

Neutral Citation No. [2016] NIMag 1

Ref:

Judgment: approved by the Court for handing down

Delivered : 05/01/2016

*(subject to editorial corrections)**

DPP

-v-

JAMES MCCONNELL

DISTRICT JUDGE McNALLY

[1] James Mc Connell is charged that on a date unknown between the 17th May 2014 and the 22nd of May 2014, in the county court division of Belfast, he:

- (i) sent by means of a public electronic communications network a message or other matter that was grossly offensive, contrary to section 127(1)(a) of the Communications Act 2003
- (ii) caused to be sent by means of a public electronic communications network a message or other matter that was grossly offensive, contrary to section 127(1)(b) of the Communications Act 2003.

[2] In opening the case Mr Russell, on behalf of the prosecution, stated that the charges as above had been laid in the alternative. The case for the prosecution was based on a sermon given by the defendant at the Whitewell Metropolitan Church on 18th May 2014. He referred to a section at page 5 of the transcript wherein the defendant referred to Allah as a heathen, cruel and demon deity. He told of Christians being persecuted for their faith

and in particular a woman called Miriam and concluded "These fanatical worshippers are the worshippers of the God called Allah".

Mr Russell accepted that these last words were not grossly offensive but part of the context in the development of the sermon. He further accepted that the defendant was entitled to describe Allah as a cruel, heathen and demonic deity in the course of a sermon and that such views were protected by Articles 9 and 10 of the Convention.

The main focus of the prosecution case was the following passage:

"Today we see powerful evidence that more and more Moslems(sic) are putting the Koran's hatred of Christians and Jews alike into practice. Now people say there are good Moslems in Britain that may be so but I don't trust them, Enoch Powell was right and he lost his career because of it, Enoch Powell was a prophet and he told us that blood would flow in the streets and it has happened.

Fifteen years ago Britain was concerned of IRA cells, right throughout the nation they done a deal with the IRA because they were frightened of being bombed, today a new evil has arisen, there are cells of Moslems right throughout Britain, can I hear an Amen

Right throughout Britain and this nation is going to enter a great tribulation and a great trial. To judge by some of what I have heard in the past few months you would think that Islam was a little more than a variation of Christianity and Judaism, not so Islam's ideas about God about humanity, about salvation are vastly different from the teaching of the Holy Scriptures. Islam is heathen, Islam is satanic, Islam is a doctrine spawned in hell."

Mr Russell stated that whilst the last sentence was capable of being grossly offensive it was protected by Articles 9 and 10 of the Convention and the evidence in the case would proceed on that basis. However, it was to be considered as part of the context of what was said before and that what the defendant was saying, effectively, was that he did not trust a single Muslim. He was characterising the followers of an entire religion in a stereotypical way and that was grossly offensive and not protected by saying it from the pulpit. Nor was it protected by the Convention principles on freedom of expression and freedom of speech.

Mr Russell indicated that the prosecution would be relying upon a number of interviews of the defendant on the Nolan show as circumstantial evidence supporting its case and which would show that what was said by the defendant was no accident. They were also

relying upon the contents of the defendant's police interview and the statement he gave to the police. The prosecution would say that the message was grossly offensive, that it was not protected by Articles 9 and 10 of the Convention and that the decision to prosecute was proportionate and necessary.

[3] A DVD of the entirety of the service at the Whitewell Metropolitan church on 18th May was played and this was followed by a DVD of the defendant's appearances on the Nolan Show on 21st May 2014 and on 28th May 2014.

[4] Det Sgt Pue gave evidence that the defendant appeared as a voluntary attender with his solicitor for interview on 6th June. He read out the contents of the two interviews he conducted.

In cross examination he accepted that the defendant had no criminal record and that in the course of the interview he maintained that he had not intended to express or stir up hatred.

He had interviewed the defendant in relation to section 9(1)(b) of the Public Order (NI) Order 1987 which deals with use of words likely to stir up hatred or arouse fear. He accepted the defendant had not been charged with any such offence and at the time of the interview he had not considered the Communications Act 2003. He had questioned the defendant from the perspective that the defendant was an influential preacher and that people listened to his words. He had put to the defendant that his words in regard to Muslim cells were inflammatory but accepted that the defendant was entirely correct if he had been referring to radicalised Muslims.

[5] An edition of the Nolan Show on 28th May 2014 was played followed by an edition of Talkback on 19th June 2015 featuring interviews of the defendant and his solicitor Joe Rice.

[6] Constable Stewart gave evidence that she was the officer in charge of the case. She gathered a number of witness statements and assisted in the interview of the defendant on 16th June 2014. She downloaded the "Rivers of Blood speech" made by Enoch Powell and formally proved it.

[7] At the close of the prosecution case Mr Mateer made an application that the defendant had no case to answer. He referred me firstly to the guidelines of the Crown Prosecution Service in England which had been introduced following the case of Chambers -v- DPP [2012] EWHC 2157 (Admin) and argued that the decision to prosecute did not meet the criteria set out therein. Mr Mateer went on to dissect the offending passage and demonstrated that the defendant could justify all the phrases contained therein. The defendant had conceded there were good Muslims and if he had wanted or intended to offend them there was every opportunity for him to do so. He emphasised the use of the word "I" in that the defendant was saying he did not trust Muslims but he was not saying to his congregation not to trust Muslims. He did not disparage anyone. Mr

Mateer argued the defendant was quite entitled to refer to IRA cells and compare them to the evil being currently caused by cells of Muslims. Rather than stereotyping an entire religion the defendant was talking about cells of Muslims. Finally, he referred me to the Convention principles set out in the relevant case law.

[8] Mr Russell responded that the references made by Mr Mateer to the prosecution guidelines were irrelevant as no application had been made by him to stay the proceedings. The issues which I had to consider were if the words were capable of being considered grossly offensive and if there was evidence capable of showing that he had the requisite intent. Context was all important in the case. When the words were looked at they showed that the defendant did not even trust good Muslims against the background of violence he was describing coming from fanatical Muslims. When he had been interviewed by the police he confirmed that his mistrust of Muslims applied to all Muslims. In that context Mr Russell argued that the words were capable of being grossly offensive. Finally, Mr Russell referred me to the authorities on the Convention principles and, in particular, the rights of the Muslim community and what was said about them. The law did not permit the defendant to express his beliefs in words that were grossly offensive.

[9] I refused the application that the defendant had no case to answer for the reasons I gave at that time.

[10] Pastor McConnell gave evidence as to his background and stated he became a Christian at the age of 8 and has been a full time preacher for 60 years. He founded the Whitewell Metropolitan Church which is an independent church with loose links to the Elim Church. He belongs to the Pentecostal Evangelical Protestant tradition. He numbers among his congregation Protestants, Catholics and Muslims. His church finances missions in Kenya and Ethiopia.

On 18th May 2014 he gave a sermon based on the Book of Timothy chapter 2 the theme of which was that there was one mediator between God and Man. It never entered his head that he would be offending anyone and all he wanted to do was to present the truth. He was completely and totally unaware he had caused offence until he was contacted by Steven Nolan of Radio Ulster a few days later. On being interviewed by Mr Nolan he apologised to any Muslim in Belfast who was offended. It was a sincere apology but he was not apologising for the Gospel. When he said that Islam was satanic, heathen and spawned in hell he was not being gratuitously offensive. He was attacking the doctrine and theology of Islam. His view was that Islam was satanic and hellish but it never entered his head to harm any Muslim when he spoke those words. He lived in a country of free speech and he had a right to comment on other religions just as others had a right to attack him and his beliefs.

When asked to explain his words that he would soon not be able to preach his sermon he stated that he lived in an increasingly pluralist society which was rapidly changing. That

was why he was in Court and his words had come to pass 3 days after he had delivered his sermon. He had simply wanted to present the exclusivity of the Christian gospel.

He had spoken about the girl Miriam in Sudan as he was concerned not enough was being done to pressurise the Sudan government to prevent her being stoned and put to death.

In regard to his comments about cells of Muslims he reminded the court that his sermon had been preached 18 months ago and that events which had taken place in the U.K. Europe and U.S.A. since then had proved he was correct. He emphasised he had been referring to fanatical Islamists.

He had not tarred Muslims with the one brush and took the view there were good and bad Muslims, good and bad Catholics and good and bad Protestants.

He had mentioned Enoch Powell's "River of Blood" because his words had come to pass and he regarded him as a prophet of politics.

In regard to his comments on not trusting Muslims he was referring to those governed by the Sharia law. He had gone out of his way to clarify what he had said and assure any Muslim in NI that he meant no harm and that no harm would come to them from him. He had no intention of hurting any one of them and it had not occurred to him that someone would be offended in the course of him preaching in his own church to his own people.

He had refused the offer of an informed warning as he regarded it as an insult to Jesus and an attempt to gag him in the future.

In cross examination he expressed regret that he did not realise that good Muslim people would be hurt. He stood over the words in his sermon and stated he had qualified his words in his statement to the police to let Muslims know that he had nothing against them and that he was condemning those Muslims who used their religion as a justification for violence. He did not trust the majority of Muslims in view of the fact they followed the Sharia law.

[11] Evidence of the defendant's good character was given by Jason Allen who manages a mission in Kenya on behalf of the Whitewell church, Sammy Wilson M.P. who is a member of the defendant's church and Fr Patrick McCafferty who became friendly with the defendant whom he had initially confronted about trenchant views the defendant had expressed about Fr McCafferty's religion.

[12] At the close of the defence case I heard further submissions from Mr Russell and Mr Mateer which in substance emphasised the points which they made at the close of the prosecution case.

[13] I remind myself that the burden of proof, as in any criminal case, is that the prosecution must prove the case against the defendant beyond a reasonable doubt.

[14] THE FACTS of the case are not in dispute. The defendant accepted that he gave a sermon as contained in the DVD of the church service at Whitewell on 18th May 2014 and that the service was transmitted via the internet.

[15] THE LEGISLATION.

Section 127(1) of the Communications Act 2003 states that a person is guilty of an offence if he:

- (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) causes any such message or matter to be so sent.

Article 9 of the Human Rights Convention provides:

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- (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.

Article 10 provides:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[16] The seminal case on the interpretation of section 127(1) is Director of Public Prosecution-v-Collins [2006] 1 WLR in which Lord Bingham traced the genealogy of

section 127(1) to the Post Office (Amendment) Act 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, or obscene or menacing character. The 2003 Act updated this to include a “public electronic communications network”.

The legislators can be forgiven for not foreseeing the arrival a short time thereafter of Facebook and Twitter the widespread use of which has resulted in an increasing number of prosecutions under section 127(1) and, in turn, a parallel increase in criticism of the section as an interference to the right of freedom of expression. Specifically it has been criticised as a widely drafted law designed:

- (a) primarily to regulate one to one communications rather than one to many;
and
- (b) to safeguard a public utility built with public money,

which is now being applied to a privately owned, publicly accessed, many to many domain.

Indeed it is interesting to note the views expressed by the Indian Supreme Court on section 66A of the Information Technology Act 2000 which is expressed in almost exactly similar terms to section 127(1). The Court took the view that the expressions used in section 66A were nebulous and imprecise in meaning and the expressions such as “grossly offensive” or “menacing” were so vague that there was no manageable standard by which a person could be said to have committed an offence. The Court concluded that section 66A was:

- (a) unconstitutionally vague and arbitrarily, excessively and disproportionately invaded the right of free speech and upset the balance between the right and the reasonable restrictions that could be imposed on such a right; and
- (b) was unconstitutional also on the ground that it encompassed protected and innocent speech and was liable to be used in such a way as to have a “chilling effect” on free speech and would therefore have to be struck down on the ground of overbreadth.

[17] The House of Lords in Collins took a different view and concluded that although section 127(1)(a) interfered with the right to freedom of expression under Article 10 of the Convention, it went no further than was necessary in a democratic society for achieving the legitimate objective of preventing the use of the public electronics communications network for attacking the reputation and rights of others. Accordingly, I shall now set out a number of important principles which can be distilled from Lord Bingham’s judgment.

- (i) The purpose of section 127(1)(a) is not to protect people against receipt of unsolicited messages which they may find seriously objectionable but 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 society. The defendant would not be guilty of an offence under this section if the service had not been transmitted on the internet, nor indeed, if he had posted a copy of his sermon to every Muslim living in N.I.

- (ii) The offence is committed when the message is sent. It does not matter if the message is never received or if the recipient of the message is, or is not, offended by the message. It is likely that those personally attending the service and the 700 people listening to it on the internet would not have been offended by its content.
- (iii) It is for the court to determine as a question of fact whether a message is grossly offensive.
- (iv) In determining this the Court must apply the standards of an open and just multiracial society, taking into account the context of the words and all relevant circumstances.
- (v) The sender of the message must have intended to insult those to whom the message relates or must have recognised that there was a risk of so doing.

[18] Accordingly, I must ask myself the following questions:

- (A) Did Pastor McConnell send a message which was offensive? If "no" I must acquit him.
- (B) If "yes" was the message grossly offensive? If "no" I must acquit him.
- (C) If "yes" did he intend the message to be grossly offensive to the Muslim community and those who follow the Islamic faith? If "yes" I must convict him of the offence.
- (D) If "no" must he have realised there was a risk of grossly offending the Muslim community? If "yes" he is guilty of the offence and if "no" he is not guilty.

[19] In the course of the interviews on the Nolan shows and on Talkback probably more emphasis was placed on the words "Islam is heathen, Islam is satanic, Islam is a doctrine spawned in hell" than on the portion about mistrust of Muslims. In his opening Mr Russell stated that these words were capable of being construed as grossly offensive but conceded that they were protected by the defendant's rights to freedom of thought, conscience and religion and freedom of expression under Articles 9 and 10 of the Convention. For my part I agree entirely with Mr Russell that they are easily capable of being construed as grossly

offensive. Pastor McConnell is absolutely entitled to criticise the Islamic faith in a robust and trenchant manner but entirely absent from this 35 minute sermon is any attempt to set out the doctrines and teachings of the Islamic faith and then to dissect them and set out in a clear and concise way the grounds upon which he takes issue with those beliefs. On the contrary he has done nothing other than indulge in a bout of name calling. Indeed I struggle to think of anything more offensive to say about another person's sincerely held beliefs than that those beliefs are satanical and "spawned in hell". This is not just an attack on Islamic doctrine. When broken down the message he is getting across is that all those who subscribe to the Islamic faith are disciples of the Devil. This was further illustrated by him when, sandwiched in between his description of Allah as being a heathen, cruel and demon deity and the above description of Islam he preaches "you cannot drink the cup of the Lord and the cup of devils, you cannot be partakers of the Lord's table and of the tables of devils". Indeed his use of the word "spawned" in the context in which he uses it is highly pejorative in that it depicts a sticky, messy and multiple birth. I return to the scenario I posed to Mr Mateer. What if a Muslim had preached "Christianity is heathen, Christianity is satanic, Jesus Christ was not the son of God but spawned in hell."? I venture to say that there would be such a tornado of protest about this which would have made the protests about what Pastor McConnell said look like an April shower.

Pastor McConnell is quite happy, and indeed is quite entitled, to call upon the protection of Articles 9 and 10 for his use of these words but, in my view, has failed to recognise his responsibilities and the rights of the Muslim community under the Articles. Whilst I cannot convict him for describing Islam as heathen and satanic in light of, as previously stated, the concession by the prosecution that these words are protected by his rights under Articles 9 and 10 it is within the context of the above that I will now go on to consider the section on his mistrust of Muslims upon which the charges he faces are based.

[20] Before I do so, I want to take into account the evidence as to the defendant's good character. The effect of this is that I can factor into my decision that, because of his good character, he is less likely to have committed an offence and that the fact that he has good character lends weight and support to his evidence where it would not if he was a person of bad character. Accordingly, I am satisfied from his own evidence and the high calibre of good character evidence given on his behalf that Pastor McConnell did not set out intentionally to cause offence. He is a man with strong, passionate and sincerely held beliefs. The evidence before me is that he has translated his Christian beliefs into actions which have benefitted many people in this community and in Kenya and Ethiopia. He is an influential and effective preacher as is witnessed by the success of his Church. In my view Pastor McConnell's mindset was that he was preaching to the converted in the form of his own congregation and like-minded people who were listening in to his service rather than preaching to the worldwide internet. His passion and enthusiasm for his subject caused him to, so to speak, "lose the run of himself" and he would do well to take on board the words of Robert Greene in "The 48 Laws of Power":

“But the human tongue is a beast that few can master. It strains constantly to break out of its cage and if it is not tamed, it will run wild and cause you grief”.

Having said that I am satisfied that, on either an objective or subjective test, that, he must have realised that there was a risk of offence being caused and, unfortunately ignored it. Pastor McConnell has honed his skills as a communicator over 60 years and cannot have been unaware that there was such a risk. This finding is further evidenced by his statement at the commencement of his sermon that “he could be misunderstood”.

[21] I now turn to the words “Now some say there are good Moslems in Britain that may be so but I don’t trust them.” In his subsequent interviews by Steven Nolan, Pastor McConnell qualified these remarks by saying he was only referring to Muslims who followed Sharia law. There was, of course no such reference in his sermon. If he had clarified this in his sermon and set out in a clear and precise way why the Sharia law was repugnant to him he could have saved himself a lot of trouble. In the manner in which he did express this he has, in my view, characterised the followers of an entire religion in a stereotypical way. Indeed when he uses the word “MAY” in the context of whether there are any good Muslims it leaves open the inference that that might not be exactly right and there may not be any good Muslims in Britain. Either way, he is making it crystal clear that he does not trust any Muslim.

The dictionary definition of “offensive” is variously given as “insulting”, “rude”, “disrespectful” and “hurtful”. I have no difficulty in concluding that reasonable persons would have found these words offensive.

[22] Were the words “grossly offensive”? “Grossly” is defined as something done in a disgusting or extreme or excessive manner. It is more than something which is “very” offensive or “highly” offensive. On drawing up guidelines for the Crown Prosecution Service Keir Starmer recognised the difficulty in determining whether something was “grossly offensive” when he said:

“The distinction between offensive and grossly offensive is an important one and not easily made. Context and circumstances are highly relevant and as the European Court of Human Rights observed in the case of *Handyside-v-UK* the right to freedom of expression includes the right to say things or express opinions “that offend, shock or disturb the state or any section of the population”.”

I am happy to adopt the test used by Lord Bingham in Collins and ask myself in exercising his right to say things or express opinions which offended, shocked or disturbed the Muslim community did Pastor McConnell use language which was “BEYOND THE PALE of what is tolerable in our society”?

In coming to a conclusion I take into account the context of his comments following his expression of mistrust in Muslims to which I have referred at para 20. However, I also take into account the wider context and circumstance of him delivering a sermon wherein he was trying to communicate strong and robust beliefs that the God in which he believed was the only true God and that the worship of any other god was idolatrous.

I have also considered the proportionality of a conviction under section 127 in light of his rights under Articles 9 and 10 of the Convention.

[23] Having considered all these matters and the particular facts of this case I have come to the conclusion that the words upon which the charges are based, whilst offensive, do not reach the high threshold required of being “grossly offensive”. I find myself in agreement with Lord Justice Laws in the “Chambers” case when he said that the courts need to be very careful not to criminalise speech which, however contemptible, is no more than offensive. It is not the task of the criminal law to censor offensive utterances. Accordingly I find Pastor McConnell not guilty of both charges.

[24] Finally, having heard a great deal about Pastor McConnell’s beliefs over the course of this trial I think it appropriate to leave the last word with the Islamic scholar and poet Rumi who said:

“Silence is the language of God, all else is poor translation.”