SHERIFF APPEAL COURT

[2021] SAC (Crim) 7
SAC/2021-301/AP

Sheriff Principal D L Murray
Sheriff Principal D C W Pyle
Sheriff Principal N Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in

Appeal by Stated Case

by

VAIVA SUTINYTE

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: Findlater, Advocate; Faculty Appeals for Ross and Fox, Solicitors Glasgow
Respondent: Goddard QC, Advocate Depute; Crown Agent

16 November 2021

[1] The appellant was convicted of sending, by means of a public electronic communications network, email messages to Patrick Grady MP that were grossly offensive or of an indecent, obscene or menacing character, in that they contained language of an offensive and menacing character including swear words, derogatory terminology and abusive language; contrary to the Communications Act 2003, section 127(1)(a) ("the 2003 Act").

[2] That section is in the following terms:

> "127 Improper use of public electronic communications network
> (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;"

[3] Two questions are posed in the Stated Case:

> "(i) Did I err in repelling the appellant's no case to answer submission made under Section 160 of the Criminal Procedure (Scotland) Act 1995?
>
> (ii) Did I err in convicting the appellant of a contravention of Section 127(1)(a) of the Communications Act 2003?"

The sheriff explains that he determined that the appellant's messages to the MP on 1 February 2021 at 06:04 hours and at 22:36 hours were grossly offensive. The first message was in the following terms:

> "Bitch I am taking you to court. You leave people to be fucked by your cops and do nothing to help can find posh solicitor".

The message at 22:36 was in the following terms:

> "Dear Patrick Grady you fuckin bitch, I am taking you to Strasbourg Human Rights Court, because you don't care about protecting me. Nor your fuckin police nor system. I hope you choke from your morning coffee as its nerve-racking situation. I am preparing case to Strasbourg because loose conduct and broken system with your ignorance doesn't help and its nerve-racking situation I am also thinking to start a non profit which will try to deal with all problems I mentioned earlier practically as you are too posh to bother. Maybe I should apply for MP post as well. Doesn't look you practically care. How can I do it? It's not Scotland, it's bananen republic, where cops are above the law, nobody protects people from police and nobody sees the problem why bother misconduct for a while it's my favourite nerve-racking activity thank you"

[4] The sheriff heard evidence from Malcolm McConnell, a member of the MP's parliamentary team, and Police Constable Macrae. The sheriff narrates that the appellant had sent eight messages of a similar nature over a short period of time. The evidence of

Mr McConnell was that the messages should be referred to the parliamentary team which investigated abusive correspondence, as they were concerned that the appellant was a fixated individual and the messages were becoming increasingly erratic. Constable Macrae in his evidence stated that the appellant in the course of being transported to Helen Street Police Office stated, "I only abused him because he was not helping me".

[5] The submission to the sheriff and repeated to this court was that the messages sent were not on an objective analysis grossly offensive, indecent, obscene or menacing. Reference was made to *Brown* v *McPherson* 2016 SCCR 564 and *DPP* v *Collins* 2006 UKHL 40 which require the court objectively to assess the communications to determine whether section 127(1)(a) has been contravened. The inclusion of the adverb "grossly" prior to the word "offensive" means that the Crown needs to overcome a high bar before there is a contravention. In this case, the use of the term "fuckin bitch" was offensive but not grossly offensive. Counsel further submitted that the messages were obviously not indecent, menacing or obscene and that the context should be looked at, namely of the appellant becoming frustrated with her MP and the response. He accepted that the word "bitch" was used in a pejorative sense but that the word had perhaps in some circumstances been reclaimed and that it may have sanded the edges of its offensive quality.

[6] For the Crown it was submitted that the sheriff's analysis was correct and that he had applied the correct test. He had properly considered the messages objectively in the context which they were sent. Applying that test, the use of "fuckin bitch" and "I hope that you choke on your morning coffee" and the words "Bitch I am taking you to court" in the context of the series of messages sent over a short period between 31 January and 1 February 2021 to an elected member of parliament rendered the messages grossly offensive. The test was correctly set out in *Brown* v *McPherson* but it fell to be distinguished on its facts.

[7] In *DPP* v *Collins*, in which Lord Bingham gave the leading judgment, with which their lordships agreed, it was accepted (at para 9) that it was for the justices at first instance to:

> "determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi−racial society, and that the words must be judged taking account of their context and all relevant circumstances….The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates."

[8] In applying that test we find no error in the sheriff's conclusion that the section 160 submission was properly refused. He was entitled to reach the view that, objectively assessed and taking into account the context in which they were sent, these messages did contravene section 127(1)(a) of the 2003 Act. The context includes that these were sent to a public servant working in the course of the duties for which he was elected.

[9] We further consider that the sheriff was correct in his analysis that Mr McConnell's description of the messages as "abusive" rather than grossly offensive or of an indecent, obscene or menacing character; was not determinative, nor was the absence of any evidence from the MP himself. The sheriff accepted that the messages sent at 06:04 and 22:36 were grossly offensive, having discounted that the terms of the earlier messages crossed that threshold. On objective assessment, the messages included language which was intrinsically offensive, which conveyed personal insult, and which wished physical harm to the recipient, who was acting as a public servant. We agree that, in context, the messages went beyond merely offensive, and were grossly offensive. To quote Lord Bingham the appellant "used language which is beyond the pale of what is tolerable in our society."

[10] We therefore answer the first question in the Stated Case in the negative. There was no error in the decision of the sheriff to convict the appellant for the contravention of

section 127(1)(a) and accordingly we also answer the second question in the negative. The appeal is refused.