Case No: CO/436/2005

Neutral Citation Number: [2005] EWHC 1308 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 23 June 2005

Before :

LORD JUSTICE SEDLEY AND MR JUSTICE MITTING

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Between :

THE DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
LESLIE GEORGE COLLINS	**Respondent**

- -
- -

Mr. J Lloyd-Jones (instructed by Crown Prosecution Service) for the **Appellant**
Miss E Harrison (instructed by Messrs Mander Cruickshank) for the **Respondent**

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Judgment

Lord Justice Sedley :

1. On an unspecified number of occasions between 1 January 2002 and 6 January 2004, the respondent telephoned the constituency office of David Taylor MP to give vent to various financial and political grievances. If a member of the staff answered the telephone, that was who he spoke to; if not, he spoke to the answering machine. On a number of these occasions he made reference to people to whom he objected as "wogs", "Pakis" and "black bastards". Of those who heard the messages, one had found the language upsetting, one had not done so and one had found it depressing. None, at least so far as the evidence went, happened to be a member of an ethnic minority.

2. This history was incorporated in a single information laid on the 20 May 2004 charging that between the two dates I have mentioned (a span of over two years), the respondent had sent, by means of a public telecommunications system, messages that were grossly offensive or of an obscene or menacing character. To send such messages was an offence by virtue of the Telecommunications Act 1984, section 43 (1), under which the information was laid; but in July 2003 this provision was repealed and replaced by section 127 of the Communications Act 2003. While the wording of the two sections is the same, an information which spans the lifetime of both without differentiating between them, which relies on an uncertain and unspecified number of messages, and which fails to spell out which aspect or aspects of the statutory provision the messages offended against, was wide open to objection. That no objection was taken on any of these grounds either before the justices or before this court, and that no opposition was offered to the enlargement of the prosecutor's time for appealing to this court because the senior prosecutor had gone on holiday and had let time run out, may be regarded by the appellant prosecutor as pure good fortune. It is certainly not an endorsement of the sloppy drafting of the information or of inefficiency within the Crown Prosecution Service.

3. The outcome, however, is that this court has been able, with the help of counsel, Mr John Lloyd-Jones for the Director of Public Prosecutions and Miss Esther Harrison for the respondent, to focus on the issue of principle. It arises out of the case stated for the opinion of the court by the Leicester Justices who, having found the facts I have summarised, on 4 October 2004 acquitted the respondent on the ground that, while his messages had been offensive, a reasonable person would not consider them grossly offensive. The question they pose, at the prosecutor's request, is whether they were wrong so to find.

4. I am bound to say that my first reaction to the question was that if these messages were offensive, it was not possible in a decent society to find that they were less than grossly offensive. One has only to visualise having to explain and justify the making of the material distinction to a black person or to one of Asian origin in order to appreciate its invidiousness.

5. But for much the same reason, I can understand the dilemma in which the justices found themselves. In order to interfere as little as possible with freedom of expression, Parliament has criminalised only grossly offensive messages. To have found the respondent's messages to be inoffensive would have been extraordinary: hence the justices' initial finding. But some added value had to be given to the word "grossly" and the question is whether the justices, despite what I have said about the

character of the respondent's language, were entitled in the particular circumstances of the case to find that this additional criterion was not met.

6. I have concluded that they were entitled to do so, for the following reasons.

7. Section 127 (1) of the Communications Act 2003 provides:

> 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.

8. It is a longstanding peculiarity, but not an anomaly, that Parliament has criminalised the use of language which is not otherwise unlawful if it forms part of a message sent by post or by telephone – or, now, by any public electronic communications network: see section 127(1)(1A) of the Communications Act 2003. The reason, in essence, is that people are entitled to be protected from unsolicited messages which they may find seriously objectionable. Although neither side's argument has made any reference to the Human Rights Act 1998 or the European Convention on Human Rights, a balance is clearly being struck here between the respect for private life enjoined by Article 8 and the right of free expression protected by Article 10.

9. This is why it is the message, not its content, which is the basic ingredient of the statutory offence. The same content may be menacing or grossly offensive in one message and innocuous in another. As was pointed out in argument, counsel in the present case are unlikely to have exposed themselves to prosecution by discussing its facts on the telephone. A script writer e-mailing his or her director about dialogue for a new film is not likely to fall foul of the law, however intrinsically menacing or offensive the text they are discussing. In its context, such a message threatens nobody and can offend nobody. Here, as elsewhere, context is everything.

10. I have left obscene and indecent messages out of these examples because the inclusion of them in the statutory prohibition poses a problem which needs to be noted though not, for present purposes, resolved. The four classes of message which are proscribed are not of the same kind. A menacing message, fairly plainly, is a message which conveys a threat – in other words, which seeks to create a fear in or through the recipient that something unpleasant is going to happen. Here the intended or likely effect on the recipient must ordinarily be a central factor in deciding whether the charge is made out. Obscenity and indecency, too, are generally in the eye of the beholder; but the law has historically treated them as a matter of objective fact to be determined by contemporary standards of decency.

11. If (as I will assume) these are the respective meanings of menacing, obscene and indecent messages in the communications legislation, the category of grossly offensive messages can be seen to lie somewhere near the centre of the spectrum.

What is offensive has to be judged (very much as the justices, by considering the reaction of reasonable people, judged it) by the standards of an open and just multiracial society. So too, therefore, what is grossly offensive, an ordinary English phrase with no special legal content, which on first principles (see *Brutus v Cozens* [1973] AC854) it is for the justices to apply to the facts as they find them. Whether a telephone message falls into this category has to depend not only on its content but on the circumstances in which the message has been sent and, at least as background, on Parliament's objective in making the sending of certain messages a crime.

12. The respondent had no idea, and evidently did not care, whether the person he was addressing or who would pick up his recorded message would be personally offended – grossly offended – by his abusive and intemperate language. It was his good fortune that none was, but this was nevertheless a fact which the justices were entitled to take into account. So was the fact that it was his Member of Parliament to whom he was trying to address his opinions. Had the respondent nevertheless found himself speaking on any of his calls to a member of an ethnic minority, it might well have been impossible, however stoically the hearer might have brushed it aside, to avoid the conclusion that the message was grossly offensive: Miss Harrison concedes as much. Such a conclusion would be loyal to Parliament's essential objective of protecting people from being involuntarily subjected to grossly offensive messages. It would also have to take account, however, of the fact that it is not every transmission of grossly offensive language which is punishable, but only messages which, in their particular circumstances and context, are to be regarded in the wider society which the justices represent as grossly offensive.

13. I do not consider that the approach of the Leicester Justices transgressed these principles, and I would accordingly dismiss this appeal.

Mr Justice Mitting:

14. I agree.