Neutral Citation Number: [2019] EWCA Crim 1372
No: 2019 00686 A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 5 June 2019

B e f o r e:

LADY JUSTICE DAVIES DBE

MR JUSTICE MARTIN SPENCER

HIS HONOUR JUDGE PICTON

R E G I N A

v

DAVID BITTON

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 GJ Lowe appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

1. **JUDGE PICTON**: On 18th January 2018 the appellant pleaded guilty to six offences of publishing written material that was threatening, abusive or insulting with intent to stir up racial hatred, contrary to section 19(1) of the Public Order Act 1986. On the same occasion the appellant pleaded guilty to seven offences of publishing threatening written material with intent to stir up religious hatred, contrary to section 29C(1) of the same Act. He was committed to the Crown Court for sentence pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. On 15th February 2018 in the Crown Court at Minshull Street Manchester the sentence was sentenced by Mr Recorder Rankin to concurrent terms of 4 years' imprisonment on each of the charges. He appeals by leave of the single judge.

2. The offences took place between 12 and 19 May 2016, in the month leading up to the Brexit vote. The police became aware of concerning activity on a Twitter account with the user name of '@catamafiauk'. The account was actively monitored, and between 13 and 19 May 1,028 tweets were captured. Police analysis identified 86 written and 3 retweeted messages that were assessed as coming within the legislation. Each of the offences charged related to particular tweets posted on Twitter by the appellant but the case was opened on the basis that these were specimen charges representative of the greater total of offending Twitter traffic.

3. The following examples of the appellant's tweets are sufficient to demonstrate the appalling nature of the offending material posted by him:

12th May: "Kill a coon, kill a coon, kill, kill, kill a coon."

14th May: "Kill the black bastards." "Negro cunts need bombing." "Time for these coons to

get killed."

15th May: "Burn every single mosque in England." "Kill the lot of these Muslims."

16th May: "These Muslims need a full mosque at a time taking out."

17th May: "Kill coons." "Jews need to die with the. Muslims."

On the same date and answer to a previous tweet: "That's right. When we blow up 50 mosques you will soon get in your smelly houses and shut your curry breath mouth." "Stay in the EU. Will get a lot of Muslims killed; we hate them." "Mass Murder the Muslims at Dover."

Finally, on 18th May: "We will mass bomb them all in the same hour."

4. The tweets were all openly viewable by users of Twitter. The appellant's Twitter account had some 724 followers who would receive the tweets that he posted. Some of the tweets contained links to other internet web pages. Many of the appellant's tweets contained offensive and inappropriate terms. He expressed pro-Brexit and anti-immigration sentiments.

5. The police were unable to discern any particular reaction arising from the dissemination of the tweets, ie postings back. The tweets that the appellant posted were each removed by him shortly after publication. In the experience of the investigating officer this is a technique deployed in order to keep a Twitter account live and avoid it being taken down by the administrators.

6. The police were able to trace the tweets to an address in Altrincham and attended at the address on an occasion when the appellant was not present. He did, however, voluntarily attend at the police station for interview on 24 May 2016.

7. In interview he accepted that he had been responsible for the tweets. When asked to explain the tweets he maintained that they were all related to music and claimed that there was no specific agenda. He said: "everyone is against everyone", and that many of the tweets were lines to songs that he noted in order to jog his memory. He suggested that all of his contacts were Jamaican and were interested in the music that he was interested in, and that he was trying to keep the music alive. He denied that the tweets related to his personal feelings or views. The appellant said he was merely putting matters down that he had heard or thought about in reggae music. He denied that he intended to offend anyone, or to promote racial or religious hatred.

8. In sentencing, the Recorder commented on the fact that the appellant had chosen to represent himself at the sentence hearing, specifically declining the services of a solicitor available in the court building on that day to whom he had been given an opportunity to speak. The Recorder stated that he regarded what the appellant posted on Twitter in May of 2016 as being the foulest of racist material. He observed that the appellant used language and conveyed sentiments that no right-thinking person would ever consider appropriate. The Recorder described the content of the tweets as xenophobic, nationalistic and vitriolic. The Recorder noted that in view of the pleas entered the appellant's explanations as to his intentions when posting the material as he related that to the police could not have been true.

9. The Recorder further noted that the appellant was 41 years of age and had 34 convictions in respect of 61 offences with a history of dishonesty and public disorder and that the list of prior convictions included offences of harassment and sending malicious communications. The Recorder also referred to the fact that the appellant had breached a number of court orders and had received custodial sentences and stated that a current Community Order would be revoked.

10. The Recorder commented that the pre-sentence report made unhappy and difficult reading. The author concluded that the appellant had strong racist beliefs, and that he had little insight into the potential consequences of posting this type of material. It was recorded that the appellant tried to suggest his behaviour had something to do with his being a friend of Fusilier Lee Rigby who was murdered in a terrorist attack in 2013. Upon investigation, it became clear that the appellant was never friends with that young soldier.

11. The Recorder observed that the appellant appeared to be something of a social recluse, leading a rather sad, isolated and lonely fantasy life via social media. He had been

assessed as being at a high risk of reconviction and his response to previous attempts to help him by way of supervision had been poor.

12. The Recorder commented that the appellant's claim not to be a racist could not be reconciled with the contents of the tweets and the analysis undertaken by the Probation Service. The Recorder noted the appellant's claims to have worked and socialised with Muslims throughout his life. The appellant also stated he identified as being Jewish and reported that he had got carried away with what he perceived as being false media. The Recorder commented that none of that was in any way an explanation or excuse for his actions.

13. The Recorder observed that the appellant had pleaded guilty on the very first opportunity and was entitled to the maximum credit.

14. The Recorder referred to the fact that there were no guidelines for the offences but said that his attention had been drawn to a number of authorities in relation to this type of offending. The Recorder highlighted the need for deterrence and also the number of people who had seen the material. The Recorder said that hundreds of Twitter users had received the tweets automatically but possibly many more. The Recorder commented that the true number who may have seen the tweets could run into the thousands if not tens of thousands because of the ease of dissemination.

15. The Recorder stated that it was clear that the appellant was engaged in a campaign of hatred against the black, Muslim and Jewish communities; that he was quite deliberately trying to stir up religious and racial hatred. The Recorder said it was no coincidence that the tweets were posted in the run-up to the European Union Referendum in June 2016.

16. The Recorder stated the only significant mitigation was the appellant's pleas of guilty. The Recorder also said that he was taking account of totality. The Recorder identified that after a trial the sentence would have been 6 years' imprisonment but after reduction for the guilty pleas the sentence would be 4 years' imprisonment concurrent on each of the 13 charges.

17. The grounds of appeal settled by counsel appointed after sentence argue that a term of four years should be assessed as being manifestly excessive because:

(i) the circumstances of the offences did not merit a starting point of 6 years after trial;

(ii) the appellant published the tweets over a period of 6 days. The charges were apparently treated as specimen counts;

(iii) there was a significant delay before sentence;

(iv) the sentence did not adequately take his personal mitigation into account;

(v) cases drawn to the Recorder's attention involved identical offences and indicated a lower level of sentence as being appropriate;

(vi) the appellant was not legally represented at the sentence hearing (nor in the magistrates' court) and it was therefore possible that all the mitigating factors were not presented to the court.

18. In the course of this hearing Mr Lowe has helpfully and economically sought to develop those arguments, but has concentrated his attention on the fifth of the points that were raised in the grounds of appeal. In terms of the cases upon which reliance is placed, we have been referred to R v Sheppard & Whittle [2010] EWCA Crim 65 and also R v Bonehill-Paine [2016] EWCA Crim 980. In terms of the former case, that involved two appellants who were convicted after a trial of a number of charges in respect of their publishing racially inflammatory material. The offenders in that case worked collaboratively to run a website on which they published grossly offensive material directed to stirring up racial hatred towards various racial groups and most particularly people described in the judgment as 'Jewish and black'. One particular focus on the material was by way of denying the holocaust. The Court commented that the point on appeal that impressed them most was the absence of evidence as how many people saw the material or the consequences of them having seen it, although the Court did identify that the site received several thousand hits per day. The Court commented that there was no evidence of anyone being corrupted by the material although it was recognised that evidence of that being the case was unlikely to be forthcoming. Sheppard was referred to as a repeat offender, with offences spanning a not inconsiderable period and with some being committed whilst on bail. Despite those factors the Court concluded that a total sentence of 4 years 6 months was too long and reduced the term to 3 years and 6 months. With regard to Whittle it was noted that his involvement was for a shorter period, and that he was of previous good character. On the other hand, however, he was said to be the *'brains'* behind the website, feeding the material to Sheppard for his co-defendant to post. The sentence imposed upon him was reduced from 2 years to 18 months.

19. The Court in Bonehill-Paine applied Sheppard and Whittle when considering a sentence of 3 years 4 months imposed upon that appellant following a trial in respect of charges of stirring up racial hatred. The offender in that case had published a post on his own internet site urging people to attend what was referred to as an "anti-Jewification event". The offender encouraged others to print and distribute a poster that was designed to encourage racial hatred. He also posted material on Twitter and that in turn was reposted by others. The anti-Jewish event that the appellant sought to promote did take place but passed off peacefully, albeit in the context of a significant investment of time and resources by the police. The appellant had prior relevant convictions, one of which involved him publishing false messages claiming that a public house would not serve servicemen for fear of antagonising the local Muslim population. On another occasion the appellant published material that falsely asserted certain political opponents were paedophiles.

20. The Court identified the following factors as being relevant:

(i) the nature of the publication and the intent behind it;

(ii) the need to deter others;

(iii) the number of people who saw the material; and.

(iv) the consequences of them having seen it.

The Court also commented that in comparing individual cases it had to be borne in mind that each one will depend on the particular factual matrix. The Court concluded that the sentence of 3 years 4 months imposed by the trial judge was not manifestly excessive, although the Court did comment that the sentence was severe and towards the top end of the expected range.

21. We have also had regard to the case of R v Burns [2017] EWCA Crim 1466. The appellant in that case was a member of National Action, a far-right supremacist group, and was an avowed racist. Between August and September 2014, when he was aged 20, he posted a series of virulently racist updates, comments and links to a Facebook account he operated under an alias. Those posts gave rise to count 1. The comments contained many vile and deeply offensive remarks directed at, in particular, the Jewish and Afro-Carribean communities. The gist of the messages was to promote militant action against them, with the aim that they should be eliminated, with a view to protecting what the applicant described as "an advanced warrior race consisting of white men and women". Recovered from electronic media belonging to the appellant were e-books expressing extreme anti-Semitic views and extolling Adolf Hitler as "the ultimate being". The Facebook account had 98 "friends", some (but not all) of whom appeared to be located overseas. However, the account was not locked and so could be readily accessed by any user on the internet. Count 2 related to a speech made by the appellant on 23 May 2015, whilst he was aged 21 and on bail for the offence charged in the first count. During a demonstration staged outside the United States Embassy, the appellant spoke, using highly inflammatory language directed towards non-white immigrants and Jews. He alleged that the former were "rapists, robbers and murderers" and that the latter were "parasites and bankers" who wanted to create what he termed a "mongrelised" race. The speech was filmed. The appellant subsequently indicated in an online post that he knew the video was to be posted on YouTube, which indeed it was.

22. The judge at first instance sentenced the appellant to 4 years' imprisonment. The Court, on appeal, reduced the sentence to 2 years 6 months, referring to the facts of Bonehill-Paine and Whittle & Sheppard in the course of the judgment as well as making reference to the youth of that particular appellant.

23. Discussion

24. The tweets that the appellant published were of an utterly vile nature. No right-thinking person could consider them to be anything other than abhorrent. The publication of this kind of material is corrosive to our society and highly damaging.

25. The pre-sentence report records that the appellant did not think there was anything wrong with what he had said or done. The report writer stated that the appellant did not have any immediate diagnosable mental illness. He was assessed as being a fantasist who was fully culpable for his behaviour. It appears that the appellant does

not show any remorse or understanding of the impact that his views could have on minority groups, many of whom have been victims of racist behaviour. It is suggested in the report that the appellant lives out his fantasies to compensate for his unsatisfactory offline life. It is notable that the appellant's response to previous probation supervision has been poor. He is assessed as a high risk of reconviction.

26. In terms of the factors identified in the authorities as being relevant for the assessment of sentence, we will consider each of those in turn:

(i) *The nature of the publication and the intent behind it.*

27. The material that was published via Twitter was grossly offensive and appalling. What it lacked in sophistication it made up for by reason of the vile terminology that was adopted. The point can perhaps be properly made that the material was not perhaps as considered as that which featured in the cases to which we have made reference, but it was still deeply deplorable.

(ii) *The need to deter others.*

28. There is an obvious need for the court to do what it can to inhibit others from publishing material of this kind.

(iii) *The number of people who saw the material.*

29. That is not entirely clear. The appellant had a limited number of followers but there were lots of posts and, as Recorder noted, there exists the potential for the material to be further disseminated across social media with ease.

(iv) *The consequence of them having seen it.*

30. There is no evidence of there having been any particular consequences arising from the appellant's actions. That was not necessarily the situation in <u>Bonehill-Paine</u>, where some people did attend the event that the appellant sought to promote.

31. What can be said on the appellant's behalf is that he did at least plead guilty although remorse would appear to be wholly absent. He does not have prior convictions of a like nature, as was the situation in respect of the appellant <u>Bonehill-Paine</u> whose offending merited 3 years 4 months.

32. As to the other matters raised on behalf of the appellant, we consider that the Recorder was entitled to assess the charges in the context of the general Twitter traffic that the police investigation revealed and for which the appellant admitted being responsible. Whilst there was delay between interview and the commencement of proceedings, it was not such as merited any significant reduction in sentence. These cases are complex, and the police had to undertake a detailed investigation. Further, the fact that the appellant was unrepresented was a situation entirely of his own choosing and had he wished to be so then he could and would have had legal representation.

33. We have, however, concluded that the length of sentence after a trial that the Recorder identified as being appropriate was simply too long. Appalling though the tweets were, such a sentence is out of line with the cases to which we have referred. Although not guideline cases, and of course each case has to be considered on its own facts, they do give some assistance in respect of offences of this nature. This appellant is unsophisticated and whilst he has a significant record for offending it is for matters of a very different nature. We note in particular the assessment of the probation officer that the appellant is a social recluse leading what is described as a lonely fantasy life via social media. Whilst his outpourings on Twitter are properly to be condemned as utterly reprehensible, the sentence passed by the Recorder is simply too long when examined in the context of the other cases to which we have referred.

34. In our judgment after a trial this offending would have merited a sentence of 4 years. The appellant was entitled to maximum credit for plea and that produces a sentence to 2 years 8 months. Accordingly, the sentences imposed were manifestly excessive and this appeal must be allowed. The sentences of 4 years are quashed and in their place we will substitute ones of 2 years and 8 months on each count concurrent.

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

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: Rcj@epiqglobal.co.uk