Neutral Citation Number: [2022] CA (Bda) 12 Civ

Case No: Civ/2021/14

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2021: No. 055

Sessions House
Hamilton, Bermuda HM 12

Date: 17/06/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

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Between:

THE QUEEN

Appellant

- and -

BARBI BISHOP

Respondent

Mrs Shakira Dill-Francois, Attorney-General's Chambers, for the Appellant
The Respondent did not appear nor was she represented

Hearing date: 31 May 2022

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APPROVED JUDGMENT

KAY JA:

Introduction

1. By section 68(1) the Electronic Communications Act 2011 ("the Act"), it is an offence if a person:

> *"sends, by means of a public electronic communications service, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character…"*

2. On 21 October 2020, Barbie Bishop ("the Respondent") was charged with such an offence. It was alleged that on 3 June 2021 she:

> *"…sent by means of a public electronic communications service, a post, on Facebook and Instagram, of a grossly offensive meme with the wording* ***"ALL LIVES SPLATTER NOBODY CARES ABOUT YOUR PROTEST. KEEP YOUR ASS OUT OF THE ROAD****."*

3. It will be obvious from that wording that the context was a Black Lives Matter protest to which the Respondent took exception. The prosecution considered that the posting of the meme was "grossly offensive" within the meaning of section 68(1) of the Act. The Respondent, on the other hand, maintained that she had simply exercised her right to freedom of expression pursuant to section 9 of the Bermuda Constitution Order 1968 ("the Constitution"). She sought a declaration that the criminal proceedings against her were unconstitutional, unlawful and incompatible with and contravened her fundamental right and freedom under the Constitution. She also relied on similar provisions in the European Convention on Human Rights ("ECHR"). On 27 August 2021, Hargun CJ handed down a judgment in her favour in which he held that the criminal proceedings were in breach of her fundamental right to freedom of expression under section 9 of the Constitution. By Notice of Appeal dated 8 October 2021, the Appellant appealed against the decision of the Chief Justice. Although the Appellant is identified as "the Queen", the proceedings are in reality conducted on behalf of the Attorney-General.

The Context

4. It is well known that, particularly in the aftermath of the murder of George Floyd by a police officer in the United States in May 2020, there have been protests around the world, many of them under the aegis of the Black Lives Matter ("BLM") movement. In many places, protests have given rise to opposing demonstrations. In Bermuda, a group of local supporters organised a protest to take place on 7 June 2020 in solidarity with BLM. Four days before the protest was due to take place, the Respondent posted the message containing the contentious meme.
5. At the time, she was a serving police officer. On the day of the protest there were calls for her dismissal from the Bermuda Police Service ("BPS"). She had been suspended on 5 June, pending disciplinary proceedings and she remained suspended at the time of the hearing before the Chief Justice.

6. The Respondent was not the originator of the slogan or meme "All lives splatter". It seems to have come into existence in August 2017 when a rally of white nationalists took place in Charlottesville,

VA. It prompted a counter-demonstration, in the course of which an alleged neo-Nazi and white supremacist drove a vehicle into the crowd of counter-demonstrators, killing one and injuring several others.

7. The Respondent has not been present or represented on the hearing of this appeal. She was represented by Ms Victoria Greening before the Chief Justice but since then our understanding is that she has left Bermuda, and Ms Greening has informed the Court that she is no longer instructed by the Respondent.

The Constitution

8. The relevant parts of section 9 of the Constitution read as follows:

> *"**Protection of freedom of expression***
> *9 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*
>
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*
>
> *(a) that is reasonably required—*
>
> *(i) in the interests of defence, public safety, public order, public morality or public health; or*
>
> *(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*
>
> *(b) that imposes restrictions upon public officers or teachers,*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."*

9. Although the ECHR was referred to in the judgment below, the decision of the Chief Justice was based specifically and exclusively on section 9 of the Constitution.

The judgment of the Chief Justice

10. In paragraph 21 of his judgment the Chief Justice said:

> *"The real issue in this case is whether the decision to prosecute the Applicant under section 68(1)(a) of the Act, on the basis that her Facebook and Instagram postings were grossly offensive, was reasonably required in the interests of the public order or public morality; or for the purposes of protecting the rights and freedoms of other persons. As noted above in considering the issue whether it was reasonably required the respondent must prove (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right of freedom are no more than is necessary to accomplish the objective."*

11. In other words, at that point he correctly focused on the question whether the interference with the Respondent's right to freedom of expression brought about by the prosecution was "reasonably required" when measured against interests such as public safety, public order or the protection of the rights, and freedom of other persons. He then assessed the question of what was "reasonably required" by reference to the three stage test adopted by the Judicial Committee of the Privy Council ("JCPC") in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, lands and Housing* [1999] 1 AC 69, per Lord Clyde at page 80. In that case, the constitutional provision under consideration was one in the the Constitution of Antigua and Barbuda which permitted a freedom of expression restriction in relation to public officers that was "reasonably required" except to the extent that the restriction was shown not to be "reasonably justifiable" in a democratic society. Lord Clyde said that the court would ask itself:

> *"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii)the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective"*

12. He later added at page 81 that the third stage "raises a question of proportionality".

13. It seems to me that it was appropriate for the Chief Justice to restate the requirements of section 9 by reference to the *de Freitas* test. Indeed, the Deputy Solicitor General does not suggest otherwise. Having done so, he decided that the first and second criteria were satisfied. As to the first, he said (para 48):

> *With this background and context it can be appreciated that the post made by the Applicant is capable of being considered as "grossly offensive" by reasonable people in this multi-racial and multi-cultural community. There is clearly the potential of offending people, as was indeed the case, and the potential for public disorder, as can be seen from the reaction of those who attended the march and the reaction from the group Social Justice Bermuda. The object of section 68(1)(a) of the Act, as stated by Lord Bingham in Collins, is to prohibit the use of a public electronic communications service which contravenes the basic standards of our society such as posting messages*

which are "grossly offensive". The posting of "grossly offensive" messages has the potential of negative impact upon public order. Accordingly, the Court would be prepared to hold that the legislative objective is sufficiently important to justify limiting the fundamental right of freedom of expression set out in section 9 of the Constitution subject to the important consideration whether the means used to impair the right of freedom are no more than is necessary to accomplish the objective (see paragraphs 51 to 66 below). For present purposes the Court is prepared to hold that the first limb of the deFreitas test can be satisfied.

14. And, turning to the second criterion, he said:

> *"Section 68 (1)(a) of the Act is designed to ensure that the general public does not use the electronic communication service by sending messages that are grossly offensive or of an indecent or obscene or menacing character. In principle, compliance with the terms of section 68(1)(a) of the Act can reasonably be expected to contribute towards the maintenance of public order and public morality. Accordingly, the second limb of the deFreitas test would appear to be satisfied."*

15. So far as the third criterion was concerned, the Chief Justice adopted the approach of the ECHR to article 10 of the ECHR and said that *"any justification put forward… must be… convincingly established"*. Again, the Deputy Solicitor General does not take issue with that. The Chief Justice then considered a number of authorities from the ECtHR and the courts of England and Wales which address article 10 of the ECHR. The wording of article 10 differs from that of section 9 of the Bermuda Constitution and, to that extent, I am not convinced that this consideration was necessary. However, at the end of it, the Chief Justice said this:

> *"Having regard to the legal requirements outlined above the Court turns to consider whether in this case the prosecution of the Applicant under section 68(1)(a) of the Act is proportionate to the legitimate aim being pursued and whether it is supported by reasons which are relevant and sufficient. In other words, is the Court satisfied, based on the reasons and evidence adduced by the Respondent, that the prosecution of the Applicant under section 68(1)(a) of the Act is no more than necessary to accomplish the objective? The burden of proof, as noted above, in relation to these requirements rests with the Respondent."*

16. In answering the central question, the Chief Justice identified four factors. First, the Respondent had not previously manifested conduct which potentially contravened section 68(1)(a) of the Act and the offensive post "was not part of a campaign to change any views". Secondly, the original post was not accessible by the public at large but only by her Facebook and Instagram "friends". Thirdly, it had been taken down immediately following realisation that it was "highly inflammatory". Fourthly, the Respondent was immediately suspended from duty by the BPS pending an investigation into an allegation of gross misconduct arising out of the same incident which formed the basis of the charge under section 68(1)(a) of the Act and, if proven, she faced the prospect of loss of her employment with the BPS.

17. The Chief Justice then said at paragraph [66]:

"Having regard to the circumstances outlined above and in particular to the fact that the Applicant is already facing disciplinary proceedings for gross misconduct, pursuant to the Police Conduct Orders 2016, which, if proved, may result in her dismissal from the BPS, the Court is not satisfied that the concurrent criminal proceedings under section 68(1)(a) are no more than necessary to accomplish the legitimate aim being pursued. It follows that the third limb of the de Freitas test is not satisfied in this case and consequently the Court is unable to conclude that the restriction upon the Applicant's right to freedom of expression is reasonably required in the interests of public order and public morality pursuant to the terms of section 9(2)(a)(i) of the Constitution."

18. He then concluded:

"[67] The Court has found that the posting of the meme by the Applicant is capable of being considered "grossly offensive" by reasonable people in this multi-racial and multi-cultural community. The posting of "grossly offensive" messages has the potential of negative impact upon public order. In principle, the objective sought to be achieved by section 68(1)(a) is sufficiently important to justify limiting the fundamental right of freedom of expression.

[68] However, in the circumstances of this case as set out in paragraphs 62 to 66 above and in particular the fact that the Applicant is already facing disciplinary proceedings for gross misconduct based upon the same facts which, if proved, may result in a dismissal from the BPS, the Court is not satisfied that the concurrent criminal proceedings under section 68(1)(a) are no more than necessary to accomplish the legitimate aim being pursued."

19. Accordingly, he declared the proceedings against the Respondent under section 68(1)(a) of the Act to be "in breach of her fundamental rights to freedom of expression within section 9 of the Constitution" and dismissed those criminal proceedings.

The Grounds of Appeal

20. The essence of the grounds of appeal is to be found in these three sub-paragraphs of paragraph 3 of the Notice of Appeal:

i. *"The learned Chief Justice, at paragraph 61-66, misconstrued the principles of constitutional interpretation in deciding whether a measure is proportionate as explained by the Privy Council in e.g. de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80.*

ii. *As a result, the learned Chief Justice omitted reference to an overriding requirement which featured in the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103, from which this approach to proportionality derives: the need to balance the interests of society with those of individuals and groups.*

iii. *As a result, the learned Chief Justice, at paragraph 66, ought not to have considered the fact that the Respondent was facing disciplinary proceedings for gross misconduct based upon the same facts which, if proved, may result in dismissal.*

iv. *Further at paragraph 55 and 56, the Learned Chief Justice placed too much weight on the Guidelines on prosecuting cases involving communications sent via social media failing to recognise that the Guidelines are not intended to and do not lay down any rule of law, bind the Director of Public Prosecutions to follow any particular course in any individual case, nor does it fetter the Director, or her counsel in the proper exercise of any discretion conferred on any of them to consider any particular case or set of circumstances on its own merits.*

v. *As a further result, the learned Chief Justice mistakenly found that he had the jurisdiction to dismiss a criminal prosecution, when the criminal matter was not properly before that jurisdiction."*

Discussion

21. It is axiomatic that any justification of restrictions on freedom of expression must be convincingly established. The parameters of justification in Bermuda are defined by section 9 of the Constitution. The basic protection of freedom of expression is set out in section 9 (1). Section 9 (2) then addresses *restrictions "contained in or done under the authority of any law"*. The question is whether the law in question

> *"makes provision –*
>
> *(a) that is reasonably required –*
>
> *(i) in the interest of… public safety, public order [or] public morality…*
>
> *…except so far as that provision or, as the case may, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."*

22. In the present context, section 9(2) prescribes that a restriction – in this case the prosecution of the Respondent under section 68 (1) (a) of the Act - was reasonably required in the interest of public safety, public order or (arguably) public morality. If that is convincingly established, it is still open to a person whose freedom of expression is sought to be restricted to show that the statutory provision or the thing done under its authority "is not reasonably justifiable in a democratic society".

23. I have set out the test again because it is important to keep in mind that the judgment of the Chief Justice was founded entirely on section 9 of the Constitution, the language of which is not identical

to that found in article 10 of the ECHR, which was incorporated into UK law by the Human Rights Act 1998. We have to construe and apply the Constitution.

24. As I have related, the Chief Justice considered it helpful and appropriate to adopt the three stage test set out in *de Freitas*. i agree with that approach because the language of the Antigua and Barbuda legislation contained the same "reasonably required" and "reasonably justifiable in a democratic society" provisions. As I have said (paragraph 13 – 14 above), the Chief Justice found the first two criteria to have been satisfied. He was unquestionably right about that. Accordingly, the central issue on this appeal is whether he was also correct to conclude that the third criterion – … *"the means used to impair the right of freedom are no more than necessary to accomplish the objective"* – is also satisfied.

25. When addressing the central issue, the Chief Justice drew upon the jurisprudence established by article 10 of the ECHR. He said:

> *"In considering whether the Court is satisfied that the means used to impair the right of freedom are no more than necessary to accomplish the object, it is relevant to keep in mind that the jurisprudence in relation to article 10 of the European Convention (upon which section 9 of the Constitution is based) imposes stringent requirements before there can be any infringement of the freedom of expression. The jurisprudence shows that any justification put forward by the respondent must be "convincingly established". The burden of proof is on the respondent. Secondly, a measure that interferes with the freedom of expression is only justified if it is prescribed by law, pursues one or more of the legitimate aims in article 10(2), and is shown convincingly to be "necessary in a democratic society". Thirdly, the court must consider whether the interference complained of (in this case the prosecution of the Applicant) (1) corresponds to a pressing social need, (2) is proportionate to the legitimate aim pursued and (3) is supported by reasons which are relevant and sufficient."*

26. In my judgment, that was an erroneous approach. Article 10 uses language different from that of section 9 of the Bermuda Constitution. For example, "necessary in a democratic society" is not synonymous with "reasonably justifiable in a democratic society" (section 9 (2)). By importing the ECHR jurisprudence, it seems to me that the Chief Justice inappropriately added to, and thereby complicated, the *de Freitas* test. I am not saying that, when construing and applying the test, it is wrong to seek and gain assistance from a comparative exercise. However, it is neither appropriate nor necessary to import requirements, the origin of which is to be found in a different legislative context. In my judgment, the Chief Justice ought to have restricted his analysis to the language of the Constitution, assisted by *de Freitas,* which was concerned with the same language, but without encrusting it with additional concepts and subtests.

27. The next question is whether, if the Chief Justice had adopted this approach, he would have reached the same conclusion. I have set out the four factors which led to the Chief Justice's finding that the Respondent's constitutional right to freedom of expression was violated by the criminal proceedings. By way of summary they were (1) the Respondent's previous history; (2) limited accessibility; (3) immediate taking down of the post; and (4) "In particular", the disciplinary proceedings against her which "may result in a dismissal from the BPS".

28. As to (1), previous history, it is correct that there is no evidence of the Respondent having previously expressed herself in an objectionable or inflammatory manner. This caused the Chief Justice to conclude that the objectionable post "was not part of a campaign to change any views". However, there is no requirement that an objectionable post be part of a campaign in a temporal or, indeed, any sense. Context is important. The offensive meme was posted on 3 June, four days before the BLM Bermuda protest was to take place. The words "keep your ass out of the road" were likely to discourage participation in the march. To that extent, at least, they would inevitably be read as an attempt to change minds about participation in the march. The Respondent was suspended from duty two days after her name was posted. I infer that that was when the post was deleted. I do not consider that this chronology establishes anything to the Respondent's credit.

29. Turning to (2), limited accessibility, I do not think that the evidence was as favourable to the Respondent as the Chief Justice considered. It is true that the statement of one witness, Inspector Simons, states that the Respondent was in his list of social medial friends. However, Sergeant Butcher, who first reported the post, says "I only have public access to her social media accounts." It is common knowledge that no one can ensure that material posted on social media does not reach a wider audience that the originator had intended. Moreover, it seems to me that the message was intended to be seen by those who were planning to participate in the march four days later - "Nobody cares about <u>your</u> protest. Keep <u>your</u> ass out of the road." (Emphasis added).

30. As regards (3), the immediate taking down of the post, there is nothing to suggest that when this occurred, two days after the publication, it was anything other than a consequence of the inception and notification of the disciplinary investigation and the notification of suspension.

31. It was factor (4), the disciplinary proceedings, which weighed most heavily on the Chief Justice. He was concerned that they "may" result in the Respondent's dismissal. In these circumstances, he was not satisfied that the "concurrent" criminal proceedings were "no more than necessary to accomplish the legislative aim being pursued". I have already said that it would have been more appropriate for the Chief Justice to have remained within the confines of the language of section 9 of the Constitution as to what was "reasonably required" and what was "not reasonably justifiable in a democratic society", although I accept that the "no more than is necessary" test set out in the third question in *de Fraites* is an appropriate measure of the reasonableness criteria in section 9. However, in my judgment, the Chief Justice was wrong to hold that, in effect, the inchoate disciplinary proceedings rendered the prosecution not to be reasonably required or reasonably justifiable. At the time of the hearing in the Supreme Court, no one could predict the future outcome of the disciplinary proceedings or whether the Respondent would choose to remain a member of the Bermuda Police Service long enough for any likely sanction to take effect. It is common for employees to "jump before they are pushed" in such circumstances. In a sense, that is what has eventuated in this case. Having prevailed in the Supreme Court, the Respondent, an American citizen, relocated to Florida and took no part in the hearing of this appeal.

32. It is apparent that, in reaching his decision on the third stage of the *de Freitas* test, the Chief Justice also derived support from the <u>Guidelines on Prosecuting cases involving Communications sent via Social Media</u>, issued by the Crown Prosecution Service in England Wales. This document was produced in the Supreme Court by the attorney then representing the Respondent. In the form in

which the document was produced, it was of some assistance to the Respondent's case. However, what was produced was issued in 2014. The Chief Justice had no way of knowing that it had been superseded by a new document under the same title in 2018. The new document is somewhat different. Under the sub-heading "Social Media Hate Crime Offences", it refers to the Code for Crown Prosecutors which provides:

> *"Prosecutors must also have regard to whether the offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required."*

33. Paragraph 57 of the Guidance then provides:

> *"Hate crime messages may sometimes use language that prosecutors are not familiar with, but which may cause gross offence to those to whom it relates. Prosecutors should ensure that they fully understand the meaning and context of particular language or slurs used, so that they can properly assess the degree to which it may cause offence. To do so, further information may be sought from a complainant or from relevant community groups."*

34. It also refers to the Strasbourg authorities illustrating the appropriateness of prosecuting those who use social media to leave racist messages and also notes the view of the EU Commission that extreme racist speech is outside the protection of Article 10 of the ECHR *"because of its potential to undermine public order and the rights of the target minority"*. It is clear to me that the current UK Guidance, far from supporting the Respondent's case, militates against it. It is unfortunate that the Chief Justice was presented with an out-of-date document. I suspect that it played a part in leading him to an erroneous conclusion.

35. It is important to focus on the full context of this case. Having done so, I consider that the context and timing of the post were both offensive and inflammatory. The content, especially the "all lives splatter" meme and its history, would inevitably be grossly offensive to those who were intent upon participating in a peaceful march four days later. Although, and partly because, the timeframe was short, it was calculated to have a significant impact. Otherwise, one might reasonably ask, why post it?

Conclusion

36. It follows from what I have said that, in my judgment, the Chief Justice was wrong to conclude that the Respondent's right to freedom of expression under section 9 of the Constitution was violated by the pursuit of criminal proceedings in this case.

GLOSTER JA:

37. I agree with My Lord's judgment and would also allow the appeal.

CLARKE P:

38. I, also, agree. The appeal is therefore allowed.