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Case No: CO/1199/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2007

Before :

LORD JUSTICE HUGHES
MR JUSTICE COLLINS

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Between :

The Queen (on the application of Stephen Green)	**Claimant**
- and -	
The City of Westminster Magistrates' Court	**Defendant**
-and-	
Jonathan Murray Thoday	**1st interested party**
-and-	
Mark Thompson	**2nd interested party**

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Mr Michael Gledhill QC and Mr Mark Mullins (instructed by **Criminal Law Advocates**) for the **Claimant**
Miss Naina Patel (instructed by **Olswang**) for the **1st interested party**
Mr David Pannick QC and Mr Javan Herberg (instructed by **British Broadcasting Corporation Litigation Department**) for the **2nd interested party**

Hearing dates: 20th and 21st November 2007

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Judgment

Lord Justice Hughes :

1. This is the judgment of the Court, to which we have both contributed.

2. On 8 January 2007, the Claimant, Mr Green, a member of an organisation called Christian Voice, sought to bring a private prosecution for the ancient offence of blasphemous libel. His target was a theatrical work entitled 'Jerry Springer: the Opera'. This had been performed in various theatres in the UK, including runs within the jurisdiction at the National and Cambridge Theatres in London between April 2003 and February 2005; the last performance alleged was at Brighton in July 2006. One live but also recorded performance had been broadcast by the BBC on 8 January 2005. The Claimant sought from the Magistrates Court summonses against the producer of the stage play and the Director General of the BBC.

3. The District Judge refused to issue the summonses. She held (1) that the prosecution was prevented by the Theatres Act 1968; and (2) that there was no prima facie case of blasphemous libel. She added (3) that given the long delay and the circumstances in which this archaic offence had been invoked, the application bordered on the vexatious, but this was not a reason for her decision.

4. This has been the hearing of the Claimant's application for judicial review of the District Judge's decision. He seeks a mandatory order requiring her to issue the two summonses.

5. The general description of the theatrical work is common ground. It is a parody of Mr Springer's television chat show. The stock in trade of the original chat show is the presentation as entertainment of dysfunctional people who have lurid, and largely sexual, stories to tell. Violence or abuse involving the studio audience and/or the guests is a frequent feature of the show. Whilst no doubt it has its defenders, critics have focussed on its elements of prurience, foul language and the exploitation of the vulnerable.

6. The play which is the subject of these applications is in two acts. It is set to music, hence the title. In the first act, the chat show is lampooned. A succession of extreme characters are presented as guests. Their revelations are lurid and, to many, probably offensive, and the language is incessantly bad, but there is nothing of significance bearing upon religion in anything portrayed. The host, Mr Springer, is portrayed as recalling, but dismissing, his lost idealism. At the end of the act, he is shot by one of the 'guests'.

7. The second act revolves around Springer imagining his descent into hell. He is confronted by his destiny. The first act characters reappear as Satan, Christ, God, Mary and Adam and Eve. Mr Springer treats them as chat show guests. In their behaviour and language they exhibit considerable excesses, as his terrestrial guests habitually do. The particular scenes to which the Claimant draws attention include (but are not limited to) the following:

    i) an argument between the Satan character and the Christ character; the former abuses the latter; both swear; the Christ character tells Satan to talk to the stigmata; Satan offers a representation of a large Communion wafer; the Christ character is accused of being homosexual and accepts it;

ii) Eve, sitting alongside the Christ character as 'guests', fondles his genitals under his loincloth; Satan swears dismissively at the crucifixion;

iii) a character in the role of Mary is the subject of a song suggesting that she was tricked by God; there are references to a failed condom;

iv) the God character is glossy but inadequate; Springer is invited to help him; a chorus includes the repeated chant of 'Jerry Eleison', which is a parody of the Greek 'Kyrie Eleison', or 'Lord have mercy', a regular feature of Christian services in many denominations.

8. It is apparent from the Claimant's own description of this work, confirmed by our own brief viewing of a recording of it, that its target is the tasteless 'confessional' chat show, rather than the Christian religion. The eponymous hero is visited by destiny and unequivocally receives his come-uppance. The last scenes show that he is indeed, despite anything he may have imagined in his dying throes, dead from the shooting at the end of Act One.

9. The Claimant's case is that no matter what the merits or demerits of the artistic qualities of this work, it contains material which is contemptuous and reviling of the Christian religion, of Christ and several biblical characters and of the formularies and tenets of the Church, and further that it is delivered in a scurrilous and ludicrous manner; as such, he contends, it constitutes the offence of criminal blasphemous libel whether or not its principal target is Mr Springer.

The offence of blasphemous libel

10. Although it is very rarely invoked, the existence of the offence of blasphemous libel is established in English law. That is demonstrated by the decision of the House of Lords in Whitehouse v Lemon [1979] AC 617, where the point was conceded after elaborate review of its history in the Court of Appeal. Before that case, the last known instance of the offence being invoked was in 1922. There appears to have been no other since 1979 until the present. Nevertheless, Mr Pannick QC and Miss Patel, for the interested parties, rightly disclaim, at least in this court, any submission that the offence is bad in law, whether as inconsistent with Article 10 ECHR or otherwise.

11. Once it be established that the production was intentionally performed in the theatre or broadcast on the television (as to which there is and can be no dispute here) the elements of the offence are common ground. First, there must be contemptuous, reviling, scurrilous and/or ludicrous material relating to God, Christ, the bible or the formularies of the Church of England. Second, the publication must be such as tends to endanger society as a whole, by endangering the peace, depraving public morality, shaking the fabric of society or tending to cause civil strife.

12. The second of these elements is important and has been well established now for over one hundred years. Until the second half of the seventeenth century after the restoration, blasphemy was dealt with by the ecclesiastical courts or Star Chamber. Thereafter it was recognised to be a common law misdemeanour and so punishable in

the ordinary courts. At that time, any attack on Christianity or the Church of England would, because of the identity of church and state, and the near universality of Christian conviction in this country (whatever the sectional differences), have led to a ready assumption that the second element would follow naturally from the first: see for example Taylor's Case (1676) 3 Keb 607:

> "For to say that religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved and that Christianity is a parcel of the laws of England and therefore to reproach Christianity is to speak in subversion of the law."

13. But by the nineteenth century, it became necessary to identify the second element separately. Lord Denman CJ's direction to the jury in R v Hetherington (1841) 4 St Tr NS 563 at 590 began to do so:

> "Because, a difference of opinion may subsist, not only as between different sects of Christians, but also with regard to the great doctrines of Christianity itself……even discussions on that subject may be by no means a matter of criminal prosecution but, if they be carried on in a sober and temperate and decent style even those discussions may be tolerated and may take place without criminality attaching to them; but that if the tone and spirit is that of offence and insult and ridicule, which leaves the judgment really not free to act and therefore cannot be truly called an appeal to the judgment but an appeal to the wild and improper feelings of the human mind, more particularly in the younger part of the community, in that case the jury will hardly feel it possible to say that such opinions, so expressed, do not deserve the character which is affixed to them in this indictment."

To the same effect, Lord Coleridge CJ directed the jury in R v Ramsay and Foote (1883) 15 Cox CC 231 as follows:

> "the mere denial of the truth of the Christian religion or of the Scriptures is not enough per se to constitute a writing a blasphemous libel….But indecent and offensive attacks on Christianity or the Scriptures, or sacred persons or objects, calculated to outrage the feelings of the general body of the community, do constitute the offence of blasphemy…"

14. This manner of expressing the offence received emphatic endorsement by the House of Lords in Bowman v Secular Society [1917] AC 406. Lord Sumner (at 466-7) expressed it thus:

> "Our courts of law, in the exercise of their own jurisdiction, do not and never did that I can find, punish irreligious words as offences against God. As to them they held that deorum injuriae dis curae. They dealt with such words for their manner, their violence or ribaldry or, more fully stated for their tendency to endanger the public peace then and there, to

> deprave public morality generally, to shake the fabric of society and to be a cause of civil strife. The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault."

15. This development of the law of criminal blasphemous libel was carefully traced by Roskill LJ when Whitehouse v Lemon was in the Court of Appeal [1979] 1 QB 10, in an analysis which received clear endorsement when the case reached the House of Lords. Roskill LJ observed (at 18G):

> "The state only became interested in the offence if the actions of the alleged offender affected the safety of the state."

He cited both Hetherington and Ramsay & Foote and concluded (at 20E) that this view of the law was 'finally and authoritatively' established by Bowman. By the time that case reached the House of Lords the only question at issue was the intent which must be proved. Their Lordships did not accordingly have to address the nature of the actus reus. Some of them made clear that the second element of the offence did not necessitate proof that an *immediate* breach of the peace was to be expected as a result of the words used. But in a wide ranging speech, Lord Scarman (at 662E) observed of the phrase 'a tendency to cause a breach of the peace' that although it was but a minor contribution to the discussion of the issue before the House,

> "It does remind us that we are in the field where the law seeks to safeguard public order and tranquillity."

16. There is therefore ample basis for the common ground before us that the gist of the crime of blasphemous libel is material relating to the Christian religion, or its figures or formularies, so scurrilous and offensive in manner that it undermines society generally, by endangering the peace, depraving public morality, shaking the fabric of society or tending to be a cause of civil strife. It was on this basis that the application was made to the Magistrate for the summonses in the present case. It should clearly be understood that this second element of the crime must not be watered down. What is necessary to make such material a crime is that the community (or society) generally should be threatened. This element will not be shown merely because some people of particular sensibility are, because deeply offended, moved to protest. It will be established if but only if what is done or said is such as to induce a reasonable reaction involving civil strife, damage to the fabric of society or their equivalent.

17. Given the way in which the application was put to the magistrate it is not strictly necessary for our decision to decide the point, but it seems to us that the necessity for this essential second element in the crime is also consistent with the requirement in modern times that any such crime be compatible with Article 10 of the European Convention on Human Rights. That article protects the right of freedom of expression and by Article 10(2) allows interference with it only according to law and (so far as relevant to this case) where it is necessary in a democratic society for the prevention of disorder or crime or for the protection of the rights of others. It is clear law that the protection of freedom of speech must be accorded to the unpopular, tasteless or offensive, as well as to the popular, moderate or reasoned, unless interference be justified under paragraph (2). Whilst the law of blasphemy may well be 'consonant'

with the right to freedom of thought and to manifest one's religion enshrined in Article 9 – see Wingrove v UK (1996) 24 EHRR 1 at para 48, it does not seem to us that insulting a man's religious beliefs, deeply held though they are likely to be, will normally amount to an infringement of his Article 9 rights since his right to hold to and to practise his religion is generally unaffected by such insults. The Article 10(2) basis for the crime of blasphemous libel is best found, as it seems to us, in the risk of disorder amongst, and damage to, the community generally.

The Theatres and Broadcasting Acts

18. The Theatres Act 1968 was passed, according to its long title, to abolish censorship of the theatre, and by section 1 removes the powers which the Lord Chamberlain previously had to control the content of live theatrical performances. Section 2(4) provides as follows:

> "(4) No person shall be proceeded against in respect of a performance of a play or anything said or done in the course of such a performance –
>
> (a) for an offence at common law where it is of the essence of the offence that the performance or, as the case may be, what was said or done was obscene, indecent, offensive, disgusting or injurious to morality….."

The District Judge held that that provision prevented her from issuing the summonses sought in this case.

19. A prosecution for the ancient offence of blasphemous libel is a prosecution for an offence at common law. The essence of the offence is, as the foregoing discussion demonstrates, offensiveness; indeed such offensiveness as to engender a threat to society generally. In that it is to be distinguished from criminal defamatory libel, which is clearly preserved by the Act (see sections 4 and 8). The gist of defamatory libel is the publication of material which exposes the victim to hatred ridicule or contempt amongst other people (or damages him in his trade); its essence is not any offence which it may cause the victim (although of course it may) but rather the effect upon other people. Blasphemous libel may also involve a complaint of injury to morality, but that is not necessary to decide.

20. For the purposes of the Act, a 'play' is defined by section 18 in terms which mean, in effect, a live performance. Section 7 removes from the other provisions of the Act a performance which is given 'solely or primarily' for the purpose, among others, of enabling the performance to be broadcast. But the broadcast in the present case is agreed to have been of one (or possibly more than one) ordinary live performance; there was no special performance 'soley or primarily' for recording for the purposes of broadcasting. It follows that the exemption from the Act provided for by section 7 does not apply in the present case. And it follows also that the District Judge was correct to hold that section 2(4) prevents the prosecution which the Claimant sought to bring in the present case, at least so far as the live performances were concerned.

21. The Theatres Act does not apply to the broadcast by the BBC, because it was not within the definition of a 'play'; it was not a live performance given to the viewer by persons present and performing. But there are in Schedule 15 paragraph 6 of the Broadcasting Act 1990 provisions applicable to broadcasts which are couched in terms identical to those of section 2(4) as applied to plays. The District Judge was not referred to this Act, but her reasoning as to the Theatres Act applies equally to it.

22. True it is that section 2 Theatres Act begins by creating a new offence of obscenity in a play, and true it is that Schedule 15 Broadcasting Act has the side-title "Application of the Obscene Publications Act 1959" and begins with provisions as to the modified way in which that Act shall apply to broadcasting. But side titles and cross-headings need to be treated with caution; as Lord Reid explained in R v Schildkamp [1971] AC 1 at 10, they are not normally directly considered by Parliament and whilst they ought to indicate the scope of the sections which follow, there is always the possibility that the scope of one of these sections may have been widened, for example by amendment. Here both statutory enactments clearly step beyond the range of obscenity in their provisions. The Theatres Act, in particular, continued as originally enacted by creating two further new offences for plays in sections 5 and 6 (the former now re-housed substantially unchanged in the Public Order Act 1986). It then went on by section 8 to provide for the consent of the Attorney General to be required to any prosecution for any of the three new offences contrary to sections 2, 5 or 6, or for criminal defamatory libel, which was plainly regarded as the only significant common law offence left remaining after section 2(4) which might be alleged against a play. (Seditious libel could properly have been regarded as obsolete, inapplicable or not calling for statutory treatment because of the availability of specific statutory offences. It is to be noted that the only attempted prosecution for seditious libel since the 19th century appears to have been *R v Caunt* (17 Nov 1947) unreported which arose from a speech which vilified fellow citizens on the ground of race. That sort of conduct had been dealt with by statute in the Race Relations Act 1965. It is difficult if not impossible to envisage circumstances today in which a prosecution for seditious libel would be appropriate.)

23. We were invited to say that observations contained in some of the speeches in the House of Lords in Knuller v DPP [1973] AC 435 demonstrate that section 2(4) Theatres Act refers only to the different offences of conspiracy to corrupt public morals and conspiracy to outrage public decency. We are quite satisfied that they say no such thing. In Knuller, the charges were of those two conspiracies. The House was asked to hold that these two offences were no longer known to the law; so far as the first was concerned that would have meant departing from its own earlier decision in Shaw v DPP [1962] AC 220. It declined to do so. The principal reason for that decision was that Shaw was a recent and authoritative decision, so that legislative intervention was needed if change there were to be. One ancillary reason given in a number of the speeches was that the intervening passage of the Theatres Act in 1968 demonstrated that the first, and perhaps both, offences under consideration were recognised by Parliament still to exist. But the House was not remotely concerned with blasphemous libel, and whether blasphemous libel was or was not referred to in section 2(4) was a matter which was entirely irrelevant. Nothing that any of their Lordships said can have any bearing on that question.

24. For these reasons, the District Judge was right to refuse to issue these summonses.

25. We should add that, if we were wrong in this construction of the Theatres Act, and a prosecution for criminal blasphemous libel is not prevented by section 2(4), we do not agree with the further submission, advanced on behalf of the play's producer, that section 8 of the Theatres Act can be construed so as to require the consent of the Attorney General to such a prosecution. That section clearly says that it applies to prosecutions for the three new offences under sections 2, 5 and 6, and to criminal defamatory libel. It could easily have said that it applied to any prosecution of a play, and does not do so. Nor do we agree that blasphemous libel is a subdivision of defamatory libel, or that the present play could be described as defamatory of Christ or the Church. The target of criminal defamation must be a living person and not an idea or a faith, nor can Christ be regarded as a living human being for these purposes, despite Christian belief in His resurrection, which is not as a presently living human being but rather to the realms of the Almighty. The play may or may not have been defamatory of Mr Springer but that is irrelevant to the questions before us. The significance of section 8 is that, as explained above, it is couched in the terms it is because s 2(4) would effectively bar all common law prosecutions which could be regarded as potentially live.

26. That is enough to decide this case. But we ought to address also the District Judge's finding that there was no prima facie case that the essential ingredients of the offence charged were present.

<u>A prima facie case ?</u>

27. The Claimant's original challenge to the District Judge was put on the basis that she had fettered her decision by treating the issue before her as concluded by two previous findings of other bodies in relation to this play. First, in <u>R (The Christian Institute) v BBC</u> CO/1378/2005 a different Christian group had applied for judicial review of the BBC's decision to screen the play. It had contended that the decision to screen it was unlawful as (i) a breach of the Corporation's Charter and of its Agreement with the Secretary of State on the grounds that it offended applicable Programme Code Standards and was a systematic denigration of the Christian faith, and (ii) a breach of the Article 9 rights of Christians. Those claimants were refused permission to proceed by Crane J, on paper, on 27 May 2005. His decision was thus that there was no arguable case. Secondly, a complaint was made to the BBC Governors' Programme Complaints Committee (GPCC) on grounds of persistent bad language and blasphemous content; that complaint was rejected by a majority of 4 to 1 after a very detailed review of the complaint and of the artistic pros and cons of the play.

28. It is apparent from a reading of the decision of the District Judge that she did not regard the issue before her as one for decision by anyone but herself. She directed herself in accordance with <u>R v West London Metropolitan Magistrate ex p Klahn</u> [1979] 1 WLR 933 that she must exercise her own discretion. She referred to the decisions on the application for judicial review and of the GPCC, but only as support for her own conclusion, independently reached. The first challenge accordingly fails.

29. For the Claimant, Mr Gledhill QC's alternative challenge was that the District Judge had placed too much weight upon these decisions. There is no sign of that either, but in any event, weight is a matter for the primary decision-maker, not for this court.

Neither decision addressed the ultimate question for the District Judge, but neither was wholly irrelevant to it. The application for judicial review contained (although only in the particulars rather than as a complaint of unlawfulness per se) the assertion of blasphemy, and it was denied by the BBC. If Crane J had been of the view that there was an arguable case of blasphemy, he would surely have granted permission to proceed on the basis that that entailed a breach of the Charter and/or Agreement. The GPCC findings did not address the law of blasphemous libel at all, but they did include detailed analysis of the form of the play, a finding that its target was the exploitative chat show and not any religious figure or observance, and reference to a number of prizes which the play had won for its artistic/dramatic content; those matters were relevant to the issue of what the likely public effect of the work would be upon society.

30. Next, Mr Gledhill contended that the District Judge had wrongly treated the fact that she viewed the proposed prosecution as an attempt to re-introduce theatrical censorship as a basis for saying that there was no prima facie case. It is not possible so to read what she said. On the contrary, her reference to censorship was plainly made in the context of the Theatres Act argument, where it falls naturally in view of the long title of that Act. Only after disposing of that part of her judgment does she turn (with the clear word "additionally") to the presence or absence of the elements of the offence.

31. Lastly, Mr Gledhill challenged the District Judge's conclusion on the basis of perversity. This argument was only obliquely referred to in the Claimant's grounds, but we were satisfied that the interested parties had had sufficient opportunity to file evidence going to the content, form, artistic merits and public reception of the play, and had availed themselves of it, so that there was no unfairness to them if we considered it.

32. Mr Gledhill relied upon a passage in the judgment of Watkins LJ in <u>R v Metropolitan Magistrate ex p Choudhury</u> [1991] 1 QB 429 at 437:

> "..in our opinion a statement will not necessarily be prevented from being a blasphemous libel simply because the statement is put into the mouth of a character, even a disreputable character, in a novel."

We agree. Such a dramatic device is no doubt almost as old as drama itself. In that case, however, it was not necessary to investigate the effect of quality of the words because they were not in any event aimed at Christianity. It is, nevertheless, plainly relevant to the question whether there be blasphemy or no to examine the context in which the words are spoken; the word 'necessarily' is a vital part of the proposition. If a blasphemer be shown in a dramatic production or novel to be roundly condemned by right-thinking people, that must at least lessen and may eliminate both offence and any danger to the public weal being caused by the work. We understood Mr Gledhill not to dissent from that general proposition. We are prepared to assume for the purposes of argument that the content of the present play was such that it might cause deep offence to some (though not most) practising Christians, and that it is couched in not merely tasteless but lurid and arguably contemptuous or reviling terms. But the evidence presented to the District Judge, confirmed by the recording shown to us, makes it clear that this play, whether tasteful or objectionable or otherwise, has as the

object of its attack not religion but the exploitative television chat show. Whitehouse v Lemon (in the Court of Appeal at 24C-G) shows that it is not a necessary part of the offence that there should be an attack on the whole edifice of Christianity. It suffices that there are insults to or vilification of Christianity or the scriptures or sacred persons or objects. But the frequently used word 'attack' does focus attention on the need for what has been said to be properly regarded as immoderate or offensive treatment of Christianity or sacred objects. In the circumstances, the District Judge was entitled to consider that the matters here relied on as constituting blasphemy could not in context be regarded as such because the play as a whole was not and could not reasonably be regarded as aimed at, or an attack on Christianity or what Christians held sacred.

33. In addition, and crucially, there was no evidence at all before the District Judge of any of the second element of the crime. The play had been performed regularly in major theatres in London for a period of nearly two years without any sign of it undermining society or occasioning civil strife or unrest; there had been no violence (or even demonstrations). We have been told, and accept for present purposes, that on the day before and the day of the broadcast (January 2005) demonstrations were mounted outside BBC Television Centre, that there were approximately 75 and 500 people present respectively, and that on the first of those occasions there was some disorder and at least one arrest. But even if that evidence had been before the District Judge it would not have justified a finding of a prima facie case of damage to society or of risk of civil strife. It must be set against the complete absence of public reaction to the stage play over many months, it came by way of anticipation of what the contents might be rather than as a consequence of what the play actually contained, and it is the protest of a comparatively small, if vociferous and no doubt committed, group of people. The question for this court is whether the District Judge's conclusion is within the range of decisions properly open to her. She was required to ask whether any jury, properly applying the criminal standard of proof, could convict of this offence. If there were a dispute of fact, and on one view of the facts a conviction might properly follow, she ought of course not to pre-empt the jury. But here the facts were not in dispute; the content of the work was established once and for all by recording. She was entitled to conclude that on the undisputed evidence no jury, correctly directed as to the law, could properly convict. It is impossible on the evidence which she had, or which we now have, to describe her conclusion as perverse. Indeed, it seems to us that it was right. Accordingly, on this ground also, the present application fails.

34. We reach that conclusion without taking into account an additional submission of Mr Pannick, namely that any jury (or if not, the trial Judge) would have to consider whether the prosecution of *this* play infringed Article 10's protection of freedom of speech without sufficient Article 10(2) justification, and could not fail to conclude that it did. That was not part of the District Judge's reasoning. We should want further argument than we have had on whether it would be a question for the jury, but in any event we are not persuaded that whoever had to answer it the outcome is so plain that it would (at any rate by itself) justify refusal to issue the summonses on the ground of absence of prima facie case.

Delay/Vexation

35. The decision whether or not to issue a summons is a judicial one; it calls for the exercise of judgment. In ex p Klahn Lord Widgery CJ, in holding that the magistrate is not compelled to seek submissions from the proposed defendant (and indeed we would not expect him ordinarily to do so), referred to the minimum enquiries which must be made:

> "It would appear that he should at the very least ascertain (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not 'out of time'; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority."

It is apparent on its face ("at the very least") that that does not purport to be an exhaustive statement of relevant factors. Mr Gledhill rightly accepts that the magistrate is entitled to consider whether the application is vexatious. R v Clerk to Medway JJ ex p DHSS (1986) 150 JP Rep 401 shows that he is entitled also to consider delay, even within any time limit for the bringing of prosecutions and absent any finding that a fair trial would be impossible, at least if there is wholly unexplained delay which can be regarded as unconscionable.

36. The District Judge did not refuse to issue the summonses on grounds of delay, or even of vexation. She observed that given the combination of (1) delay, (2) the resurrection of a little used archaic offence and (3) the omission to refer her to the earlier application for judicial review and the GPCC enquiry, the applications "verged on" the vexatious. Since she did not rely on this as a reason for her decision, we add only a few words in deference to the arguments which have been presented to us.

37. The District Judge was concerned that this attempt to bring a private prosecution had been brought only six months after the end of the theatrical performances which had continued for approximately three years, and two years after the BBC broadcast. She would no doubt have been more concerned if it had been known, as we now know, that the Claimant had, through solicitors consulted for the purpose, specifically threatened a prosecution for blasphemy as long ago as January 2005, in the run up to the broadcast, but had then done nothing for two years, and whilst the GPCC proceedings, and the application for judicial review had proceeded and the play was more or less continuously performed. There is, as it seems to us, a particular need for due expedition where a prosecution is brought in connection with a continuing activity about the legality of which opinions may legitimately differ. A producer of a play may be led by prolonged inaction following a threat of proceedings to conclude that it has been decided that what he is doing is not unlawful. The reasons given for the passage of time are exiguous and for the most part unpersuasive, although if it indeed be the case that one problem encountered was difficulty in instructing Counsel in a potentially unpopular cause we should much deprecate that departure from the high standards of the profession. Time taken to obtain funding and to find expert evidence on Christian practices and beliefs are wholly unsatisfactory explanations. Nevertheless, in our view it will only be rarely that delay can by itself justify refusal

to issue a summons; as the court pointed out in Medway JJ an enquiry into the effect of delay is usually better conducted once proceedings are under way. That the offence here charged is very rarely appropriate was accepted by Mr Gledhill, who contended that it would be a very exceptional, perhaps only a once in a lifetime event; that justifies enquiry whether there is an element of vexation. The District Judge was given detailed, not to say comprehensive, written grounds for the application; they ought to have referred to the other legal or quasi-legal proceedings to which the play had been subject, but we accept the assurance that the omission occurred in good faith. The District Judge did not make a finding that the application was vexatious, albeit she felt nearly so. Despite the undoubted criticisms which can properly be made of the application on grounds of delay and failure to set out the legal history, it would not be right for us to make a finding which she did not.

Conclusion

38. It follows from the foregoing that the two reasons given by the District Judge for her decision were correct. This application for judicial review must, accordingly be refused.