

Neutral Citation No: [2020] EWCA Crim 665

Case No: 201903767/A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Sitting at Cardiff Crown Court
Law Courts Cathays Park, Cardiff CF10 3PG

Wednesday, 4 March 2020

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MRS JUSTICE JEFFORD DBE

MR JUSTICE HILLIARD

R E G I N A

v

JAY MALCOM DAVISON

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22
Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr H Salman appeared on behalf of the **Appellant**
J U D G M E N T
(Approved)

LADY JUSTICE NICOLA DAVIES:

1. On 28 August 2019, in the Crown Court at Cardiff, the appellant was convicted of three offences of publishing material with intent to stir up racial hatred, for which he was subsequently sentenced to a period of four years' imprisonment to run concurrently on each count. He was acquitted of counts 2 and 3.
2. He appeals against sentence with leave of the single judge.
3. On 6 August 2018 the appellant published written material on Instagram, including an image of himself bare chested, holding a long-barrelled musket-type gun pointing upwards. His finger was on the trigger. The photograph featured alongside posts: "Fuck Allah", "scum cunt" and "stand up" (count 1); "Ever seen a white cut a head off... no cos there fucking scum heil, heil, heil fuck Allah CUNT" (count 4) and "When has an arian cut another man's head off" alongside the comments "scum cunt" and "fuck Muslims" (count 5). The appellant's Instagram account had 394 followers, it was set to "Private".
4. Later that day Ms Ali checked her mobile phone and saw that she had received messages from a member of a WhatsApp group to which she belonged. Two of those messages featured posts made by the appellant on his Instagram account. Ms Ali recognised the appellant in the photograph that appeared alongside the posts. The member of the WhatsApp group who sent the message was a follower of his Instagram account. The postings had been "Liked" by a number of people. Ms Ali reported the matter to the police.
5. On 13 August 2018 the police attended the appellant's home and arrested him.
6. In interview he accepted posing for and posting the picture on his Instagram account. The appellant claimed not to have racist views. He said that the gun was an ornament which was on the wall in a friend's house and that the incident had escalated into something silly, which he regretted. The appellant said the language was disgusting, he was drunk and they were not his beliefs. The appellant would not provide the name of the friend to whom the gun belonged nor would he tell the police where the gun could be found.
7. At the date of sentence the appellant was aged 38. He had been before the courts on seven previous occasions, for offences which included criminal damage, driving a motor vehicle with excess alcohol, driving whilst disqualified and failing to comply with a suspended supervision order.
8. A Pre-Sentence Report was before the court, which stated that the appellant minimised the offences by stating that the messages were posted on his private Instagram account and as such would not have reached a wider audience. While acknowledging the offensive nature of his actions the appellant did not accept the finding of guilt in respect of his intention to stir up racial hatred. He attributed his behaviour to the amount of alcohol he had consumed. He disclosed long-term issues with alcohol abuse describing himself as a "functioning alcoholic". The author of the report stated that there are significant cognitive deficiencies in regard to the appellant's understanding of his own problematic alcohol abuse. He has a clear understanding of the actual and potential impact of the index offences.
9. In well-structured and reasoned sentencing remarks the judge considered the nature of the publications and the intention of the appellant. She found that the appellant's intent was to stir up racial and religious hatred. Identified as very significant was the photograph which

the appellant posted with the comments. The judge observed that the appellant's intention was that he would appear as someone in possession of a working firearm which would be believed by others, with everything that implied. The judge did not accept the appellant's evidence that he was disgusted by the language in the posts nor his claim that he did not know what some of his remarks meant. The judge accepted that the posts had been put on a protected account which in theory meant that its distribution was limited to a few hundred people. However, there was nothing to prevent the post being disseminated to others who are not part of the protected group, which is what occurred in this case.

10. Ms Ali, who reported the matter, was said to be upset and feared that the appellant was someone who could be violent.
11. In sentencing the appellant the judge took account of the authority of *R v Bitton* [2019] EWCA Crim 1372, in which the appellant pleaded guilty to six offences of publishing written material that was threatening, abusive or insulting with intent to stir up racial hatred and to seven offences of publishing threatening written material with intent to stir up racial hatred. The offences took place over an eight-day period and were posted on Twitter. The words used were described by the court as "vile and deeply offensive". Death threats were made during the course of messages tweeted. The appellant's Twitter account had some 724 followers. The words were published in the run up to the Brexit vote; they expressed anti-immigration sentiments in offensive and inappropriate terms. On appeal, the court held that the offending would have merited a sentence of four years. Maximum credit was given for the appellant's pleas which resulted in the sentence of two years and eight months. In sentencing this appellant the judge identified as a significantly aggravating factor the fact that he posted a photograph of himself, half naked and in possession of a large firearm which, in her view, made the case more serious than that of *Bitton*.
12. On behalf of the appellant Mr Salman has addressed the court. His submissions were concise and cogent and the court is grateful to him. He makes three concessions. Firstly, that the content published was utterly vile and repulsive. Secondly, the photo was an aggravating factor of the appellant's offending. Thirdly, a custodial sentence in terms of years was inevitable. That said, given the circumstances and the history of this offender, it is contended that a total sentence of four years was manifestly excessive.
13. In particular, Mr Salman relies on the following points:
 - 1) The particular circumstances of the offending. The matter was published on a private account with a limited number of followers.
 - 2) The posts were in place for only a short period. They were posted in the early hours of the morning and were deleted by him by 11.30 am later that day.
 - 3) The particular circumstances of the appellant, namely an absence of relevant criminal convictions and this was his first custodial sentence.
14. Mr Salman seeks to distinguish this case from the authority of *Bitton*: in *Bitton* there were 13 specimen counts; the material included an express incitement to kill on more than one occasion; the scope of that material could be further disseminated as there were a greater number of followers and the account was not of a private nature. Further, the point is made that the judge had undue regard or placed undue weight to the photograph in the postings.
15. In considering this appeal, we take account of the fact that the judge had presided at the trial

of the appellant. She was well placed to assess the nature of the postings and the evidence of the appellant as to his intent. She properly observed that in respect of counts 4 and 5 the published material contained language which was implicitly threatening and making reference to decapitation. Relevant to the threats were the postings of the image of the appellant holding the gun. In our judgment, the intention of stirring up racial and religious hatred was compounded by the threat contained both in the words and the photograph.

16. As to the number of people who saw the material, this is unknown. It is of note that Ms Ali, who reported the matter, was not a follower of the appellant but the material was sent to her. We accept that there is no evidence other than that of Ms Ali as to the consequences for individuals of them having seen the photograph. We also accept that the posts were removed by the appellant within a relatively short time.

17. We have considered the authority of *Bitton* above. We consider the four factors identified in the authority at [12] as follows:

1) The nature of the publication and the intent behind it

In this case, the published material was vile and grossly offensive. It was also threatening and its content was compounded by the image of the appellant.

2) The need to deter others.

In our judgment, there is a clear need for this court to do what it can to inhibit others from publishing material of this nature.

3) The number of people who saw the material

This is unknown. Although the appellant had a limited number of followers on his protected Instagram account, the postings had the potential for further dissemination of the material across social media. It was by this means that Ms Ali had received the post.

4) The consequences of individuals having seen the posts.

Ms Ali stated that she felt scared and fearful. Save for this there is no evidence of any particular consequences arising from the appellant's actions.

18. We agree with the assessment of the judge that the image of the appellant, bare chested and holding a large gun, with his finger on the trigger, was a significant aggravating feature of this offending. We have considered the authority of *Bitton* but each case has to be decided upon its own factual matrix. These were three convictions following a trial, the sentence was passed by the trial judge who had a proper opportunity to assess the appellant and his intention. We regard the sentence as being at the upper end of the scale of such sentencing but, given the nature of these offences and the need to deter others, we are unable to state that the total sentence of four years' imprisonment is manifestly excessive. Accordingly, this appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the

proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk