

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Director of Public Prosecutions (Appellant)

v.

Collins (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:

David Perry

Louis Mabley

(Instructed by Crown Prosecution Service)

Respondents:

Frances Oldham QC

Esther Harrison

(Instructed by Mander Cruikshank)

Hearing date:

22 June 2006

ON

WEDNESDAY 19 JULY 2006

HOUSE OF LORDS

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE**

Director of Public Prosecutions (Appellant) v. Collins (Respondent)

[2006] UKHL 40

LORD BINGHAM OF CORNHILL

My Lords,

1. By section 127(1)(a) of the Communications Act 2003 it is an offence to send a message that is grossly offensive by means of a public electronic communications network. In this appeal by the Director of Public Prosecutions, the House is asked to consider the meaning and application of that provision.

The facts and the proceedings

2. The relevant facts are simple and (save in one important respect) undisputed. The respondent, a man now aged 61, made a number of telephone calls over the two years from January 2002 – January 2004 to the constituency and Westminster offices of Mr David Taylor, the Member of Parliament for North West Leicestershire, whose constituent the respondent was. On some occasions he spoke to a member of Mr Taylor’s staff; on others he left recorded messages, to which members of staff and Mr Taylor himself later listened. In these telephone calls and recorded messages the respondent, who held strong views on immigration and asylum policy and the provision of public support to immigrants and applicants for asylum, ranted and shouted and made reference to “Wogs”, “Pakis”, “Black bastards” and (according to the statement of facts agreed between the parties for purposes of this appeal but not the case stated by the Justices) “Niggers”. Some of those who received the calls and heard the messages described themselves as shocked, alarmed and depressed by the respondent’s language.

3. The respondent was charged with sending messages of a grossly offensive, obscene or menacing character by means of a public telecommunications system between 1 January 2002 and 6 January 2004, contrary to section 43(1) of the Telecommunications Act 1984. The information issued against the respondent was formally defective, since section 43(1) of the 1984 Act was superseded by section 127(1)(a) of the 2003 Act in the course of the two-year period charged and the information was duplicitous. But no objection has at any time been taken on these grounds. It has been agreed to treat section 127(1)(a) as if it had been effective throughout the relevant period, and to treat the charge as one of sending messages that were grossly offensive.

4. The respondent pleaded not guilty and following a trial on 4 October 2004 Leicestershire Justices dismissed the charge. In a case stated for the opinion of the High Court the Justices gave their reasons. They found that the racist terms used by the respondent sprang from his obvious frustration at the way his concerns were being handled. They concluded:

“The conversations and messages left were ‘offensive’ but not ‘grossly’ offensive. A reasonable person would not find the terms used to be grossly offensive.”

5. On the Director’s appeal to the Queen’s Bench Divisional Court the leading judgment was given extempore after a brief argument by Sedley LJ, with whom Mitting J agreed: [2005] EWHC 1308 (Admin). In paras 4-5 of his judgment Sedley LJ said:

“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.”

He concluded that the Justices had been entitled to find as they had. He referred to section 127(1)(a) of the 2003 Act and (which the parties had not) the Human Rights Act 1998, suggesting that the reason for criminalising certain messages sent by post, telephone or public electronic communications network was to protect people against receipt of unsolicited messages which they might find seriously objectionable. Thus the legislation struck a balance between the respect for private life enjoined by article 8 and the right of free expression protected by article 10. He continued, in para 9 of his judgment:

“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.”

The Lord Justice then considered obscene, indecent, and menacing messages and expressed his conclusions in paras 11-12:

“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 multi-racial 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] AC 854) 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: [counsel for the defendant] 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."

The legislation

6. Section 127 of the 2003 Act, so far as material, provides:

"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; or

- (b) causes any such message or matter to be so sent.
- (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he?
 - (a) sends by means of a public electronic communications network, a message that he knows to be false,
 - (b) causes such a message to be sent; or
 - (c) persistently makes use of a public electronic communications network.
- (3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.”

The genealogy of this section may be traced back to section 10(2)(a) of the Post Office (Amendment) Act 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene or menacing character. That subsection was reproduced with no change save of punctuation in section 66(a) of the Post Office Act 1953. It was again reproduced in section 78 of the Post Office Act 1969, save that “by means of a public telecommunication service” was substituted for “by telephone” and “any message” was changed to “a message or other matter”. Section 78 was elaborated but substantially repeated in section 49(1)(a) of the British Telecommunications Act 1981 and was re-enacted (save for the substitution of “system” for “service”) in section 43(1)(a) of the Telecommunications Act 1984. Section 43(1)(a) was in the same terms as section 127(1)(a) of the 2003 Act, save that it referred to “a public telecommunication system” and not (as in section 127(1)(a)) to a “public electronic communications network”. Sections 11(1)(b) of the Post Office Act 1953 and 85(3) of the Postal Services Act 2000 made it an offence to send certain proscribed articles by post.

Conclusions

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. The respondent did not seek to support this approach.

9. The parties agreed with the rulings of the Divisional Court that it is for the Justices 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. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ("Old Contemptibles"). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

10. In contrast with section 127(2)(a) and its predecessor subsections, which require proof of an unlawful purpose and a degree of knowledge, section 127(1)(a) provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the subsection. What, if anything, must be proved beyond an intention

to sent the message in question? Mr Perry, for the Director, relying by analogy on section 6(4) of the Public Order Act 1986, suggested that the defendant must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken to be so.

11. It is pertinent to recall Lord Reid's observations in *Sweet v Parsley* [1970] AC 132, 148:

“Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.”

This passage is relevant here, since Parliament cannot have intended to criminalise the conduct of a person using language which is, for reasons unknown to him, grossly offensive to those to whom it relates, or which may even be thought, however wrongly, to represent a polite or acceptable usage. On the other hand, a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender. The same will be true where facts known to the sender of a message about an intended recipient render the message peculiarly offensive to that recipient, or likely to be so, whether or not the message in fact reaches the recipient. I would accept Mr Perry's submission.

12. In seeking to uphold the decisions below in the respondent's favour, Miss Oldham QC relied on the context in which the messages were sent, stressing that they were sent by him to his MP seeking redress of his grievances as constituent and taxpayer. This is undoubtedly a relevant fact. The respondent was entitled to make his views known, and entitled to express them strongly. The question is whether, in doing

so, he used language which is beyond the pale of what is tolerable in our society.

13. The Justices thought not. A decision of justices on a matter of this kind is not to be disturbed at all readily, as the Divisional Court rightly recognised. But some at least of the language used by the respondent was language which can only have been chosen because of its highly abusive, insulting, pejorative, offensive character. There was nothing in the content or tenor of these messages to soften or mitigate the effect of this language in any way. Differing from the courts below with reluctance, but ultimately without hesitation, I conclude that the respondent's messages were grossly offensive and would be found by a reasonable person to be so. Since they were sent by the respondent by means of a public electronic communications network they fall within the section. It follows that the respondent should have been convicted.

14. Miss Oldham did not contend that this conclusion would be inconsistent with article 10 of the European Convention, given effect by the Human Rights Act 1998, and she was right not to do so. Section 127(1)(a) does of course interfere with a person's right to freedom of expression. But it is a restriction clearly prescribed by statute. It is directed to a legitimate objective, preventing the use of a public electronic communications network for attacking the reputations and rights of others. It goes no further than is necessary in a democratic society to achieve that end. Effect must also be given to article 17 of the Convention, as was held in *Norwood v United Kingdom* (2004) 40 EHRR SE 111.

15. For these reasons, and those given by my noble and learned friends Lord Carswell and Lord Brown of Eaton-under-Heywood, I would accordingly allow the Director's appeal. At an earlier stage he undertook to the respondent that he would not, if his appeal succeeded, seek remission of the case to the magistrates' court. There will therefore be no further order.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

16. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, with which I agree, I too would allow this appeal.

BARONESS HALE OF RICHMOND

My Lords,

17. For the reasons given in the opinion of my noble and learned friend Lord Bingham of Cornhill, with which I agree, I too would allow this appeal but make no further order.

LORD CARSWELL

My Lords,

18. The reports of cases before appellate tribunals are strewn with instances in which the courts have reminded themselves of the importance of resisting the temptation to interfere too lightly with the findings of a lower court to which a decision has been entrusted, and have then proceeded to yield to that very temptation. The magistrates' court in this case was given the task of determining whether an expression or other matter sent by means of a public electronic communication was grossly offensive in the eyes of reasonable people, judged, as Sedley LJ put it (para 11 of his judgment in the Divisional Court) by the standards of an open and just multiracial society. The justices who sit in the magistrates' court are people who are expected to apply the standards of today's society to determination of such issues. It is of importance that their determinations should not be upset lightly. Appellate tribunals should pay more than lip service to that principle and when they do reverse them they should be clear on what basis they do so: cf *Brutus v Cozens* [1973] AC 854, 862–864.

19. The magistrates' court found (para 3 of the case stated) that one member of the staff of Mr David Taylor MP who listened to the messages on his answering machine was upset by the language used, but another was not. A third found it depressing. Mr Taylor was not personally offended but was concerned about the possible effect on his staff. The court expressed its conclusion in paragraph 9 of the case stated:

“the conversations and messages left were ‘offensive’ but not ‘grossly’ offensive. A reasonable person would not find the terms used to be grossly offensive.”

20. In the Divisional Court Sedley LJ, with whom Mitting J agreed, expressed his opinion in paragraph 12 of his judgment in the following terms:

“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.”

The justices did not express any view on whether a reasonable person belonging to any of the ethnic minorities to whom the respondent referred in his telephone calls would find the terms used grossly offensive.

21. I respectfully agree with the conclusion expressed by my noble and learned friend Lord Bingham of Cornhill in paragraph 11 of his opinion that it must be proved that the respondent intended his words to be offensive to those to whom they related or be aware that they may be taken to be so. I also agree with his conclusion in paragraph 8 that it can make no difference to criminal liability whether a message is ever actually received or whether the persons who do receive it are offended by it. What matters is whether reasonable persons in our society would find it grossly offensive.

22. These conclusions are sufficient to answer the certified question. It remains to apply the principles to the facts of the present case and the findings of the magistrates' court. I felt quite considerable doubt during the argument of this appeal whether the House would be justified in reversing the decision of the magistrates' court that the reasonable person would not find the terms of the messages to be grossly offensive, bearing in mind that the principle to which I have referred, that a tribunal of fact must be left to exercise its judgment on such matters without undue interference. Two factors have, however, persuaded me that your Lordships would be right to reverse its decision. First, it appears that the justices may have placed some weight on the reaction of the actual listeners to the messages, rather than considering the reactions of reasonable members of society in general. Secondly, it was conceded by the respondent's counsel in the Divisional Court that a member of a relevant ethnic minority who heard the messages would have found them grossly offensive. If one accepts the correctness of that concession, as I believe one should, then one cannot easily escape the conclusion that the messages would be regarded as grossly offensive by reasonable persons in general, judged by the standards of an open and just multiracial society. The terms used were opprobrious and insulting, and not accidentally so. I am satisfied that reasonable citizens, not only members of the ethnic minorities referred to by the terms, would find them grossly offensive.

23. I accordingly agree with your Lordships that we are entitled to reach a different conclusion from the courts below. I would allow the appeal and declare that the respondent should have been convicted of the offence charged, while making no further order.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

24. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Carswell and for the reasons they give, with which I agree, I too would allow this appeal.

25. I add only this. The contrast between section 127(1)(a) of the 2003 Act—under which the respondent was charged—and section 1 of the Malicious Communications Act 1988 (a contrast struck by Lord Bingham at para 7 of his speech) is crucial to an understanding of the true nature and ambit of liability under section 127(1)(a). Whereas section 127(1)(a) criminalises without more the sending by means of a public electronic communications network of inter alia a message that is grossly offensive, the corresponding part of section 1(1) of the 1988 Act (as amended by section 43(1) of the Criminal Justice and Police Act 2001) provides that:

“Any person who sends to another person (a) a letter, electronic communication or article of any description which conveys (i) a message which is . . . grossly offensive . . . is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should . . . cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.”

26. In short, for liability to arise under section 1(1), the sender of the grossly offensive message must intend it to cause distress or anxiety to its immediate or eventual recipient. Not so under section 127(1)(a): the very act of sending the message over the public communications network (ordinarily the public telephone system) constitutes the offence even if it was being communicated to someone who the sender knew would not be in any way offended or distressed by it. Take, for example, the case considered in argument before your Lordships, that of one racist talking on the telephone to another and both using the very language used in the present case. Plainly that would be no offence under the 1988 Act, and no offence, of course, if the conversation took place in the street. But it *would* constitute an offence under section

127(1)(a) because the speakers would certainly know that the grossly offensive terms used were insulting to those to whom they applied and would intend them to be understood in that sense.

27. I confess that it did not at once strike me that such a telephone conversation would involve both participants in committing a criminal offence. I am finally persuaded, however, that section 127(1)(a) is indeed intended to protect the integrity of the public communication system: as Lord Bingham puts it at paragraph 7 of his speech, “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”. (Quite where that leaves telephone chat-lines, the very essence of which might be thought to involve the sending of indecent or obscene messages such as are also proscribed by section 127(1)(a) was not explored before your Lordships and can be left for another day.)