a subdomain entitled "tellmemorelies.wordpress.com", a blog which allowed her to publish and manage multimedia content. On this blog site the applicant informed those looking at the site that she had performed the songs, and pasted a hyperlink which connected with the YouTube site and allowed immediate streaming of the London Forum video of her performances.

9 The third charge concerned section 127(1)(a). The applicant accepted that on 2 September 2017 she had uploaded the video of her performing another song called "I like the story as it is - SATIRE!" onto the YouTube website. This song was grossly offensive for the same reasons.

10 In respect of the first two charges, the applicant originally took a whole raft of points, first before the district judge and then before Judge Hehir. The only one of those that survives to this court (Issue 1) is the submission that the posting of a hyperlink did not 'cause an offensive message or other matter to be sent'. The submission is that the posting of the hyperlink was a neutral act on the part of the applicant.

11 In relation to the third charge, the only issue that remains is the submission that a communication cannot occur with an inanimate object, and that uploading the video to the YouTube server, located in a bunker in California, could not amount to a communication (Issue 2).

3. *Collins* and *Chambers*

12 In my view, these issues fall to be considered primarily by reference to two well-known English decisions, one of the House of Lords and the other of a particularly strong constitution of this Court.

13 In *Director of Public Prosecutions v Collins* [2006] 1 WLR 2223, the defendant telephoned his MP and spoke directly to him or members of his staff, or left messages on an answering machine, referring to ethnic minorities in highly derogatory terms. Both the magistrates and the Administrative Court dismissed the charges, in part on the basis that none of those with whom the defendant interacted or who had received the messages were from the ethnic backgrounds of those abused and were not grossly offended by the language used.

14 The House of Lords allowed the appeal. They held that the purpose of section 127(1) was not to protect people against the receipt of unsolicited messages but to prohibit the use of a service provided and funded by the public and for the benefit of the public, for the transmission of communications which contravened the basic standards of society. The *actus reus* of the offence was the sending of the message of the proscribed character by the defined means. The House of Lords also stressed that the offence was complete when the message was sent, and it made no difference that the message was never accessed by

anyone, always provided that there was an intention to insult those to whom the message related.

15 Relevant paragraphs of the speech of Lord Bingham include:

> "7. This brief summary of the relevant legislation suggests two conclusions. First, the object of section 127(1)(a) and its predecessor sections is not to protect people against receipt of unsolicited messages which they may find seriously objectionable. That object is addressed in section 1 of the Malicious Communications Act 1988, which does not require that messages shall, to be proscribed, have been sent by post, or telephone, or *public* electronic communications network. The purpose of the legislation which culminates in section 127(1)(a) was to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society. A letter dropped through the letterbox may be grossly offensive, obscene, indecent or menacing, and may well be covered by section 1 of the 1988 Act, but it does not fall within the legislation now under consideration.
>
> 8. Secondly, it is plain from the terms of section 127(1)(a), as of its predecessor sections, that the proscribed act, the *actus reus* of the offence, is the sending of a message of the proscribed character by the defined means. The offence is complete when the message is sent. Thus it can make no difference that the message is never received, for example because a recorded message is erased before anyone listens to it. Nor, with respect, can the criminality of a defendant's conduct depend on whether a message is received by A, who for any reason is deeply offended, or B, who is not. On such an approach criminal liability would turn on an unforeseeable contingency."

16 In *Chambers v DPP* [2013] 1 WLR 1833, this court (Lord Judge CJ, Owen and Griffith Williams JJ) found that a tweet posted to Twitter suggesting that the defendant would blow up Teesside Airport constituted a message sent under section 127(1)(a), even if that message may not have been accessed immediately but by a subsequent search. Posting a message generally to Twitter not for the attention of a specific individual or group, which was then stored electronically, was still an offence. This Court endorsed in principle the approach adopted by Her Honour Judge Jacqueline Davies, sitting in Doncaster Crown Court, but concluded on the facts that the message was not menacing. On the issue of public electronic communications, Lord Judge CJ said:

> "21 Nevertheless Mr John Cooper QC on behalf of the appellant sought to argue that the appellant's message was not sent by means of a 'public electronic communications network'. He submitted that this was a 'tweet' found by means of a subsequent search, and so should be treated as no more than 'content' created and published on a social media platform rather than a message sent by means of a communications network. It would, he submitted, be a dangerous development to extend the ambit of section 127(1) of the 2003, Act to 'Twitter'…
>
> 23. In her judgment in the Crown Court Judge Davies addressed this issue when rejecting a submission that there was 'no case' for the appellant to answer. She said:

> ‘The “Twitter” website although privately owned cannot, as we understand it, operate save through the internet, which is plainly a public electronic network provided for the public and paid for by the public through the various service providers we are all familiar with … The internet is widely available to the public and funded by the public and without it facilities such as “Twitter” would not exist. The fact that it is a private company in our view is irrelevant; the mechanism by which it was sent was a public electronic network and within the statutory definition … “Twitter”, as we all know is widely used by individuals and organisations to disseminate and receive information. In our judgment, it is inconceivable that grossly offensive, indecent, obscene or menacing messages sent in this way would not be potentially unlawful.’
>
> 24. We agree with this approach. As Mr Robert Smith QC submitted on behalf of the Crown, the potential recipients of the message were the public as a whole, consisting of all sections of society. It is immaterial that the appellant may have intended only that his message should be read by a limited class of people, that is, his followers, who, knowing him, would be neither fearful nor apprehensive when they read it.
>
> 25. In our judgment, whether one reads the ‘tweet’ at a time when it was read as ‘content’ rather than ‘message’, at the time when it was posted it was indeed ‘a message’ sent by an electronic communications service for the purposes of section 127(1) of the 2003 Act. Accordingly ‘Twitter’ falls within its ambit. We can now come to the heart of the case.”

17 That last was a reference to the factual issue as to whether or not the message was menacing. Of course, in the present case, that issue does not arise because there is no challenge to the conclusion that the performances of the applicant’s songs were grossly offensive.

18 There have been a number of subsequent cases which have followed the approach in *Collins* and *Chambers*. In *DPP v Kingsley Anthony Smith* [2017] EWHC 359 (Admin), the defendant was convicted having posted four extremist messages to his profile page on his Google+ account for public viewing, each message attached a YouTube video which had been downloaded to his account. In Scotland, in *Sutherland v HM Advocate* [2017] HCJAC 22, it was not challenged that somebody sending an indecent or obscene message to their own account on Facebook via the internet which stayed on their account for three hours constituted the offence of sending via a public electronic communications network.

4. Hyperlinks

19 In his arguments in relation to Issue 1, namely whether pasting a hyperlink can amount to causing an offensive message to be sent, Mr Davies relied on two persuasive but nonbinding authorities from other jurisdictions. They both deal with defamation, and Mr Davies properly conceded that the Court had to be very careful when considering such authorities in the context of a criminal offence.

20 I agree with that. For one thing, defamation centres on the receipt of the libellous material and its consequences; criminal offences, such as those we are considering here, centre on the sending of the material (see for example *Bata v Bata* [1948] WN 366 and the difference between libel actionable in tort and seditious libel).

21 In the Canadian Supreme Court case of *Crookes v Newton* [2011] 3 SCR 269, the majority concluded that the mere creation of a hyperlink in a website did not lead to a presumption that somebody actually used the hyperlink to access the impugned words. The defendant was a website commenting on various issues, including free speech and the internet.

22 The result in that case needs to be treated with some care, because the case was heard by nine justices of the Supreme Court in total, and very different approaches can be discerned from what they say. However, notwithstanding that, I agree with Mr Davies that some assistance can be derived from these judgments. Speaking for the majority, Abella J said:

> "29. Although the person selecting the content to which he or she wants to link might facilitate the transfer of information (a traditional hallmark of publication), it is equally clear that when a person follows a link they are leaving one source and moving to another. In my view, then, it is the actual creator or poster of the defamatory words in the secondary material who is publishing the libel when a person follows a hyperlink to that content …
>
> 30. Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral — it expresses no opinion, nor does it have any control over, the content to which it refers …
>
> 42. Making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content …"

23 But the Chief Justice and Fish J considered that posting a hyperlink could constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific contents to which it links. This view was expressed in these terms:

> "In our view, the combined text and hyperlink may amount to publication of defamatory material in the hyperlink in some circumstances. Publication of a defamatory statement via a hyperlink should be found if the text indicates *adoption or endorsement of the content of the hyperlinked text*." (Emphasis in original)

24 And one justice thought that excluding hyperlinks from the scope of the publication rule was an inadequate solution to the novel issues raised by the internet. She said at [99]:

> "Because the inquiry into availability is essentially factual, it would be neither prudent nor desirable to attempt to adopt a bright-line rule indicating the exact time when something becomes 'readily' available. Such an approach could hinder the evolution of the common law. However, given the context of this appeal, a few specific observations about hyperlinks are in order. In determining whether hyperlinked information was readily available, a court should consider a number of factors, including whether the hyperlink was user-activated or automatic, whether it was a shallow or a deep link, and whether the linked information was available

> to the general public (as opposed to being restricted). This list of factors is by no means exhaustive …"

25 In summary, the decision in *Crookes* is far from clear-cut, with a number of the justices anxious to avoid the sort of black-letter law approach to modern technology that can result in inflexibility and even absurdity. What mattered to many of them was not the broad question of whether the posing of a hyperlink can ever be defamatory, but the much more nuanced question of the extent to which, on the facts, the posting of the hyperlink involved an endorsement of the message revealed by clicking on the link. In my view, that is the correct approach.

26 Those nuances appear to have escaped the European Court of Human Rights in *Magyar Jeti ZRT v Hungary* [2019] EMLR 8, because at [31] the judgment gives an abbreviated – and misleading – summary of the decision in *Crookes*. But even here, which was another case about a news service hosting a video as part of its news coverage, it appears that one of the matters that the Court did have in mind was the extent to which the person posting the hyperlink endorsed the impugned content. Thus at [77] the Court said:

> "The Court identifies in particular the following aspects as relevant for its analysis of the liability of the applicant company as publisher of a hyperlink:
>
> (i) did the journalist endorse the impugned content;
>
> (ii) did the journalist repeat the impugned content (without endorsing it);
>
> (iii) did the journalist merely include a hyperlink to the impugned content (without endorsing or repeating it);
>
> (iv) did the journalist know or could he or she reasonably have known that the impugned content was defamatory or otherwise unlawful;
>
> (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?"

5. Answer to Issue 1

27 It is possible to approach Issue 1 in three different ways and reach the same conclusion: that, on the facts of this case, the applicant was properly convicted under section 127(1)(b).

28 The first is by reference to ordinary common sense: the applicant told those looking at her blog that she performed these songs and that her performances had been uploaded onto YouTube. To facilitate their access to those performances, she pasted onto her blog page the hyperlink to the YouTube video. That was not in any sense a neutral footnote or a passive reference to something unconnected to her, but instead a direct signpost to the performance of her own songs. She was endeavouring to widen the distribution of her own material.

29 It was the applicant who set in train the sending process. She used the internet to put in place an interface between the two websites (the embedded deep link between her blog and YouTube) which ensured the conveyance of the contents of a video from one to the other. The software created a direct link to where the video was stored and enabled immediate access to it by the push of a button. As long as it remained on YouTube, it was accessible via the applicant's blog.

30 Moreover, the purpose of setting up the link was to cause the material to be sent. Without the applicant going onto the YouTube site, copying the hyperlink and pasting it onto her own wordpress.blog page, it would not have been possible for others to access the material from that location. The applicant put in place the process by which the video was sent, which is why it can be said that she caused the message to be sent. It is not tenable to argue, as Mr Davies attempted to do, that the Court should ignore all of that and to say that the causing of it to be sent was the act of the visitor to her blog who clicked on the hyperlink.

31 The other point by reference to common sense that I should make is by reference to [77] of *Magyar*. As I have said, that passage puts some emphasis on the question of the knowledge of the journalist, that being a case about defamation. Of course here the applicant had complete knowledge of the contents of her songs which had been found to be grossly offensive.

32 The second analysis of Issue 1 considers the posting of the hyperlink by reference to the decisions in *Collins* and in *Chambers*. As Lord Bingham stated in *Collins*, the aim of section 21 is to protect the integrity of a public service and to prevent it being a means by which grossly offensive material may be enabled. That is precisely what the applicant was doing here. In addition, the answering machine situation in *Collins* is directly analogous to the hyperlink here, and, as per *Chambers*, it makes no difference if the message (in this case the hyperlink to the YouTube video) was stored as content or as a separate message. I agree with Mr Mulholland QC that it would be wrong to place undue emphasis on the technology that was involved in achieving the applicant's aim.

33 The third approach to Issue 1 is by reference to the non-binding authorities to which Mr Davies himself referred which dealt expressly with hyperlinks, albeit, as I have said, in the context of defamation. In my view, those authorities are not inconsistent with the approach that I have already outlined. On a proper analysis, both the Canadian Supreme Court in *Crookes* and the European Court of Human Rights in *Magyar* suggest that what might matter is the connection between the person posting the hyperlink and the underlying message. Was the defendant endorsing the underlying message, or was it just a footnote? There was room in both cases to say that the defendants were neutral hosts of current affairs sites who were not endorsing the particular message in question, but in the present case the answer is plainly different: the applicant was telling people that there was a video of her singing her songs and providing them with the means by which with one click they could access those performances. That was an unequivocal endorsement of the material.

34 I should say one final thing about Issue 1. During the course of his helpful submissions, Mr Davies attempted a number of analogies in order to advance his arguments, including references to blackmail letters sent from abroad, messages to the speaking clock and even a libretto prepared without the author's permission. As my Lady pointed out during argument, in the modern digital age such analogies are unhelpful. The Court has to deal with the modern world as it is, in order to see whether or not the offence is created by this relatively recent statute have captured this particular type of behaviour. That is at root a relatively simple task, and analogies with other means of communication do not assist.

35 For all those reasons, therefore, the application in respect of judicial review on Issue 1 is dismissed.

6. Answer to Issue 2

36 Issue 2 is a much more straightforward point. Although the applicant admitted that she had uploaded the relevant video to YouTube using the internet, and that this constituted "other

matter" within the meaning of section 127(1)(a), Mr Davies argued on her behalf that a communication could not be made with or to an inanimate object. Therefore, in relation to the third charge, he said that the sending of the video to YouTube's server meant that there was no communication and therefore no basis for a conviction under section 127(1)(a).

37 In my view, this argument fails for four separate reasons. First, there is nothing in the Act to provide any support for the proposition that the message had to be received by a human being in order for the offence to have occurred. Mr Davies accepted that the intended recipient did not need actually to receive it, but maintained that there had to be such an intended recipient in the first place. Such a qualification would, in my view, be contrary to the words of section 127, which is dealing with individuals using a public electronic communications system to send or cause to be sent messages of a particular kind, and does not stipulate if, when, how or by whom any such message has to be received.

38 Secondly, assuming that Mr Davies is right and there had to be an intended recipient, it is wholly unrealistic to suggest that the video uploaded to YouTube was "a packet of data always intended for an inanimate object" (paragraph 39 of Mr Davies's skeleton). In my view, it was no such thing: it was a video of a song performed by the applicant, uploaded to YouTube by the applicant, intended solely to be seen by other people. So there were intended recipients, and the criminal offence cannot disappear because the applicant used the YouTube platform as her chosen method of communication.

39 Thirdly, I consider that Mr Davies's contentions are contrary to *Collins*. Lord Bingham made clear that the offence was complete when the message was sent to the inanimate answer machine (see [8] of his judgment, which I have cited); what happened thereafter was irrelevant to the offence. Otherwise, as he pointed out, criminal liability would turn on the happenstance of, for example, whether the message was received by an individual or not. Moreover, in the light of *Collins* and the challenges of the digital age, I would suggest that John Stephenson J's remark in *Treacy v DPP* [1971] AC 537, on which Mr Davies also relied, that the sort of demand with menaces required for blackmail "cannot of course be an offence if made to the winds" was not meant in a general way but went specifically to a necessary ingredient of the offence of blackmail. It is not applicable here, save perhaps to note that, 50 years on, it might be thought that sending messages to the winds (or certainly the clouds) was a prescient, if rather romantic, description of the internet itself.

40 Fourthly, Mr Davies's submissions are contrary to the approach in *Chambers*, *Kingsley Anthony Smith* and *Sutherland*. There is no reason to depart from either the reasoning or the result in any of those cases. There is no reason at all to distinguish between Twitter and YouTube for these purposes.

41 For these reasons, the fact that the message in question was sent to the YouTube bunker in California, rather than, say, to the applicant's next-door neighbour, is irrelevant in law. The offence under section 127(1)(a) was made out when the video was downloaded to YouTube by the applicant with the intention that people might view it. That is therefore the answer to Issue 2.

42 For all these reasons, this application for judicial review is refused.

MRS JUSTICE CHEEMA-GRUBB:

43 I agree.

CERTIFICATE

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