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Social Media: 'A Theme Park just for Fools'

R v Alison Chabloz (unreported)

Westminster Magistrates' Court 25 May 2018

Keywords: Anti-Semitic hate; Grossly offensive comments; Holocaust denial, Freedom of Expression

The defendant, Chabloz, was prosecuted under section 127(1) of the Communications Act 2003 (CA 2003), which prohibits the sending '... 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.'

Chabloz had made several anti-Semitic comments relating to the Holocaust, defining herself as a 'Holocaust revolutionist'. She was charged with 5 counts of sending grossly offensive material contrary to the CA 2003. Two of the counts concerned anti-Semitic songs she had published online after her appearance at a London Forum Event in 2016. In one of these songs, she referred to Auschwitz concentration camp, where it is estimated that 1.1 million people died during the Second World War, describing it as a 'theme park just for fools'. In a second song, she directly attacked the Jewish faith: 'Isra-hell is a genocidal state with no right to exist, everyone knows the score under international law'. Many of her songs were set to traditional Jewish folk music. A third count was raised in relation to a video which had been uploaded on the Social Networking Site YouTube, called '(((Survivors)))', mocking the Holocaust victims, Irene Zisblatt and Elie Wiesel:

'My name is Elie Wiesel may I show you my tattoo. I wrote a book for US kids to study while at school. It's full of nonsense tales of course, what do you all expect? But it made me very wealthy, as a liar I'm the best.'

In the same song, she went on to mock the killing of children during the Holocaust. A further two counts related to 'causing' offensive material to be sent via a communications network.

The original case was brought as a private prosecution by the 'Campaign Against Anti-Semitism' group, who were critical of the lack of response by authorities:

"We have called for zero tolerance enforcement of the law against anti-Semitism and that is what politicians have promised, but the CPS [Crown Prosecution Service] has failed to take action, so now we [Campaign Against Anti-Semitism] must act instead."

The Crown Prosecution Service (CPS) eventually took over the case.

In her defence, Chabloz relied upon her right to freedom of expression and, therefore, argued that she was protected under Article 10 of the European Convention on Human Rights. Prosecutor Karen Robinson rejected this argument, stating:

'Miss Chabloz's songs are a million miles away from an attempt to provide an academic critique of the Holocaust. They're not political songs. They are no more than a dressed-up attack on a group of people for no more than their adherence to a religion.'

Furthermore, Chabloz's legal team suggested that it was YouTube who was responsible for the publication of the offensive material, despite the social networking site being protected under the e-Commerce Directive (2000/31/EC). Under this directive, social networking sites, such as Facebook and YouTube, are regarded as hosts rather than publishers. Put simply, they only have an obligation to remove illegal content from their site when they are made aware of it. (C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] ECR I- 474)

Held, Chabloz was guilty of two counts of sending grossly offensive, indecent, obscene or menacing messages, via a communications network contrary to section 127(1) of the CA 2003, in relation to her performance at the London Forum Event, which was made available online. She was further convicted of a third count under the CA 2003 for the video she had uploaded to YouTube, with District Judge John Zani commenting:

'I am entirely satisfied that she will have intended to insult those to whom the material relates. Having carefully considered all evidence received and submissions made, I am entirely satisfied that the prosecution has proved beyond reasonable doubt that the defendant is guilty.'

Chabloz was acquitted of two further counts of 'causing' offensive material to be sent online. She was sentenced to 20 weeks' imprisonment, suspended for 2 years, along with a 12 month social media ban and 180 hours of unpaid work.

Commentary

The successful prosecution of Chabloz followed the case of *R v Mark Meechan*, (unreported, Airdrie Sheriff Court, 20 March 2018). Meechan was found guilty of sending grossly offensive material contrary to s127(1) of the CA 2003, after uploading a video online showing his girlfriend's dog responding to anti-Semitic statements. This included comments such as, 'Gas the Jew' and 'Sieg Heils' (hail victory), an expression commonly associated with Nazi Germany. Consequently, he received a fine of £800. Following this case and the matter of *Chabloz*, it may be argued that a dangerous precedent has been set, which undermines Article 10 of the European Convention on Human Rights.

Article 10 protects a citizen's right to freedom of expression, but it is not an absolute right. Under the Article, a person's right to freedom of expression can be restricted if specific criteria are met. First, the restriction must be prescribed by law in a clear and certain manner. (*Sunday Times v United Kingdom* (1992) 14 EHRR 229 (at [59])) In the United Kingdom, there are several Acts of Parliament which can be used to restrict a person's expression online, including, though not limited to, the Malicious Communications Act 1988 and the CA 2003. In addition, the limitation placed on a

person's right to free speech needs to be necessary in a democratic society, fulfilling one of the following legitimate aims located in the second paragraph of the right:

'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'.

The limitations placed on Chabloz comments would be regarded as protecting the rights of others, along with maintaining the morals of a secular society, so long as it was considered necessary in a democratic state.

The necessity to restrict a person's expression differs from state to state. For instance, in Poland, it is a criminal offence to suggest that the country was complicit in the Holocaust. Failure to comply with this law can lead to a fine or imprisonment of up to three years. However, the European Court of Human Rights (ECtHR) gives significant weight to a person's freedom of expression as it is considered as an important aspect of a democratic society, as shown in *Handyside v United Kingdom* (1976)¹ EHRR 737 (at [49]). Though the ECtHR has confirmed that freedom of expression does not necessarily cover Holocaust denial:

'As such, it does not belong to the category of clearly established historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 by Article 17.' (*Lehideux and Isorni v France* [1998] ECHR 90 at para [47]).

In the United Kingdom, there is currently no specific criminal offence prohibiting Holocaust denial, though, there is legislation which restricts hate speech and online conduct, such as the CA 2003. Here, an individual's right to freedom of expression can be limited if a message is sent of a grossly offensive nature and where the sender is aware that it was so. It is the duty of the court to decide when a person's right to free speech goes beyond an acceptable expression of free speech to one that warrants criminalisation under the law.

Whereas Chabloz suggested that her songs were merely 'satire', the prosecution was able to successfully prove otherwise:

'The songs, specifically the language used within them, have been carefully considered and composed with the language chosen deliberately ... They are anti-Semitic, they are targeting the Jewish people as a whole and use both their content and their tone to ensure maximum offence.'

Chabloz may not have committed an offence by denial of the Holocaust but her comments clearly crossed the boundary from being offensive to grossly offensive contrary to section 127(1) of the CA 2003. Throughout her songs, she made direct reference to Auschwitz concentration camp: 'Now Auschwitz, holy temple, is a theme park just for fools, the gassing zone a proven hoax, indoctrination rules'; While in her song '(((Survivors)))', she openly suggested that the diary of Anne Frank was created by her family for financial gain and made direct reference to the killing of children in the War being a 'hoax'. Triple brackets, such as those used around Chabloz's song

'(((Survivors)))', are associated with anti-Semitic hatred and is commonly used to help categorise anti-Semitic content online. It allows for this type of content to be easily identifiable by other users. In addition, during the hearing held at Westminster's Magistrates' Court, Chabloz sang along to her songs as they were played to the court.

However, the successful prosecution of Chabloz illustrates the continued difficulties the criminal justice system experiences when it comes to grossly offensive, indecent, obscene or menacing messages posted online. On numerous occasions, Chabloz's conduct was reported to the police, with the authorities choosing not to pursue criminal charges against her. Indeed, Chabloz herself had contacted the police to inform them that she was being harassed by Jews, resulting in her being considered a victim during the initial investigations. Consequently, 'Campaign Against Anti-Semitism' brought a private prosecution against Chabloz, before the 6 month limitation period lapsed (as governed by section 127(5) B of the CA 2003), with the CPS later deciding to take over the case, arguably for fear of embarrassment.

The difficulties in distinguishing when a comment or conduct goes from being one that is offensive, to one so grossly offensive, indecent, obscene or menacing to warrant criminalisation, is not a new phenomenon for the criminal justice system. In 2012, following *Chambers v DPP* [2012] EWHC 2157, the CPS announced the creation of social media prosecuting guidelines. Chambers had taken to the social networking site, Twitter, to express his frustration at the closure of Doncaster Robin Hood Airport: 'Crap! Robin Hood Airport is closed. You've got week [sic] and a bit to get your shit together otherwise I'm blowing the airport sky high.' At the Court of first instance, Chambers was found guilty of sending a menacing message via a communications network contrary to section 127(1) of the CA 2003. His conviction was later overturned by the High Court. The aim of these guidelines was to 'give clear advice to prosecutors who have been asked either for a charging decision or for early advice to the police ...' in matters concerning conduct carried out online, with these being updated in October 2016.

The guidelines categorise four types of conduct that can be carried out online: credible threats of violence; communications targeting specific individuals; breach of court orders and statutory provisions and; communications which are grossly offensive, indecent, obscene or false. The CPS, throughout the document, support the concept that the term 'grossly offensive' cannot be defined and will continue to take its 'ordinary English meaning.' (*Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 W.L.R. 27 (at [10]) The CPS then go on to cite cases concerning grossly offensive comments, many of which predate the creation of the guidelines themselves, exposing continued problems when it comes to the prosecution of conduct carried out via the use of social media. The guidelines are intended to help both prosecutors and the police in their decisions over what can be deemed grossly offensive behaviour. Instead, confusion is still present in the criminal justice system as to when a comment or conduct online warrants criminal law intervention. This is very apparent in the case of *Chabloz*, which was originally deemed unworthy of prosecution, despite the guidelines being in place.

There is clearly still a lack of clarity within the system as to when someone is practising their right to freedom of expression and when a person goes beyond this right to invoke the criminal law. The conviction by Westminster's Magistrates' Court undoubtedly conflicted with the original approach undertaken by the CPS. There is still a lack of a

comprehensive understanding by both the police and the CPS in relation to section 127(1) of the CA 2003. Arguably, we have a long way to go before we can say that the criminal justice system is keeping pace with the advancements in changing technology. Perhaps the decision in the present case will be the beginning of a body of case law which will help to identify where the line should be drawn.