Neutral Citation Number: [2021] EWHC 2140 (Admin)

Case No: CO/5022/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

LORD JUSTICE BEAN
MR JUSTICE DOVE

- -

Between :

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
PAUL BUSSETTI	**Respondent**

- -
- -

John McGuinness QC (instructed by **CPS Special Casework**) for the **Appellant**
Mark Summers QC & Anita Davies (instructed by **Lound Mulranan Jeffries Solicitors**) for the **Respondent**

Hearing dates: 20 July 2021

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Approved Judgment

Lord Justice Bean

1. On 14 June 2017 71 residents died in the fire disaster at Grenfell Tower, a tall block of flats in West London.

2. On 3 November 2018 Paul Bussetti went to a bonfire night party at the home of his friend Clifford Smith. There were about thirty people present. Some of them brought guys or effigies to burn on the bonfire. One of these effigies was a tall structure in flammable material depicting Grenfell Tower. It had the word "Grenfell" at the top and showed six cut out figures including one said by the Crown to be in a hijab looking out of the upper floors of the tower.

3. Mr Bussetti took a video of the burning of the Grenfell Tower effigy on the bonfire on his mobile and later that evening sent the video to two WhatsApp groups, each with very limited membership.

4. By Monday 5 November the video had been shared on social media. It attracted attention in a national newspaper and on television. Mr Bussetti went to Croydon Police Station that evening and was interviewed after being cautioned. He admitted filming the Grenfell Tower effigy burning and sending it to a WhatsApp group. He said he had not taken any photos or videos of any other effigies at the party, except maybe for a photograph of his own, and he had not shared any photos or videos of any effigies other than the Grenfell Tower one. He thought he had deleted all the videos of the Grenfell Tower effigy that were on his phone.

5. He was shown a video of the Grenfell Tower effigy burning which the police had obtained from the internet. He said he believed it was his recording. He watched the video and identified by name a number of people who could be seen or heard on it. He was asked what he thought of the footage and replied "terrible". He was asked whether he thought it could be quite offensive to people and replied "definitely". He was asked what other people would think about the incident and replied "it was shocking". He was asked "what about the people that survived the Grenfell Tower fire?" and replied "even more – terrified". He denied any intention for the video to go viral or for it to support any agenda. He said "There was no purpose. It was just a horrible video."

6. He was charged with sending a grossly offensive message by means of a public electronic communications network, contrary to s.127(1) of the Communications Act 2003.

7. The trial was before the Chief Magistrate, Senior District Judge Arbuthnot (as she then was: now Mrs Justice Arbuthnot). It occupied two working days. We were told that the defence raised an issue as to whether sending a message to a WhatsApp group was capable of constituting an offence under s 127(1); the Chief Magistrate ruled that it was. That issue has not been argued before us.

8. The parties agreed formal admissions which included the following:-

> "3. The defendant took a video of the burning of the Grenfell Tower effigy on his mobile Telephone (ex. HEG05118/1).

> 4. At or around 8:57 pm on 3 November 2018 the defendant sent the video to two WhatsApp groups using his telephone, one containing approximately 14 people, and one containing approximately 6 people."

9. The Chief Magistrate also had before her an agreed summary of Mr Bussetti's interview by the police on the morning of 6 November 2018. The summary noted that he had been cautioned and informed of his legal rights and declined the services of a solicitor. The summary included:-

> 5. Mr Bussetti had filmed the Grenfell Tower effigy burning and sent it to a WhatsApp group, but had not put it online on Twitter or Facebook.
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> 6. He had not taken any photos or videos of any other effigies at the party, except maybe a photograph of his own. He had not shared any videos or photographs of any effigies other than the Grenfell Tower one.
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> 7. The WhatsApp group he had sent the video to had 14 people in it, and was his 'football lot'.
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> 8. When he had handed himself in, the police had seized from him the telephone that he had used to take the film and send it to WhatsApp (an iPhone 8).
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> 9. He thought he had deleted all the videos of Grenfell Tower that were on the phone.
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> 10.He thought he had sent the video to another WhatsApp group called 'Holiday Group', which had maybe 6 people in it.
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> 11 . Mr Bussetti was shown the video of the Grenfell Tower effigy burning that the police had obtained open source, i.e. from the widely accessible internet. He said he believed it was his recording.
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> 12. He was asked why he had sent it to a WhatsApp group. He said, 'no idea, just drinking, I dunno, can't remember' .
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> 13. Mr Bussetti watched the video and, when asked, identified by name a number of people who could be seen or heard on the video.
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> 14. He was asked, 'So, looking back at that footage, what did you think of it?'. He replied, 'terrible'.
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> 15. He was asked, 'Do you think that could be quite, sort of, offensive to people?'. He replied, 'Er, definitely'.
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> 16. He was asked 'Is it offensive to you, having looked at it, back again?'. He replied, 'it is bad, it's bad, yeah'.

> 17. He said 'it was just stupidness really. Everyone was, er, had a drink, but yeah it was just complete stupidness'.
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> 18. He was asked, 'And how do you feel afterwards?'. He replied, 'Sick. It's not great. Terrible.' He was asked, 'Why were you filming it in the first place'. He replied, 'I've no idea'. He was asked, 'What did you intend?'. He said, 'l dunno. No idea. Just don't know. One of those stupid moments'.
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> 19. He denied any intention for the video to go viral, or for it to support any agenda.
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> 20. He was asked, 'What do you think other people would think about the incident if they saw it?' He replied, 'Oh it was shocking'. He was asked, 'What about the people that survived the Grenfell Tower fire?'. He replied, 'Even more yeah, terrified, terrified.'"

10. A video of the effigy being burned was played in court. We have seen it too. The soundtrack includes a number of clearly audible remarks. Someone cries out "help me, help me". Someone says "The little ninja's getting it", which the prosecution alleged was a clearly racist comment. Another replies "That's what happens when they don't pay their rent". Each of these and other comments is greeted with loud laughter. It is inexplicable what some people find funny, but behaving in a tasteless and insensitive manner on private premises is not a criminal offence.

11. The prosecution adduced written statements from two witnesses, Ms Ruiz and Mr Taylor, which the Chief Magistrate described in the case stated as follows:

> "I heard evidence read from two witnesses, Ms Ruiz and Mr Taylor about the trauma of the Grenfell fire and the effect of seeing the film on YouTube. Ms Ruiz was traumatised by the video of the effigy with the cut-out figures and what she heard said. She mentioned in particular hearing it said 'that is what happens when you don't pay rent' and 'stay in the flat'. She had never experienced hate like that before. She questioned how it was that the people watching the effigy burn could think it funny. Mr Taylor said the stereotyping of the people in the tower was awful. The video was horrendous to see. It was an attack on the Grenfell community."

12. The prosecution also applied to adduce evidence of racist text messages and other material found on the Defendant's mobile phone when it was seized by the police. The Chief Magistrate allowed the application on the basis that the evidence was "relevant to *mens rea* and was important explanatory evidence". She noted that the Crown's case was that the video of the bonfire had been sent because the Defendant was a racist. The bad character evidence was held to be relevant (a) to intention, (b) to the Defendant's awareness of the risk that it would be grossly offensive and, (c) as to motive.

13. The Defendant gave evidence and said that the cut-out models shown in the video depicted his friends. He was understandably cross-examined as to why he had never

mentioned this in interview. He called a witness, Clifford Smith, who had also been at the bonfire party and confirmed that the effigy depicted friends of the maker of the effigy (a Mr Bull) at the windows.

14. At the end of the hearing, when the Chief Magistrate was about to rise to consider her decision, the prosecution advocate (Mr Stott) became aware that Mr Bussetti was not the only person attending the bonfire party who had posted a video of the Grenfell Tower effigy. There had been at least one other, taken by a Mr Hancock. Mr Stott of course immediately informed the court.

15. This discovery caused a degree of consternation, since the hearing had proceeded on the basis that the video shown to the Chief Magistrate was the one which Mr Bussetti admitted having taken. The prosecution conceded that they could not prove that it was the same one. Submissions were made by counsel on each side. We are sympathetic to the difficulties which this last minute development caused to all those involved with the case, especially the judge.

16. The Chief Magistrate gave her judgment in the following terms:

> "1. As in all criminal cases the burden of proving the case is on the Crown and it is a high one, before I could convict I would have to be sure of the defendant's guilt.
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> 2. Putting this sort of video on the internet even in a private WhatsApp group could in certain circumstances constitute an offence under section 127 of Communications Act 2003 but in this case the Crown have not discharged the burden upon them.
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> 3. I cannot be sure that the video relied on by the Crown is the one taken by the defendant, ie the message sent by the defendant is the one that has been played to me. I cannot be sure that the cut-out images on the tower were not the defendant and his friends, burnt in a bonfire joke of colossal bad taste.
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> 4. The truly offensive racist remarks and images sent by the defendant to others on a very regular basis cannot fill the holes in the Crown's case, as abhorrent as they are and as much as they show the sort of person the defendant is.
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> 5. I find therefore that the elements of the case are not proved beyond reasonable doubt and I acquit the defendant.
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> 6. Had these issues been raised at half time, I may well have upheld Mr Summers' submission of no case. Furthermore, in the light of the recent disclosure provided after the evidence and submissions had finished, had Mr Summers raised an abuse of process argument, that too may have succeeded.
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> 7. Once someone has been charged with an offence, there is sometimes a tendency, and I am not sure whether it is a police or a Crown Prosecution Service tendency, to take the foot off the

> pedal and not to review the case much afterwards. I do not know what has happened in this case and it may be that the defence did not become crystal clear until this morning. It seems on the face of it, however, that at the very latest this morning, warning bells should have been ringing that the police were in possession of information that potentially undermined their own case and supported the defence case. Those bells did not ring and it is Mr Stott, for the prosecution, keeping his wits about him, who prevented potentially a miscarriage of justice.
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> 8. I will expect an explanation from the senior police officer and the reviewing lawyer about what has happened to disclosure in this case."

17. The DPP applied to the Chief Magistrate to state a case for the opinion of this court, which she did on 29 October 2019. I will not set it out in full. At paragraphs 2 to 9 she wrote:

> "2. The video I was shown depicted a cardboard model of a tower, with Grenfell written at the top and with about six cut-out characters in the windows. The film showed the model was being burnt on a bonfire at a bonfire night party with a number of people present. The video also contained audio sound of poor quality.
>
> 3. The video I was shown had been recovered by the police from the internet: YouTube (not WhatsApp). The police were unable to identify the person who had posted the video to YouTube.
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> 4. I had already dismissed a charge that the defendant had uploaded that video onto YouTube, after refusing an application to amend this charge out of time. There was, and the prosecution conceded before me that there was, no evidence that Mr Bussetti had uploaded any video onto YouTube.
>
> 5. The defendant admitted being present at the bonfire on 3rd November 2018 and filming the activities and sending a video to WhatsApp
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> 6. The video sent by the defendant to the WhatsApp group was however never recovered. Whilst the defendant and a number of other members of the WhatsApp group voluntarily attended their local police station and surrendered their telephones, no copies of the video were recoverable from their telephones. All that could be recovered was evidence that the defendant had sent a video to the group.
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> 7. The prosecution case before me therefore rested upon the contention that that (missing WhatsApp) video must have been the one recovered from YouTube (and presumably uploaded to YouTube by some unknown member of the WhatsApp group), because there was only one video of the bonfire that existed.

> 8. That logic appeared to be sound and it was therefore assumed throughout the trial until just before I retired to consider my verdict that the video shown to the court taken from YouTube was the one taken by Mr Bussetti.
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> 9. Applying the test in *R* v *Galbraith* [1981] 1 WLR 1039, I found that there was a case to answer in respect of the content of the YouTube video after hearing the prosecution evidence. There was no transcript provided by the Crown and the sound was of poor quality. But I found at that stage that what I could discern from the video I had been shown and that purportedly had been made by the defendant was prima facie grossly offensive. This was because (i) the video was of a burning model of the Grenfell tower, showing six cut-out figures which the prosecution maintained depicted Grenfell residents, including one figure in a hijab, and (ii) the burning of the model was accompanied on the audio recorded by the YouTube video by at least one comment which had racial overtones, namely reference to the figure wearing a hijab as a "little ninja"."

18. After setting out in detail what had occurred during the trial she concluded:-

> "21. The prosecution conceded they could not prove which video had been shown to the court, the one taken by Mr Bussetti or by Mr Hancock. There was no other evidence before me. As I record at paragraph 3 of my judgment, I could not be sure that the video shown to me was the one sent by Mr Bussetti. It followed I could not be sure what the video taken by Mr Bussetti had in fact showed, whether it encapsulated the whole incident taking place at the bonfire, none of it, part of it, whether it had audio and if so what could be heard and whether it showed the effigy or the bonfire or anything grossly offensive to any person.
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> 22. The prosecution did not then apply for an adjournment to remedy any deficiency in the prosecution evidence as they are able to do in line with authorities such as *Narinder Malcolm v DPP* [2007] EWHC 363 (Admin).
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> 23. In light of this I would rephrase the questions drafted in this appeal to these:
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> > 1. Did the court err in law in acquitting on the basis that the prosecution could not prove that the video produced in evidence at the trial was that which had been sent as a message by the defendant, given that it was not in issue he had sent by means of a public electronic communications network a message containing a video taken at the same event to that produced in evidence?
> >
> > 2. Did the court err in deciding that without seeing the video taken by the defendant it could not be sure that it was in fact

> similar in content to the video shown and subsequently uploaded onto YouTube by a person unknown?
>
> 3. In all the circumstances was I required to consider whether the content contained in a video I could not be sure I had seen was grossly offensive to members of the public or victims of the Grenfell tragedy?"

19. The DPP did not pursue question 1 but did pursue questions 2 and 3. He took issue with some of the wording of the case stated and applied to this court for a direction that it should be amended. That application was heard by Carr LJ and Jeremy Baker J on 29 October 2020. This court directed that the case stated be amended in a number of respects, of which the most important were set out at paragraphs 27, 28, 32, 33 and 37 of the judgment of Carr LJ:-

> "27 I consider that the Case Stated in its current form does not summarise the evidence which formed the basis of the Chief Magistrate's factual conclusion that, without seeing the video recording taken by the Respondent, she could not be sure that it was, in fact, similar in content to the video recording shown and, subsequently, uploaded on to YouTube. Paragraph 2 simply records an outline of the contents of the video recording recovered from YouTube and then only in the briefest of terms. Paragraph 9 simply records the Chief Magistrate's ruling, at the conclusion of the prosecution case, not to dismiss the case at that stage. The prosecution case, however, on the question of whether or not the material was grossly offensive, is, in my judgment, not limited to those material features summarised in para.9 of the Case Stated; the prosecution would not be limited in its submissions on that question at the conclusion of trial.
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> 28 I consider, therefore, the case needs to be amended to summarise the evidence which formed the basis of the Chief Magistrate's conclusion in this regard and her reasons for it. The simple point is that this court does not yet know the basis for her statement in para.21 of the Case Stated that there simply was no other evidence. In light of the admissions, the interview given by the Respondent and the evidence that he gave at trial, these are matters which would benefit from clarification.
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> ...
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> 32 It seems to me that there can be no question but that the relevant admissions that were in evidence, together with the agreed summary of the Respondent's interview under caution three days after the bonfire party, must be incorporated in the Case Stated for consideration by this court when hearing the appeal. The DPP's case could not fairly or properly be considered without them. The Respondent agreed that he took a video recording of the burning of the effigy. He stated in interview that he believed that the video recording from

> YouTube that he was shown was his. At a time when he was fully represented, he formally accepted sending the video recording to WhatsApp. This was so, despite it being obvious that others were using their telephones to record or photograph the incident as well. He did not take a different stance in the witness box.
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> 33 These matters are the basis of the DPP's contention that it was not open to the Chief Magistrate to find that she could not be sure that his video recording, even if not the actual recording on YouTube, was, if not identical, then materially similar.
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> ...
>
> 37 ……..[T]he admissions and summary of the Respondent's interview should be summarised in the body of the case or appended as an attachment."

20. The Chief Magistrate stated an amended case on 30 December 2020. This attached the video she had seen, the admissions and the interview summary, and included the following:-

> "u. **I am asked to give the reasons for the factual conclusion set out in question 2**. Unfortunately, the evidence of the Respondent had not focussed on the point. At the Case Management stage of the case, the defendant had not made any signed admissions that in interview the police had shown him the video he had taken. In any event, the PET form filled in by the Crown was not in evidence. In the police interview the Respondent had not confirmed beyond doubt that it was his video, he said he believed it to be.
>
> v. The most difficult point was whether the signed admissions agreed at a time before the subsequent disclosure was made at the end of the case, should be the basis for a finding that the Respondent was guilty of the charge. Had the disclosure been made sooner, the Respondent would have been asked in terms whether he could say it was the video that he had taken and uploaded on the WhatsApp groups. The timing of the disclosure meant he could not be asked about this.
>
> w. The Respondent was not in the video and that might have been an indication he was filming but again there were 30 people at the party but many fewer in the film.. In the circumstances, I thought it more likely than not that his film was the one I had seen but because of the lack of clear evidence on the point, I found I was not sure whether the video seen at the trial was the Respondent's.
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> x. As to the second point, whether I could be sure the video filmed by the Respondent was similar to the one seen in court,

> on the one hand the fact that he had uploaded a video at all suggested that there were audio and images on it that he wanted his friends to see as otherwise there would have been no reason for him to have uploaded it. On the other, I noted that although the images were clear the sound in the video seen in court was bad. A different video taken at the same time by another person, might be shorter or longer, contain better audio or worse, be without sound or have fewer clear images. It was impossible to say.
>
> y. I considered that although the chances were that the video uploaded by the Respondent would have been similar to the one I had seen, because of a lack of evidence on the point, I could not be sure beyond reasonable doubt that the offensive remarks relied on by the Crown would be heard or that the images would be clear enough to be grossly offensive on a different video."

The law

21. Mr John McGuinness QC for the DPP accepts that this court is not entitled to allow an appeal by case stated simply because we take a different view of the facts from that of the Magistrates' Court. He submits that the Chief Magistrate's determination that without seeing the video taken by Mr Bussetti she could not be sure that it was similar in content to the one played in court was not reasonably open to her to reach. He relies on the contents of the admissions, the agreed summary of the Respondent's interview under caution on 6 November 2018 and the video itself. He submits that the test set out by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36 is amply satisfied.

22. Section 127(1)(a) of the Communications Act 2003 states, so far as relevant, that a person is guilty of an offence if he "sends by means of a public electronic communications network a message or other matter that is grossly offensive".

23. The leading case is the decision of the House of Lords in *Director of Public Prosecutions v Collins* [2006] 1 WLR 2223. The defendant telephoned his MP a number of times and spoke either directly to him or to members of his staff or left messages on an answering machine. In those conversations and messages the defendant referred to "wogs", "Pakis", "black bastards" and "niggers". None of the people to whom he spoke on the telephone or who picked up the recorded messages was a member of an ethnic minority. The justices held that although the conversations and messages were offensive, a reasonable person would not have found them grossly offensive, and acquitted the defendant. This court dismissed the prosecution's appeal by way of case stated.

24. The House of Lords allowed the prosecution's further appeal. In the leading speech Lord Bingham of Cornhill, with whom all the other Law Lords agreed, said:-

> 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 send 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."

25. Lord Carswell said:-

> "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.
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> 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 multi-racial 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."

26. Lord Brown of Eaton-under-Heywood said:-

"25. 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.)"

27. The ratio of *Collins* was conveniently summarised by Sweeney J in *DPP v Kingsley Smith* [2017] EWHC 359 (Admin) at paragraph 28. Sweeney J's statement at paragraph 28(7) of the requisite *mens rea* was that "the Respondent intended his message be grossly offensive to those to whom it related; or that he was aware at the time of sending that it might be taken to be so by a reasonable member of the public who read or saw it". This has not been disputed before us.

28. Mr Mark Summers QC for the Respondent referred us to two further cases. The defendant in *Chambers v DPP* [2013] 1 WLR 1833 was charged with sending a message of a menacing character contrary to section 127(1)(a) of the 2003 Act. He had been due to travel from an airport which was closed due to adverse weather conditions. He responded by posting several tweets on Twitter in his own name, including:

> "Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!"

29. None of his followers on Twitter who read the posting was alarmed by it at the time. Five days later the tweet came to the attention of the duty security manager at the airport. The manager did not consider the threat credible but reported it to the police. The defendant asserted that the tweet was a joke and not intended to be menacing. Mr Chambers was convicted by the magistrates' court and his appeal to the Crown Court was dismissed.

30. On an appeal by way of case stated this court quashed the conviction. Lord Judge CJ held that:-

> "30 … a message which cannot or is unlikely to be implemented may nevertheless create a sense of apprehension or fear in the person who receives or reads it. However unless it does so, it is difficult to see how it can sensibly be described as a message of a menacing character. So, if the person or persons who receive or read it, or may reasonably be expected to receive, or read it, would brush it aside as a silly joke, or a joke in bad taste, or empty bombastic or ridiculous banter, then it would be a contradiction in terms to describe it as a message of a menacing character. In short, a message which does not create fear or apprehension in those to whom it is communicated, or who may reasonably be expected to see it, falls outside this provision, for the very simple reason that the message lacks menace."

31. At paragraph 38 Lord Judge added:-

> "38. We agree with the submission by Mr Smith that the mental element of the offence is satisfied if the offender is proved to have intended that the message should be of a menacing character (the most serious form of the offence) or alternatively, if he is proved to have been aware of or to have recognised the

> risk at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it. We would merely emphasise that even expressed in these terms, the mental element of the offence is directed exclusively to the state of the mind of the offender, and that if he may have intended the message as a joke, even if a poor joke in bad taste, it is unlikely that the *mens rea* required before conviction for the offence of sending a message of a menacing character will be established. The appeal against conviction will be allowed on the basis that this tweet did not constitute or include a message of a menacing character; we cannot usefully take this aspect of the appeal further."

Question 2: Should the Chief Magistrate have held that the video taken by the Defendant was similar in content to the video which had been played in court?

32. Mr McGuinness submits that in the case stated, even as amended, the Chief Magistrate did not address the relevance or significance of the interview, the formal Admissions or the Respondent's own evidence. He also questions the significance of her observation that Mr Bussetti's video might have been shorter or longer than the one she had seen. We agree that it is difficult to see why that was relevant. The video which was uploaded by a person unknown to YouTube, played in the Magistrates' Court and viewed by us as an attachment to the case stated is just over three minutes in length. In the course of those three minutes the effigy depicting Grenfell Tower with the name "Grenfell" at the top is brought out of a house, placed on a brazier, set alight and consumed by fire. Similarly, it is difficult to see the materiality of the observation that the content or quality of the soundtrack might have been different. More importantly, the significance of the defendant's admissions in interview and the formal admissions at trial were not dealt with.

33. The response of Mr Summers, as strikingly set out at the start of his and Ms Davies' written submissions, is that "the key to understanding the decision under appeal is racism". Mr Summers submitted that the Crown's case below was that the video was grossly offensive because it contained racist comments and images. He argued that racism was the basis on which the Chief Magistrate allowed what he described as "highly prejudicial" bad character evidence of other racist communications, and the basis upon which the case was permitted to proceed past "half time". The judge's decision to acquit was justified because (1) the Crown could not show that the video shown in court was the one sent by Mr Bussetti; and (2) the judge was then unable to conclude that the unseen video contained the "necessary racist elements (images and utterances) which had sustained the prosecution case".

34. I do not accept that this is an adequate answer to the prosecution argument relating to Question 2 of the case stated. Section 127(1)(a) of the 2003 Act does not require any element of racism. The question was whether Mr Bussetti had sent via WhatsApp a message which he intended to be, or which he was aware might be, grossly offensive to members of the public, in particular members of the Grenfell community, who saw it. Not all the victims of the Grenfell Tower disaster were from ethnic minorities, though many were. Indeed, we have not been told, either in the case stated or in argument, the ethnicity of the two witnesses, Ms Ruiz and Mr Taylor, who gave written evidence in the court below that they had found the video grossly offensive. Mr Taylor said that the

video stereotyped the people in Grenfell Tower. He may well have been referring to the comment "this is what happens when they don't pay their rent".

35. I accept that the racism factor is potentially relevant to this extent. For the offence under s 127(1)(a) to be committed the sender must intend or be aware that the message is not simply offensive but grossly offensive. The fact that the message is in bad taste, even shockingly bad taste, is not enough: see per Lord Judge CJ in *Chambers v DPP* at [28] and the CPS guidance on prosecutions involving social media communications. Mr Summers reminded us of the Strasbourg case law on Article 10 of the ECHR such as *Alekhina v Russia* (2019) 68 EHRR 14 (the "Pussy Riot" case) which also emphasises this, but it appears that expressly racist discourse has not been held to be protected under Article 10.

36. Nevertheless, I would accept the prosecution submission that the Chief Magistrate did not address the significance of the fact that on 6 November 2018, that is to say two days after the bonfire, the Respondent was shown the video which had been uploaded on YouTube; accepted that it was his; and himself described it as "shocking" and "horrible". Assuming in his favour that it was not his but Mr Hancock's or someone else's, it was so similar in what it showed that Mr Bussetti thought it was his. No one suggests that there were two different effigies burned on the bonfire. It may be that the sound quality of Mr Bussetti's video was not as good as that of the video which we have seen (if it was indeed not the same one), or the camera angle slightly different, but that is of minimal significance. In my judgment a court of trial would be entitled to conclude that the s 127(1)(a) offence was constituted by a video of the burning effigy without any sound track at all.

37. I would therefore answer question 2, "yes".

Question 3: was the court required to consider whether the content contained in the Respondent's video was "grossly offensive to members of the public or victims of the Grenfell tragedy?

38. I consider that this question is also to be answered "yes" in the light of the affirmative answer to question 2. Since it was clear for the reasons given above that Mr Bussetti's video was substantially similar (though maybe not identical) to the one uploaded to YouTube and played in court, the Chief Magistrate was required to *consider* whether its content was grossly offensive and whether the Respondent intended it to be so or was aware that it was likely to be so.

What order should then be made?

39. Mr Summers submits that even if questions 2 and 3 are answered yes, the appeal should nonetheless be dismissed. He submits that the best the DPP could do in this court would be obtain an order for the case to be remitted to the same judge for the trial to continue; and since the Chief Magistrate held that she could not be sure that the cut-out figures depicted on the effigy were <u>not</u> the defendant and his friends, burned in what she rightly described as a bonfire joke of colossal bad taste, she would have dismissed the case anyway.

40. Even if the trial court accepts that the cut-out figures may have been intended to represent the Defendant and his friends, that would not in my view provide a defence

to the charge. A member of the Grenfell community or other reasonable member of the public, seeing a video of the effigy, would not know that the figures were intended to be anyone other than the residents of Grenfell Tower. There are no names attached to the cut-out figures; only the name "Grenfell" at the top of the effigy, which clearly depicts a tall building with people at the windows.

41. In any event, it is no longer open to this court to order that the case should be remitted for the trial to continue. The trial was concluded by a judgment that the Defendant was not guilty. That was a final decision, not an interlocutory ruling.

42. Mr Summers argues in the alternative that if we allow the Director's appeal we should nevertheless make no further order: Despite the passage of time I would not take that course in a case where the incident has plainly been seriously upsetting (to use a legally neutral phrase) to many people. If the appeal is allowed then the realistic options are remittal to Westminster Magistrates' Court (a) with an order for a retrial or (b) with a direction to convict. Mr McGuinness, for his part, submits that we should remit the case to the Magistrates' Court with a direction to convict.

43. I would allow the appeal and remit the case to the Westminster Magistrates' Court. With some hesitation I have come to the conclusion that this should be for a new trial before a differently constituted court rather than with a direction to convict. Although the House of Lords in *Collins* were prepared to replace an acquittal by the justices with a conviction they did so on very simple and obvious facts, and partly on the basis of a concession by the defence that reasonable members of an ethnic minority would find the racist words used by the defendant grossly offensive. On an appeal by way of case stated this court should be slow to substitute its own view of whether a communication is grossly offensive where the court below, even making an error within *Edwards v Bairstow*, has acquitted. In addition, as noted above, during the course of the hearing it became clear that further legal argument had been advanced on behalf of Mr Bussetti in relation to whether WhatsApp is a public electronic communications network for the purposes of the 2003 Act, and we did not hear argument on that point.

Mr Justice Dove:

44. I agree.