

WARNING: reporting restrictions apply to the contents transcribed in this document, as stated in paragraphs 1 and 37-40 of the judgment. 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.

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.

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/04177/B5
[2024] EWCA Crim 1186



Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 20th June 2024

B e f o r e :

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE GOOSE

MR JUSTICE BRIGHT

R E X

- v -

B L C

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr T Singh KC appeared on behalf of the Applicant Crown

The Respondent appeared as a Litigant in Person

J U D G M E N T
(Approved)

Thursday 20th June 2024

LORD JUSTICE HOLROYDE:

1. The provisions of section 71 of the Criminal Justice Act 2003 apply to this prosecution appeal. Reporting is restricted accordingly. The name of the respondent has therefore been anonymised, and we direct that he must be referred to only by the randomly chosen letters BLC. We shall review the reporting restrictions of the conclusion of this judgment.

2. Part 9 of the Criminal Justice Act 2003 contains provisions, not all of which are in force, relating to prosecution appeals. Section 58 enables the prosecution to appeal, in accordance with the terms of that section, against a ruling made by a judge in relation to a trial on indictment. A ruling against which an appeal under section 58 is brought is sometimes referred to as a "terminating" or "terminatory ruling". However, as this court pointed out in *R v Y* [2008] EWCA Crim 10, that phrase may be convenient as a shorthand, but "its use is best avoided when considering how the Act must be construed, for it appears nowhere in the statute".

3. In recent cases this court has more than once made the same point. The shorthand phrase, nonetheless, continues to be used and, unhappily, continues on occasion to cause confusion. This appeal provides a striking example of how misunderstanding of the phrase can divert focus and result in an essentially straightforward matter becoming unduly complicated.

4. We shall summarise the relevant facts briefly and in neutral terms. Following a trial in the Crown Court the respondent to this appeal was convicted of an offence. He was sentenced to a term of imprisonment. After his release from that sentence, a number of posts were published on a total of five websites. They contained statements criticising and abusing the recorder who had presided over the respondent's trial, and the advocates who had represented

the prosecution and the defence. Some of the posts were sent to a website via an email in the respondent's name. The majority were sent via emails in a variety of other names, from different email addresses, but it is alleged by the appellant (that is, the prosecution in the proceedings in the Crown Court) that all were in fact sent by the respondent.

5. The respondent was charged on indictment with a number of offences contrary to section 1 of the Malicious Communications Act 1988. The particulars of each count alleged that the respondent had sent an electronic communication, details of which were given, to the recorder or to prosecution counsel or to defence counsel. The respondent pleaded not guilty to all counts and the case proceeded towards trial. Regrettably, a number of delays then occurred before the matter eventually came on for trial.

6. The judge who was to preside over the trial, to whom we shall refer as "the judge", was concerned about the terms in which the indictment was drawn. He noted, first, that the indictment alleged that each message was sent to the relevant complainant, whereas the evidence suggested that it was sent to someone else or posted online. He noted, secondly, that each count alleged that the message conveyed information, whereas at least some of the messages appeared to express opinions. At a hearing some months before the trial, the judge directed the appellant to review the indictment and to provide a schedule stating the full terms of the post; when and where it was posted online or sent; to whom the respondent was alleged to have sent it; and the information conveyed in it which was alleged to be false.

7. The appellant prepared such a schedule, and also provided written submissions as to how they put the case against the respondent.

8. The points raised by the judge were mentioned at further pre-trial hearings, but the judge remained concerned. It does not appear that he directed any amendment of the indictment or

of the schedule. Nor does it appear that the appellant applied for leave to amend, although it might be thought that that would have been a simple way of addressing the points which had been raised.

9. By section 40(1) of the Criminal Procedure and Investigations Act 1996, the judge had the power to make a pre-trial ruling as to a question of law relating to the case. He did so on the date when the case was listed for trial, but before a jury was sworn.

10. Before summarising the judge's ruling, we must set out some relevant statutory provisions. First, so far as is material for present purposes, section 1 of the Malicious Communications Act 1988, to which we shall refer for convenience as "section 1", provides:

"1. Offence of sending letters etc. with intent to cause distress or anxiety.

(1) Any person who sends to another person —

(a) a letter, electronic communication or article of any description which conveys —

(i) a message which is indecent or grossly offensive;

...

(b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature,

is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, 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.

...

(2A) In this section 'electronic communication' includes —

- (a) any oral or other communication by means of an electronic communications network; and
- (b) any communication (however sent) that is in electronic form.

(3) In this section references to sending include references to delivering or transmitting and to causing to be sent, delivered or transmitted and 'sender' shall be construed accordingly."

11. Section 58 of the Criminal Justice Act 2003, to which we shall refer as "section 58", provides so far as is material as follows:

"General right of appeal in respect of rulings

- (1) This section applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.
- (2) The prosecution may appeal in respect of the ruling in accordance with this section.
- (3) The ruling is to have no effect whilst the prosecution is able to take any steps under subsection (4).
- (4) The prosecution may not appeal in respect of the ruling unless —
 - (a) following the making of the ruling, it —
 - (i) informs the court that it intends to appeal, or
 - (ii) requests an adjournment to consider whether to appeal, and
 - (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.
- (5) If the prosecution requests an adjournment under subsection (4)(a)(ii), the judge may grant such an adjournment.
- (6) Where the ruling relates to two or more offences —

- (a) any one or more of those offences may be the subject of the appeal, and
- (b) if the prosecution informs the court in accordance with subsection (4) that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal.

...

(8) The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled.

(9) Those conditions are —

- (a) that leave to appeal to the Court of Appeal is not obtained, and
- (b) that the appeal is abandoned before it is determined by the Court of Appeal.

(10) If the prosecution informs the court in accordance with subsection (4) that it intends to appeal, the ruling mentioned in subsection (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued.

(11) If and to the extent that a ruling has no effect in accordance with this section —

- (a) any consequences of the ruling are also to have no effect,
- (b) the judge may not take any steps in consequence of the ruling, and
- (c) if he does so, any such steps are also to have no effect.

(12) Where the prosecution has informed the court of its agreement under subsection (8) and either of the conditions mentioned in subsection (9) is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.

(13) In this section 'applicable time', in relation to a trial on indictment, means any time (whether before or after the

commencement of the trial) before the time when the judge starts his summing-up to the jury.

..."

12. Part 38 of the Criminal Procedure Rules contains provisions as to the procedure to be followed when the prosecution wishes to appeal, pursuant to section 58. By rule 38.2:

"(1) An appellant must tell the Crown Court judge of any decision to appeal —

- (a) immediately after the ruling against which the appellant wants to appeal; or
- (b) on the expiry of the time to decide whether to appeal allowed under paragraph (2).

(2) If an appellant wants time to decide whether to appeal —

- (a) the appellant must ask the Crown Court judge immediately after the ruling; and
- (b) the general rule is that the judge must not require the appellant to decide there and then but instead must allow until the next business day."

13. Section 61 of the 2003 Act relates to the powers of this court when determining an appeal under section 58.

14. In the present case, the judge ruled that the requirements of the Act were only satisfied if, at the time of sending the message, the message was directed or sent to a person. He did not consider, taking the appellant's case at its highest, that any of the relevant postings could be said to have been sent to any individual or person. The evidence which the appellant proposed to adduce did not include anything which might support an argument that the posting was sent to the person who managed the particular website: on the contrary, each count alleged that the message was sent to the complainant concerned, rather than to the

organisation which managed or controlled the relevant platform. The judge stated that the phrase "sends to" required a focused sending to an individual or person. He therefore ruled that a post made online could not satisfy the essential element of the offence, namely a person sending to another person a message.

15. In the light of that ruling, the prosecution had two choices. It could accept the ruling and, subject perhaps to a belated application for leave to amend the indictment and/or the schedule, accept that the only proper course was to offer no evidence; or it could immediately initiate the procedure for appealing, pursuant to section 58 and rule 38.2.

16. Regrettably, neither of those courses was taken. With all respect to counsel for the appellant, he appears to have been misled by the phrase "terminatory ruling". The transcript shows a lengthy process in which the judge and counsel were at odds as to what should be done. We need not go into the details. It suffices to say that in broad terms the appellant maintained a mistaken assertion that the appeal procedure could not be initiated until the judge had "provided a ruling which terminated the proceedings", whilst the judge was correct in his analysis of the requirements of section 58 and rule 38.2.

17. The judge was generous in granting an adjournment and in thereafter further extending the adjournment to enable counsel to take instructions.

18. Ultimately, the appellant's stated position was that it would not offer no evidence; but nor would it initiate an appeal in accordance with section 58.

19. The judge then ruled that it would be an abuse of the process for the prosecution to continue with the trial despite his earlier ruling, and he stayed the proceedings as an abuse. He was, however, then persuaded to grant – again generously – a yet further adjournment,

and then to lift the stay when counsel announced that the appellant did intend to appeal and agreed to the acquittal of the respondent if the conditions in section 58(9) were fulfilled.

20. We have reflected on this unhappy sequence of events. In the hope of avoiding further misunderstandings in the future, we repeat that the 2003 Act does not contain the phrase "terminating" or "terminatory ruling". In principle, any ruling which comes within the wide definition in section 74(1) of that Act may be the subject of a prosecution appeal. As a matter of common sense, such an appeal will usually be brought against rulings which, if left to stand, would have the effect of bringing the prosecution to an end. That is because section 58(8), conveniently referred to as "the acquittal undertaking" requires the prosecution to agree that if the appeal is not successful, the defendant will be acquitted. As Hughes LJ (as he then was) put it in *R v Y* at [20]:

"... In effect the Crown is bound to accept as the price of bringing an interlocutory appeal under section 58 the consequence that if it fails, the defendant must be acquitted (as well as the possibility that this court may order such acquittal on the grounds that it is necessary in the interests of justice to do so). ..."

21. In the present case, the appellant came perilously close to falling foul of the statutory requirements for an appeal. We have, however, concluded that the adjournment granted by the judge had the consequence that the appellant did meet those requirements and gave the necessary notice of its intention to appeal and willingness to abide by the acquittal undertaking.

22. Further, because the judge lifted the stay, his ruling as to abuse of process was no obstacle to the appellant's compliance with the statutory requirements. We therefore need not examine that ruling in any detail. We say only this. The judge should not have been put in

the position of feeling it necessary to make that ruling. His earlier ruling left the appellant, as we have said, with a clear choice between two possible courses. The prosecution, in such circumstances, should not simply decline to take either course and instead try to pursue its case in defiance of the judge's ruling.

23. For those reasons, we are satisfied that we have jurisdiction to hear this appeal, to which we can now turn.

24. We have heard submissions from counsel for the appellant and from the respondent in person. We are grateful to them both.

25. The appellant's first ground of appeal challenges the judge's ruling as to the ambit of section 1. Other grounds challenge the ruling as to abuse of process and the judge's approach to an appeal under section 58. As we have indicated, the ruling as to abuse of process falls away and the judge's approach to section 58 was broadly correct. We therefore focus on the first ground.

26. With all respect to the judge, we have no doubt that his interpretation of section 1 was wrong in law. There are three principal reasons why we have reached that conclusion.

27. First, we think it clear that section 1, as amended, expresses in deliberately wide terms the ambit of the offence of sending letters, etc, with intent to cause distress or anxiety. It refers in subsection (1) to the sending of "a letter, electronic communication or article of any description". The definition of "electronic communication" in subsection (2A) includes "any communication by means of an electronic communications network" and "any communication (however sent) that is in electronic form". By subsection (3) references to sending include references to "delivering or transmitting or causing to be sent, delivered or

transmitted". Further, although the message must be sent to "another person", there is nothing in the Act to suggest that "person" should not be given its usual meaning, which includes both an individual and a corporation.

28. We therefore cannot agree with the judge that posting a message on a website cannot amount to an offence contrary to section 1. Such a message may amount to an offence if it is posted with the intention that its indecent or grossly offensive nature or contents will, at some time, in some way, be communicated to the person who is the subject of those contents and posted for the purpose of causing distress or anxiety to that person. Whether such a post does in fact amount to an offence will in general be a matter for a jury, subject of course to any judicial ruling on the particular facts and circumstances of an individual case.

29. Secondly, section 1(1) expressly states that the necessary intention to cause distress or anxiety may be directed either towards the recipient of the message or to any other person to whom the sender intends that the contents or nature of the message should be communicated. Thus, sending a letter to a husband which speaks of his wife in indecent or grossly offensive terms with the intention that the contents will be communicated to the wife, and for the purpose of causing her distress or anxiety, may constitute this offence. So, too, may the sending of an electronic communication to all the work colleagues of the person who is the subject of its indecent or grossly offensive contents, with the intent that those contents will be communicated to the subject and for the purpose of causing him distress or anxiety.

30. We can see no reason of principle why the same may not apply to a message posted on a website visible to a very wide audience, with the intention that, sooner or later, in one way or another, its contents will be communicated to the subject of the message for the purpose of causing him distress or anxiety. Such a message will generally be communicated directly to the person, whether individual or corporate, who controls the website and who effects the

posting of the message, and communicated indirectly to all who read postings on that website. Again, it will in general be a matter for a jury whether a particular website post amounts to an offence.

31. Thirdly, there is nothing in the act to state that the contents of the communication must be a statement of fact, rather than an expression of opinion. To impose such a limitation would, in our view, undermine the purpose of the Act. Many malicious communications are in fact untrue and are known by the sender to be untrue. Many are in the nature of untruthful comments or expressions of views, rather than untruthful assertions of fact. They are, nonetheless, capable of being indecent or grossly offensive, and capable of causing distress or anxiety, and they may well be sent for the purpose and with the intent specified in section 1. Once again, of course there may be issues for a jury to resolve as to whether all the elements of the offence are made out.

32. For those reasons the judge's ruling that none of the offences charged could be proved was wrong in law and must be reversed. It will be for a jury to decide whether the elements of the offence are proved in relation to any particular posting.

33. We therefore grant leave to appeal. We allow the prosecution's appeal and we reverse the judge's order. The effect of our decision is that the trial may proceed. It remains open to the prosecution to apply to amend the indictment or schedule if so advised, and it remains open to the trial judge to exercise his or her power to direct amendment.

34. We leave our judgment there in order to receive submissions about reporting restrictions and other consequential matters.

(There followed brief submissions)

35. Finally, we return, as we said we would, to the issue of reporting restrictions. We must also address the arrangements for the resumption of proceedings in the Crown Court in the light of the decision we have given.

36. We have heard from both parties in relation to these matters. Intending absolutely no disrespect to the judge, we think that it would be best for the continuing proceedings in the Crown Court to be heard before a different judge and at a different Crown Court centre. We shall invite the Presiding Judges of the circuit concerned to determine both venue and the allocation to a trial judge.

37. So far as reporting restrictions are concerned, we have considered the terms and the purpose of the statutory restrictions contained in section 71 of the Criminal Justice Act 2003. We think it imperative that nothing should be published which will lead anyone to identify the respondent. Provided that is done, it seems to us that there is no risk of prejudice to the fair trial of the continuing proceedings in the Crown Court if a report of this judgement is published.

38. We accordingly direct, pursuant to section 4(2) of the Contempt of Court Act 1981, that in any report of these proceedings, until the conclusion of the Crown Court proceedings or further order, the name of the respondent must be anonymised and he must be referred to only by the randomly chosen letters BLC.

39. We further direct that no matter may be included in any report if it gives the true name of the respondent, or would otherwise lead to members of the public identifying him as the respondent to this appeal.

40. Save to that extent, we disapply the restrictions contained in section 71(1) of the 2003 Act. The practical effect is that a report of this appeal may be published, provided that the respondent is only referred to as BLC and nothing is published which might identify him.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
