IN SWINDON MAGISTRATES' COURT

BETWEEN

REGINA

-v-

John David DUNN

CROWN RESPONSE TO DEFENCE SKELETON ARGUMENT FOR THE DEFENDANT

---

1. Paragraphs 1-5 of the defence skeleton argument go into the motivations and beliefs of the Mr Dunn (" the defendant") though of course he would be required to give this as evidence under oath/affirmation for it to be admitted.

2. Paragraphs 6-9 of the skeleton do summarise the allegations of the crown.

The offence:

3. The elements of the offence under s.5 Public Order Act 1986, in that:
    1) a person *"uses threatening or abusive words or behaviour, or disorderly behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby" (*Per s.5 of the public order act 1986)

4. The Crown accepts the wording of s.29J of the public order Act as noted by the defence at para 12 of their skeleton argument, however this section commences "Nothing in this Part…" – The defence have failed to identify what is meant by the word "part". As s29J was created and inserted by means of a schedule to the Racial and Religious Hatred Act 2006, the Crown infers that it relates specifically to attempt to stop any use of the 'aggravated' form of the offences to stop free exchange of religious views as part of debate. The allegation faced by the defendant is not that he was himself committing such an offence. There is no suggestion that he was addressing people with a view to (for example" "cease practising their religion or belief system". S29J simply is not relevant to the offence charged.

Impact of the Human Rights Act and European Convention on Human Rights ("ECHR")

5. The Crown of course accepts the outline of the Human Rights Act and applicability of the ECHR as set out in para 13 & 14 of the defence skeleton argument.

6. It is correct that to interfere with the convention rights of an individual, the State must show that an interference is necessary; controversial opinions can be protected under article 10 ECHR. However in *Brutus v Couzens [1972] 56 Cr App R 799*, as the defence themselves quote;
   "Vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having an especially wide or especially narrow meaning. They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out. But before a man can be convicted it must be clearly shown that ***one or more of them*** has been disregarded" [emphasis added]

7. With respect to the defence, they misinterpret the above quote from Lord Reed; there is nothing in that to suggest that there MUST be a personal threat to an individual for a person to be prosecuted for such speech, rather that it is one of the three.

8. In the current allegation, the defendant is said to have shouted specifically at two lesbian women that "You're going to Hell, you're going to Hell, you're sinning" (per statement of CROSS), or "You are going to burn in Hell" (per MILLER). Both women say that he called CROSS "a devil woman". These are targeted comments which are simultaneously threatening ("you're going to burn in hell"), abusive and insulting ("you're sinning" and "Devil Woman"). Comments are also made about "inheriting the kingdom of God".

9. The defendant has crossed from making comments about religion to targeted, insulting, and judgemental comments specifically at two passers-by. The court, in the position of 'the ordinary man' described by Lord Reed, can recognise that the defendant's behaviour has crossed to being specifically targeted comments which are likely to cause harassment, alarm or distress at an unacceptable level – the very purpose of the Public Order Act legislation.

The Human Rights Act

10. At paragraph 16, the defence have correctly identified Article 9(2) – "*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*"

11. That the aggrieved parties themselves have a right to respect of their private and family life (Article 8) appears to have been overlooked by both the defence in their Case Statement and the defendant in his proselytising. Also protected are their right to marriage as protected by Article 12 and confirmed by national law and their right not to be discriminated against (Article 14).

12. The Crown's position is that the defendant's alleged language – including telling others openly in the street that they would burn in hell is sufficient to make this a personal attack – a direct breach of the laws of the United Kingdom and precisely what is referred to in Article 9(2) as "limitations as are prescribed by law".

13. The same limitations apply to the argument raised by the defence under Article 10 – they have failed to correctly apply Article 10(2).

Defence case law:

Jehovah's Witnesses of Moscow v Russia

14. The first case referred to by the defence (*Jehovah's Witnesses of Moscow v Russia Application no 302/02)* relates to the dissolution of a community of Jehovah's Witnesses in Moscow. Within it are references to beatings of their members, being excluded from premises and an entire community being stripped of 'legal entity' status. Factually it is wholly dissimilar to the present case, and should be distinguished.

15. Furthermore, the defence have not quoted the entirety of the paragraph. The only quote they have obtained from the '*Jehovah's Witnesses…'* case is the four words "convincing and compelling reasons", and have disregarded the remainder of the quote: -

> "*The State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom."*

16. This section in fact relates to freedom of association – and has nothing to do with expression. The defence have incorrectly interpreted / extended the applicability of the judgement.

17. Elsewhere in '*Jehovah's Witnesses…',* the court explained that "*it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient"."* The legitimate aim in the present case is the protection from unnecessary harassment of persons in the street singled out because of their perceived sexuality.

Brutus v Cozens

18. This has been addressed at paragraphs 6-9 above. The defence interpretation is needlessly restrictive. The defence have described this case as 'seminal', without seeking to show any more recent or directly relevant caselaw which might have occurred since 1972.

Kokkinakis v Greece

19. This case is solely about trying to convert persons from one religion to another. It was a challenge to a specific Greek law which purported to outlaw proselytising. (Specifically Part 2 of Article 13 of the Greek Constitution). In the '*Kokkinakis'* case, the act of trying to persuade others to question their religion had led one individual to be arrested 60 times for proselytism. There is no suggestion in the judgement published by the European Court of Human Rights that Mr Kokkinakis used threats or abuse to do so, nor that he was prosecuted for any offence relating to his choice of language. It is plainly entirely distinct to the present prosecution and should be disregarded.

United Communist Party of Turkey

20. It is not clear to the Crown on what basis the Defence believe the case *United Communist Party of Turkey* is relevant to the present case. That matter relates to the dissolution of a political party because of its name. It is factually wholly different to the present case. The defence makes the point that "the State is a guarantor of that pluralism" – a duty which in the current case the Crown contends it is discharging in protecting the rights of the aggrieved parties.

Hoffer and Annen v. Germany

21. Again factually distinct to the present case, even based on the description supplied by the defence. The defence have not made it clear on what basis the alleged words used by the defendant in the present case would constitute "a debate on matters of public interest". It is also worth noting that the European Court of Human Rights found that there was *no* violation of article 10 in the *Hoffer and Annen* case, and the prosecution / fines imposed were appropriate. The court in that case took issue with a breach of Article 6 – namely that the prosecution of that case took an unreasonable time in lasting several years.

Bank Mellat versus HM Treasury

22. The questions addressed in *Bank Mellat versus HM Treasury* related exclusively to "closed material procedure on an appeal". Any discussion within the confines of that case about "proportionality" relate to the issue it is discussing. The statement quoted by the defence is remarkably broad – however the text cited should also be considered in reflection of the protection of the rights of the aggrieved parties under Articles 8, 12 and 14 as discussed above.

Surek v Turkey

23. *Surek v Turkey* as referenced by the defence at their paragraph 30 is once again very different to the present case, dealing as it does with broader issues, press freedom and informing the general public on a topic about which they were likely to be ignorant. It cannot be compared to the present case where the average audience might be expected to be aware of the views of the bible vis-à-vis homosexuality.

Annen v Germany

24. The Crown has to question paragraph 33 of the Defence Case Statement, specifically "In *Van Den Dungen,* in *Annen v Germany* App. [2015] No. 3690/10" – as it is not clear whether the defence are quoting the first italicised matter (which lacks a citation), or the second. Nevertheless, the point is made *by the defence* that the applicant in that case "had not specifically singled out the doctors" – whereas in the present case the Crown's case is that the defendant's behaviour specifically singles out and targets the aggrieved parties for specific comment.

Defence Submissions:

25. The Crown observes that the defence have not supplied copies of their proposed (and voluminous) caselaw for the court.

26. Additional cases are referenced in the 'Submissions' section of the Defence Skeleton Argument, which do not appear to have been addressed separately in the analysis of rights and caselaw contained in the body of their Skeleton Argument.

27. Defendant denies saying to the women that "they will burn in hell" or to one of them "you are a devil woman" – presumably because this would be 'crossing a line' into unacceptable behaviour. It is precisely these phrases which form the crux of the prosecution case.

28. Generally in their submissions, the defence appear to be taking a series of very short (4-5 word) quotes from caselaw, and stitching them together in lieu of an argument. Context of these types of very short citations, as indicated above, is key. As observed at paragraph 15, the defence have incorrectly quoted a short piece of a paragraph and missed the broader meaning. Cases cited by the defence have not been 'on topic', and in at least one case led to a finding that there was no violation by the behaviour described.

Crown's Conclusions

29. In the present case, the defendant wishes to raise his own human rights as a defence for impinging on the similarly protected rights of the aggrieved parties. The defence deny two key phrases ("burn in hell" and "devil woman") as if in recognition that these direct targeted attacks would be 'going too far' to rely on the defence of freedom of religion and expression.

30. Paragraph 35 of the Defence Skeleton Argument addresses the offence alleged. As indicated above, the Crown does contend that "you will burn in hell" is intrinsically threatening, as well as abusive and intimidating. Targeting comments through a megaphone at specific members of the public is similarly behaviour which the court can legitimately conclude is disorderly. The complainants are clear that the behaviour was 'offensive' and 'upsetting' – clearly consistent with an interpretation of 'Harassed, alarmed or distressed'.

31. Whether a statement of Christian belief or not, the Court is being asked to consider whether the language has the potential to cause harassment, alarm or distress. This document is not the forum for religious debate, but the bible contains other material recognising slavery

(Exodus 21:7), the death sentence (Exodus 35:2 and Leviticus 24:16) and cannibalism (Deuteronomy 28:27). There are references in the bible which are simply *no longer appropriate* in modern society and which would be deemed offensive if stated in public.

32. The prosecution is brought to protect the rights of others – an approach which was accepted in *Connolly v DPP [2007] EWHC 237 (Admin).* (Copy attached).

33. *Connolly* relates to the sending of grossly offensive material to 3 pharmacists. The appellant in that case raised issues relating to Articles 9 and 10 of the European Convention on Human Rights as in this case. Lord Justice Dyson in that case stated [paragraph 21] "the first question is whether the interference is "prescribed by law". Since the interference derives from the 1988 Act as interpreted by the courts, it is sufficiently precise and foreseeable to meet this requirement. The second question is whether the interference is in furtherance of one of the legitimate aims set out in article 10(2). If it does not further one of these aims, the interference will constitute a breach of article 10(1). If it does further one or more of these aims, the third question is whether the interference is necessary in a democratic society."

34. [Para 25] – "The protection of the right not to be insulted by racist remarks was a legitimate aim within article 10(2). It was a "right of others" which, by implication, must have been considered to be an "indisputable imperative" " – Clearly a parallel can be drawn between racist behaviour in that case and homophobic / religious intolerance in the present one.

35. In his conclusion, Dyson LJ stated that "The importance of freedom of thought, conscience and religion is not in doubt. But I can find no support in the decision in Kokkinakis for Mr Diamond's submission that freedom of religious expression is of a higher order and is regarded by the ECtHR as more worthy of protection that the freedom of secular expression enshrined in article 10. I am prepared to assume that, because she is a devout Roman Catholic, Mrs Connolly was exercising her freedom of thought, conscience and religion when she sent the photographs to the three pharmacies. But it seems to me that article 9(2) is as fatal to her appeal as is article 10(2) and for precisely the same reasons."

36. The same line of reasoning applies to the present case.

37. Prosecution of the defendant within the legislation generated by Parliament is both necessary and proportionate.

Proposals

38. As to the specific approach to be taken in this case, the Crown would suggest the approach the court adopted In *Abdul & Ors v Director of Public Prosecutions [2011] EWHC 247 (Admin) (16 February 2011*). (Copy attached). In that case the appellants were marching to, in their words, mark their opposition to the war in Afghanistan and Iraq. They did so by shouting various statements for about 3-4 minutes, including, but not limited to:

- ‘British Soldier Murderers’
- ‘baby killers’ ‘
- ‘Rapists all of you’
- British Soldiers go to hell

39. The appellants were charged under s5 of the public order Act. As part of her directions at trial, the District judge set out a summary of the relationship between article 10 ECHR and s.5:

> *“2) The legal framework: While the authorities are of course fact specific, the principles to be distilled from them governing the relationship between s.5 of the Act and Art. 10 of the ECHR, are now familiar. For present purposes, I would venture the following summary:*
>
> *i) The starting point is the importance of the right to freedom of expression.*
>
> *ii) In this regard, it must be recognised that legitimate protest can be offensive at least to some – and on occasions must be, if it is to have impact. Moreover, the right to freedom of expression would be unacceptably devalued if it did no more than protect those holding popular, mainstream views; it must plainly extend beyond that so that minority views can be freely expressed, even if distasteful.*
>
> *iii) The justification for interference with the right to freedom of expression must be convincingly established. Accordingly, while Art. 10 does not confer an unqualified right to freedom of expression, the restrictions contained in Art. 10.2 are to be narrowly construed.*
>
> *iv) There is not and cannot be any universal test for resolving when speech goes beyond legitimate protest, so attracting the sanction of the criminal law. The justification for invoking the criminal law is the threat to public order. Inevitably, the context of the particular occasion will be of the first importance.*
>
> *v) The relevance of the threat to public order should not be taken as meaning that the risk of violence by those reacting to the protest is, without more, determinative; some times it may be that protesters are to be protected. That said, in striking the right balance when determining whether speech is "threatening, abusive or insulting", the focus on minority rights should not result in overlooking the rights of the majority.*
>
> *vi) Plainly, if there is no prima facie case that speech was "threatening, abusive or insulting" or that the other elements of the s.5 offence can be made good, then no question of prosecution will arise. However, even if there is otherwise a prima facie case for contending that an offence has been committed under s.5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order.*

vii) If the line between legitimate freedom of expression and a threat to public order has indeed been crossed, freedom of speech will not have been impaired by "ruling …out" threatening, abusive or insulting speech: per Lord Reid, in Brutus v Cozens [1973] AC 854, at p. 862.

viii) The legislature has entrusted the decision in a case such as the present to Magistrates or a District Judge. The test for this Court on an appeal of this nature is whether the decision to which the District Judge has come was open to her or not. This Court should not interfere unless, on well known grounds, the Appellants can establish that the decision to which the District Judge has come is one she could not properly have reached.

See: Percy v DPP [2001] EWHC Admin 1125; Hammond (supra); Dehal v Crown Prosecution Service [2005] EWHC 2154 (Admin).

40. The court affirmed this approach to such cases. The court also held that the judge in convicting the appellants had been entitled to find that what the appellants had said went beyond legitimate expressions of protest and amounted to a threat to public order

41. Bearing this test in mind, the Crown suggest the offence is still made out, even with consideration to the defendant's article 9 and 10 rights.

Nicholas Hoyle
Senior Crown Prosecutor
9th September 2021