IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (DIVISIONAL COURT)

No. CO/5022/2019

[2020] EWHC 3004 (Admin)

Royal Courts of Justice

Thursday, 29 October 2020

Before:

THE HONOURABLE LADY JUSTICE CARR DBE
THE HONOURABLE MR JUSTICE JEREMY BAKER

B E T W E E N :

THE QUEEN
(ON THE APPLICATION OF
PAUL BUSSETTI)

Claimant/Respondent

- and -

DIRECTOR OF PUBLIC PROSECUTIONS Defendant/Appellant

MR J. McGUINNESS QC (instructed by the Crown Prosecution Service) appeared on behalf of the Appellant.

MR M. SUMMERS QC and MS A. DAVIES (instructed by Lound Mulrenan Jefferies Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

(Transcribed without the benefit of documentation)

LADY JUSTICE CARR:

Introduction

1 On 14 June 2017, a fire broke out in the 24-storey Grenfell Tower block of flats in North Kensington, London. Tragically, 72 people died and more than 70 others were injured.

2 At a party on 3 November 2018, a cardboard effigy of a tower - with "Grenfell Tower" written at the top and with cut-out characters appearing in the windows - was burned on a bonfire. The Respondent, Paul Bussetti, was present at the party and made a video recording on his mobile telephone. He sent that recording to two groups on WhatsApp.

3 By 5 November 2018, a video recording of the burning of the effigy was being shared on social media. Those present in the video recording began to be identified by members of the public and press. In the late evening of 5 November 2018, the Respondent, along with others, attended Croydon Police Station and identified himself as potentially associated with the video recording. The video recording sent by the Respondent to WhatsApp was, itself, not recoverable by the police since it had by then been deleted from the Respondent's telephone.

4 The Respondent was charged with an offence under s.127(1) of the Communications Act 2003, which provides, so far as relevant:

> "(1)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 …"

5 The *actus reus* of this offence consists of three elements: namely, sending a message of the described character by the defined means. The relevant *mens rea* is that the Respondent intended his message to be grossly offensive to those to whom it related or that he was aware that at the time of sending that it might be taken to be so by a reasonable member of the public who read or saw it (see *DPP v Kingsley Smith* [2017] EWHC 359 (Admin.) at para.28(2) and (7)).

6 The Respondent stood trial at the City of Westminster Magistrates' Court before the Chief Magistrate of England and Wales (Senior District Judge Emma Arbuthnot) ("the Chief Magistrate"). On 29 July and 22 August 2019, at the conclusion of the trial, she acquitted the Respondent.

7 The Director of Public Prosecutions ("the DPP") seeks to appeal that decision by way of Case Stated, pursuant to s.111 of the Magistrates' Court Act 1980, on the single ground that that acquittal was wrong in law.

8 Following submissions on both sides, the Chief Magistrate finalised a Case Stated for the opinion of this court, dated 29 October 2019 ("the Case Stated") as follows:

> "1. Did the court err in law in acquitting on the basis that the prosecution could not prove that the video produced in evidence at the trial was that which had been sent as a message by the defendant, given that it was not in issue he had sent, by means of a public electronic communications network,

a message containing a video taken at the same event to that produced in evidence? ('Question 1')

2. Did the court err in deciding that, without seeing the video taken by the defendant, it could not be sure that it was, in fact, similar in content to the video shown and subsequently uploaded on to YouTube by a person unknown? ('Question 2')

3. In all the circumstances, was I required to consider whether the content contained in a video I could not be sure I had seen was grossly offensive to members of the public or victims in the Grenfell tragedy? ('Question 3')"

9 The DPP, appearing by Mr McGuinness QC today, does not pursue Question 1, which can, accordingly, be deleted from the Case Stated, but he does pursue Questions 2 and 3. To this end, the DPP applies to amend the Case Stated by reference to six categories of proposed amendments, which I address individually below. The application is supported by a witness statement, dated 31 January 2020, from Philip Stott, prosecution counsel appearing at the trial below.

10 The application to amend focuses, mainly, though not exclusively, on Question 2: it is said that the Chief Magistrate could not reasonably have acquitted on the basis that the video recording taken by the Respondent and later sent as a WhatsApp message to a closed group of friends was not similar in content to the video of the burning effigy recovered via YouTube.

11 I emphasise that this is only an application to amend. The substantive merits of the appeal are not before the court for present purposes. Nothing that I say in this short judgment should be seen as expressing any view on those merits. I record that it is submitted for the Respondent, that there is nothing "remotely irrational" about the Chief Magistrate's decision.

The relevant facts in summary

12 Mr Stott explains why and how the trial proceeded on the basis that the Respondent had sent the video recording that reached YouTube. Whilst the Respondent had deleted the video recording that he had taken on his mobile telephone, he had stated in police interview, three days after the bonfire party and when shown the video recording from YouTube that he "believed" that it was his. He subsequently made a formal admission that he had taken the video recording found on YouTube on his mobile telephone and that he had subsequently sent it to two WhatsApp groups. He could not be seen in the video recording, itself suggesting that he was the one filming.

13 The prosecution evidence at trial was, effectively, unchallenged. The Respondent gave evidence, not denying presence or taking the video recording of the burning of the effigy; rather he stated that the figures on the effigy were not designed to represent those who had died in the Grenfell Tower fire but were members of his friendship group, many of whom were present at the party. A defence witness, Clifford Smith, was called and gave evidence to similar effect. This line of evidence had not been foreshadowed at any stage prior to the Respondent giving evidence.

14 After the defence case had closed, defence counsel asked Mr Stott, for the first time, to provide a record of Mr Smith's police interview. Mr Stott duly did so. Mr Stott then, of his own volition, reviewed the notes of the interviews of others who had attended the police station. Having done so (during the course of the defence closing speech) he properly

disclosed them, on the basis that some, but not all of them, might provide some support for the account put forward by the Respondent and Mr Smith.

15 Following that disclosure, additional facts were agreed and, with the leave of the court, put into evidence, including that another male, Peter Hancock, had filmed the burning of the effigy as well, and had put it on a WhatsApp group.

16 There followed further argument in the light of this disclosure, the defence arguing that there was no evidence that the Respondent had sent the relevant video recording - i.e. the one that was shown on YouTube - since Mr Hancock had, himself, admitted filming and sending a video recording to Whatsapp as well.

The Chief Magistrate's ruling

17 The relevant parts of the Chief Magistrate's ruling are as follows:

> "1. As in all criminal cases, the burden of proving the case is on the Crown and it is a high one. Before I could convict, I would have to be sure of the defendant's guilt.
>
> 2. Putting this sort of video on the internet, even in a private WhatsApp group, could in certain circumstances constitute an offence under s.127 of Communications Act 2003, but in this case the Crown have not discharged the burden upon them.
>
> 3. I cannot be sure that the video relied on by the Crown is the one taken by the defendant; i.e. the message sent by the defendant is the one that has been played to me. I cannot be sure that the cut-out images on the Tower were not the defendant and his friends, burnt in a bonfire joke of colossal bad taste.
>
> 4. The truly-offensive racist remarks and images sent by the defendant to others on a very regular basis cannot fill the holes in the Crown's case, as abhorrent as they are and as much as they show the sort of person the defendant is.
>
> 5. I find, therefore, that the elements of the case are not proved beyond reasonable doubt and I acquit the defendant."

The final Case Stated

18 Given the nature of this application, the final Case Stated should be attached as an appendix to this judgment.

The relevant Criminal Procedure Rules and power to amend

19 The procedure for applying to a Magistrates' Court to have a Case Stated for the opinion of the High Court is set out in the Criminal Procedure Rules CPR 35.3. CPR 35.3(4) provides materially:

> "The draft case must …
>
> (c) include a succinct summary of: …

(ii) the court's relevant findings of fact, and

(iii) the relevant contentions of the parties;

(d) if a question is whether there was sufficient evidence on which the court could reasonably reach a finding of fact --

(i) specify that finding, and

(ii) include a summary of the evidence on which the court reached that finding.

(5) Except to the extent that paragraph 4(d) requires, the draft case must not include an account of the evidence received by the court …; …

(8) A Case Stated for the opinion of the High Court must --

(a) comply with paragraphs (4) and (5) …"

20 Under s.28(a) of the Senior Courts Act 1981, where a case is stated for the opinion of the High Court by a Magistrates' Court, under s.111 of the Magistrates' Court Act 1980:

> "The High Court may, if it thinks fit, cause the case to be sent back for amendment and, where it does so, the case shall be amended accordingly."

Analysis

21 Before turning to each individual proposed amendment, it is convenient to set out the relevant general principles. An appeal by way of Case Stated, under s.111 of the Magistrates' Court Act 1980, is not a *de novo* factual appeal. The question is whether or not the decision was "wrong in law or in excess of jurisdiction". A Case Stated should be succinct and drafted as simply as possible and directed to the crucial issues upon which the case turns. The court is concerned only with the state of the evidence, insofar as it is said that the findings of fact made by the court below demonstrate an error of law or jurisdiction (see *Oladimeji v. DPP* [2006] EWHC 1199 at para.3 and *Tuthill v. DPP* [2011] EWHC 3760 (Admin) at para.20). Where a document forms a material part of the Case Stated, either the original or a copy should be appended (see *Gaimster v. Marlow* (1983) 78 Cr App R 156 at 161; 1984 QB 218 at 224(f) to (g)).

22 An appeal by way of Case Stated is freestanding and depends only on the facts found by the lower court. Thus, and importantly for present purposes, the parties are bound by the facts set out in the case and it is not permissible to refer to material at the Case Stated hearing which does not appear in the Case Stated itself. The court will not go behind the Case Stated (see *DSG Retail Ltd v. Stockton on Tees Borough Council* [2006] EWHC 3138 (Admin) at para.21; [2007] ACD 38 and *Wealden v. CPS* [2019] EWHC 249 (Admin) at paras.5 and 45) In *Skipaway Ltd v. The Environment Agency* [2006] EWHC 983 (Admin), the court stated:

> "14. … There is a surprisingly common misconception that once an appeal by way of Case Stated is before the court, the parties may refer to evidence, or at least undisputed evidence, that was before the lower court in addition to that set out in the case …

> 15. On an appeal by way of Case Stated, the Court is confined to the facts set out in the case. It is therefore important that the parties ensure that the Case Stated includes all those matters that should be before the Court when deciding the issues raised on the appeal. If a party to an appeal considers that the case produced by the lower court omits relevant matters, he should seek to have the case supplemented either by agreement with the other party and the lower court or by application to this Court under section 28(A)(2) of the Supreme Court Act 1981 for an order for the amendment of the Case Stated …"

23 All this highlights the need to ensure, if necessary by an application to amend, such as the present, that the Case Stated is adequate for the purpose of allowing a fair resolution of the issues on appeal.

24 The context for consideration of the individual proposed amendments is the central question raised under Question 2, namely, whether or not there was a sufficient evidential basis for the Chief Magistrate's conclusion that she could not be sure that the video recording taken by the Respondent was similar in content to the video recording uploaded and broadcast through YouTube.

Amendment (i): to set out a summary of the relevant evidence from which the factual conclusion was that, without seeing the video taken by the respondent, the Chief Magistrate could not be sure that it was, in fact, similar in content to the video shown and, subsequently, uploaded on You Tube by a person unknown, together with reasons for the conclusion.

25 The DPP contends that, in order for him to be able to put his case fairly and properly on the appeal, the Case Stated needs to set out a summary of the relevant evidence from which the factual conclusion identified above was reached, together with the reasons for it. Despite representations from the DPP that she should, the Chief Magistrate chose not to. Question 2 was squarely and fairly a factual one in issue. The Case Stated, itself, makes no reference in its body to the phrase "similar content at any stage".

26 The Respondent suggests that the Chief Magistrate has already done this exercise in the Case Stated, referring to paras.2, 9 and 21. Mr Summers QC, for the Respondent, submits that para.9 of the Case Stated captures the material features on the basis of which the case against the respondent was allowed to proceed beyond the halfway stage. When referring to the absence of any other evidence in para.21 of the Case Stated, the Chief Magistrate was making that finding, obviously, because there simply was no other evidence relevant to those material features. She made no reference to any additional evidence because she rejected it. It would be academic, submits Mr Summers, for the Case Stated to be remitted for amendment, as suggested by the DPP.

27 I consider that the Case Stated in its current form does not summarise the evidence which formed the basis of the Chief Magistrate's factual conclusion that, without seeing the video recording taken by the Respondent, she could not be sure that it was, in fact, similar in content to the video recording shown and, subsequently, uploaded on to YouTube. Paragraph 2 simply records an outline of the contents of the video recording recovered from YouTube and then only in the briefest of terms. Paragraph 9 simply records the Chief Magistrate's ruling, at the conclusion of the prosecution case, not to dismiss the case at that stage. The prosecution case, however, on the question of whether or not the material was grossly offensive, is, in my

judgment, not limited to those material features summarised in para.9 of the Case Stated; the prosecution would not be limited in its submissions on that question at the conclusion of trial.

28 I consider, therefore, the case needs to be amended to summarise the evidence which formed the basis of the Chief Magistrate's conclusion in this regard and her reasons for it. The simple point is that this court does not yet know the basis for her statement in para.21 of the Case Stated that there simply was no other evidence. In light of the admissions, the interview given by the Respondent and the evidence that he gave at trial, these are matters which would benefit from clarification.

29 This approach to the first proposed amendment is one that informs, necessarily, the outcome on amendments proposed as numbers (ii), (iii) and (v).

Amendment (ii): to set out a summary of or attach as an appendix the admissions and agreed summary of the respondent's interview under caution both of which were in evidence at trial.

30 The DPP points out that much of the evidence was agreed, including the production of the video recording from YouTube and a summary of the Respondent's interview under caution. Whilst the further admissions are incorporated in the Case Stated, the full original admissions are not, including the admission by the Respondent that he had taken the video recording on his mobile telephone, as exhibited. The original admissions are relied upon in support of the DPP's case that the Chief Magistrate's finding was perverse.

31 Again, in response to this proposed amendment, the Respondent submits that none of the items relied upon by the DPP go to the material features identified in the Case Stated at para.9. These items of evidence, it is suggested, are simply "irrelevant and worthless".

32 It seems to me that there can be no question but that the relevant admissions that were in evidence, together with the agreed summary of the Respondent's interview under caution three days after the bonfire party, must be incorporated in the Case Stated for consideration by this court when hearing the appeal. The DPP's case could not fairly or properly be considered without them. The Respondent agreed that he took a video recording of the burning of the effigy. He stated in interview that he believed that the video recording from YouTube that he was shown was his. At a time when he was fully represented, he formally accepted sending the video recording to WhatsApp. This was so, despite it being obvious that others were using their telephones to record or photograph the incident as well. He did not take a different stance in the witness box.

33 These matters are the basis of the DPP's contention that it was not open to the Chief Magistrate to find that she could not be sure that his video recording, even if not the actual recording on YouTube, was, if not identical, then materially similar.

34 The Respondent's response is to suggest that the Chief Magistrate permitted the Respondent, "of her own volition", to withdraw the admissions. It was clear to her, it is said, that it had never crossed the Respondent's mind to question whether the video recording shown on YouTube was, in fact, his. The Respondent made a written submission to the Chief Magistrate reminding her of her comment to this effect during the course of the hearing. The suggestion is made that this was because the police/prosecution had falsely (even dishonestly) told the Respondent that the video recording on YouTube was the only one taken on the day (as opposed to the only one recovered from the publicly-available internet). The Respondent says that, if the

Chief Magistrate were asked to include these matters, she will simply say that she had disregarded this evidence as lacking any probative value.

35 The problem for this position, for present purposes, is that nowhere does the Chief Magistrate say that this is what she did or how she approached the matter. There certainly is no record of any application to withdraw the admissions or the Respondent's answers in interview, nor any ruling to that effect. Mr Stott states that he would have objected to any such course of action: the Respondent's admission in interview under caution was freely made. A formal admission was made at a time when he was legally represented. It was obvious from the video recording on YouTube, itself, that others had taken photographs or videos of the event on their own telephones. The Respondent had, himself, identified many others on the video recording on YouTube but not himself.

36 Mr McGuinness fortifies his submissions in this regard by stating that there was also no application to admit late evidence made on behalf of the Respondent or to go outside the confines of the two-page summary of what was, I am told, a 60-page record of the Respondent's interview under caution.

37 If the Chief Magistrate proceeded as the Respondent suggests, then she needs to say so, and with reasons. If she did not, again, that can be confirmed. On either basis, the admissions and summary of the Respondent's interview should be summarised in the body of the case or appended as an attachment.

Amendment (iii): to set out a summary of the evidence of the Respondent as to the video he had taken and its contents.

38 For the same reasons, essentially, as on Amendment (ii), I consider that a summary of the Respondent's evidence as to the video recording should be included in the Case Stated. The DPP's case relied, in particular, on the fact that the Respondent did not dispute that the video recording that he had taken and sent via WhatsApp was either that adduced in evidence or similar in content.

Amendment (iv): to set out a summary of the relevant contentions of the parties on the factual issue raised in Question 2.

39 Quite properly, Mr Summers does not object to this proposed amendment. CPR 35.3(4)(c)(iii) requires such a summary. It is missing. The DPP's contentions are summarised conveniently in para.22 of Mr Stott's witness statement.

Amendment (v): to append a copy of the YouTube video.

40 The DPP submits that it is difficult to see how this court could effectively determine Questions 2 and 3 without considering the contents of the video recording. The Case Stated states that the audio sound on the video recording on You Tube is of poor quality (see paras.2 and 9). The DPP relies on over a dozen examples of oral remarks, which he says can be heard on the video recording. Mr McGuinness also made submissions to the effect that, down the line, conditional upon this court's findings in due course, the contents of the video might be relevant to the question of whether or not the material was grossly offensive.

41 The Respondent objects to this course of action, submitting that the video recording should not be before this court. It is only relevant to the question of whether or not the video recording was grossly offensive, something which it is not for this court to assess. At root, the material is not relevant for this court.

42 I agree that the video recording, which my Lord, Mr Justice Jeremy Baker, and I have viewed *de bene esse*, should be appended. It is relevant on the DPP's case to both Questions 2 and 3, but, at the very least, in my view, to Question 2. It seems to me that this is just the sort of territory visited by Sweeney J in *DPP v. Smith* [2017] EWHC 359 (Admin) where, in the context of an appeal, by way of Case Stated, against an acquittal of a defendant of an offence under s.127 of the 2003 Act, he said this at para.7:

> "In basic accordance with Rule 35.3-(4)(d) of the Criminal Procedure Rules, the Case Stated sets out the findings of fact that are in issue and a summary of the evidence on which the District Judge reached those findings (including summaries of the parts of the four videos that were shown to him, and which give something of their flavour). However, in a case such as this where films are involved and context is important to the validity or otherwise of the decision being appealed, that was plainly insufficient. The footage that the District Judge was shown should have been appended, in viewable form, to the Case Stated so as to enable this court to fully understand the evidence as to the context … This must be borne in mind in any future case of this type."

43 I am not persuaded that context and, indeed, full content are not important to the validity of the decision under scrutiny. One reason given in the Chief Magistrate's finding, that she could not be sure that the video recording taken by the Respondent was not similar to that shown on YouTube, was that there was more than one video of the incident; something which was not known to the Respondent. The DPP argues that it is clear from watching the video recording that other recordings might exist. Thus, the DPP relies on the video recording to seek to demonstrate the unreasonableness of the Chief Magistrate's finding in Question 2.

<u>Amendment (vi)</u>: to correct or clarify the statement in para.7 of the Case Stated that the case for the prosecution rested upon the contention that there only existed one video of the bonfire.

44 The DPP says that para.7 of the Case Stated contains an error reflecting a redraft proposed to the Chief Magistrate by the Respondent. It is, says the DPP, unsupported by any evidence or concession and overlooks the evidence that the video recording includes images of others present holding up mobile telephones in a manner consistent with recording the burning of the effigy. The Respondent says, to the contrary, that para.7 is entirely clear. It was indeed the logic that, because there was only one such video in the public domain, it must have been that of the Respondent. The Respondent submits that, read in context, what the court was saying was that, by omission, it had been misled into believing that there was only one video known to exist in the public domain and that, therefore, it must have been that of the Respondent.

45 In my judgment, clarification can usefully be sought. It will be a matter for the Chief Magistrate how she wishes to address the request for clarification or correction, if at all, in the context of the other matters which will be raised before her and in the context, in particular, of the reasons and the manner in which the evidence is addressed in support of her rejection of the evidence the subject of Amendments (ii), (iii) and (v).

46 I, therefore, consider it fit to cause the Case Stated to be sent back for amendment, accordingly. This is not to turn the appeal into a *de novo* factual hearing, but, rather, to arm the court on the next occasion with the necessary material fairly and properly to dispose of the issues raised

MR JUSTICE JEREMY BAKER:

47 I agree, and would only add that, whereas the Chief Magistrate may have been entitled to reach the conclusions which she did in this case, without the inclusion of the evidence set out in the proposed amendments (ii) (iii) and (v), together with the court's findings of fact arising therefrom which are relevant to her conclusion, this was insufficient for her to be satisfied, so that she was sure, that the video recording which the Respondent admitted having taken was similar in content to the video recording relied upon by the DPP. The court which ultimately determines this appeal is likely to be insufficiently equipped to do so, particularly bearing in mind the evidential issues, which appear to be in contention between the parties, as set out in the written response to this application on behalf of the Respondent dated 6 January 2020 and the witness statement of Philip Stott, dated 31 January 2020.

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

DIRECTOR OF PUBLIC PROSECUTIONS

(Appellant)

And

PAUL BUSSETTI

(Respondent)

Case stated by Senior District Judge (Chief Magistrate) Emma Arbuthnot in respect of her adjudication as a Magistrates' Court sitting at Westminster Magistrates' Court on 22nd August 2019.

CASE

I am asked to state a case by the Director of Public Prosecutions who is aggrieved by my decision to acquit Paul Bussetti on 22nd August 2019.

1. I attach below the short judgment I provided on 22nd August 2019 acquitting the defendant Paul Bussetti of one offence contrary to section 127 of the Communications Act 2003. This offence was said to have been committed by the defendant sending a video via WhatsApp on a group chat to a closed group of his friends.

2. The video I was shown depicted a cardboard model of a tower, with Grenfell written at the top and with about six cut-out characters in the windows. The film showed the model was being burnt on a bonfire at a bonfire night party with a number of people present. The video also contained audio sound of poor quality.

3. The video I was shown had been recovered by the police from the internet: YouTube (not WhatsApp). The police were unable to identify the person who had posted the video to YouTube.

4. I had already dismissed a charge that the defendant had uploaded that video onto YouTube, after refusing an application to amend this charge out of time. There was, and the prosecution conceded before me that there was, no evidence that Mr Bussetti had uploaded any video onto YouTube.

5. The defendant admitted being present at the bonfire on 3rd November 2018 and filming the activities and sending a video to WhatsApp

6. The video sent by the defendant to the WhatsApp group was however never recovered. Whilst the defendant and a number of other members of the WhatsApp group voluntarily attended their local police station and surrendered their telephones, no copies of the video were recoverable from their telephones. All that could be recovered was evidence that the defendant had sent *a* video to the group.

7. The prosecution case before me therefore rested upon the contention that that (missing WhatsApp) video *must* have been the one recovered from YouTube (and presumably

uploaded to YouTube by some unknown member of the WhatsApp group), because there was *only* one video of the bonfire that existed.

8. That logic appeared to be sound and it was therefore assumed throughout the trial until just before I retired to consider my verdict that the video shown to the court taken from YouTube was the one taken by Mr Bussetti.

9. Applying the test in **R v Galbraith [1981] 1 WLR 1039**, I found that there was a case to answer in respect of the content of the YouTube video after hearing the prosecution evidence. There was no transcript provided by the Crown and the sound was of poor quality. But I found at that stage that what I could discern from the video I had been shown and that purportedly had been made by the defendant was *prima facie* grossly offensive. This was because (i) the video was of a burning model of the Grenfell tower, showing six cut-out figures which the prosecution maintained depicted Grenfell residents, including one figure in a hijab, and (ii) the burning of the model was accompanied on the audio recorded by the YouTube video by at least one comment which had racial overtones, namely reference to the figure wearing a hijab as a "little ninja".

10. I then heard the defence case.

11. The defendant gave evidence. He said that the cut-out figures at the window of the model were in fact depictions of friends of his, including some people present at the bonfire. They were, according to his evidence, and contrary to the Crown's case, the intended targets of the "joke". Each figure was of a different friend. The defendant provided photographs and descriptions of his friends to show how they matched the cut-out figures. The defendant also provided evidence which pre-dated the bonfire and which corroborated the use of the nicknames in question. For example one figure was said by the defence to be a depiction of a ghost, referring to a friend shown to me to be commonly referred to as "ghost" due to his pale complexion. Another figure was a drawing of a gerbil, referring to another friend known as "Gerb". The defence case was that figure alleged by the prosecution to be woman in a hijab, and the "ninja" comment heard, referred to another friend, who has a history of martial arts. The defence case was that the correspondence between the figures and the specific nicknames shown to be used for those present at the bonfire could not be coincidental. Mr Bussetti was heavily cross-examined on that factual assertion. It was suggested to him that he was lying.

12. The defendant called a witness, Clifford Smith, to confirm his evidence that the cut-out figures depicted various friends, including Mr Smith himself ("ghost"). Mr Smith was forcefully cross-examined as being untruthful. It was specifically suggested to Mr Smith that he had never mentioned this when interviewed by the police. It was even suggested to him that he had concocted the "figures in the window story" in connivance with Mr Bussetti's lawyers.

13. After the conclusion of Mr Smith's evidence, and in view of the content of his cross-examination, the defence requested a copy of Mr Smith's police interview summary, not previously disclosed. The interview summary which emerged demonstrated that Mr Smith had been cross-examined on an erroneous basis. The summary confirmed that he had said, when questioned by the police, that the figures were meant to represent those at the bonfire.

14. Being unable to recall him to correct the position, I took cognisance of Mr Smith's interview and the trial continued to speeches (the prosecution having also stated that other documents had been reviewed and there was no further disclosure to be made).

15. In light of the defence evidence regarding the identity of cut-out figures, at paragraph 3 of my brief judgment I specifically addressed the issue of whether in relation to the cut-out images only, the video was grossly offensive. I found that I could not be sure that the images on the tower were not the defendant and his friends, burnt in a bonfire joke of colossal bad taste, as stated by the defence.

16. My consideration of whether the video was in any event grossly offensive to any person or persons, or (if so) whether on the evidence I heard the defendant intended (or was reckless as to the causing of) gross offence, became unnecessary due to the events outlined below.

17. Just before I retired to consider my decision, at the end of the evidence and after speeches, the court was informed by Mr Stott for the prosecution, that the prosecution considered, having heard the defence closing speech, that (contrary to what it had informed me previously) other interview summaries hitherto undisclosed to the defence should be disclosed. The summaries disclosed included those of (i) Mr Steve Bull, who had made the model of the tower and who had likewise stated that the figures were supposed to be his friends, and (ii) Mr Paul Hancock, who stated that he too had made a video of the incident and had also sent it to a WhatsApp group.

18. Neither the court nor the defendant were previously aware of any second video.

19. The following further admissions were placed before me:

    1. Peter Hancock attended Croydon Police Station on 9 November 2018 and was interviewed. He stated inter alia that he had filmed the burning of the Grenfell Tower effigy and then 'I put it on the darts group, which is mark Russell and some friends. The next day I felt a bit bad and my brother said it was kicking off so I panicked and deleted it' and also said 'They said it was supposed to be figures of cliff and all that but I don't know.'

    2. Steven Bull attended Croydon Police Station on 6 November 2018 and was interviewed. He said in relation to the effigy in the video, inter alia, 'I made it on Sat in the day, by myself' and 'There was a guy with big ears and nose that was meant to be me'.

    3. In Clifford Smith's interview at the same time he claimed the images of these people were meant to be of friends of his.

20. In light of further admission one, the prosecution conceded that they could not prove whether the video uploaded to YouTube and shown to the court was in fact the video taken by Mr Bussetti (as opposed to this second video taken by Mr Hancock). As stated above, the prosecution case had been throughout the trial that the video taken from YouTube and played to the court was the one sent by Mr Bussetti to the WhatsApp group.

21. The prosecution conceded they could not prove which video had been shown to the court, the one taken by Mr Bussetti or by Mr Hancock. There was no other evidence before me. As I record at paragraph 3 of my judgment, I could not be sure that the video shown to me was the one sent by Mr Bussetti. It followed I could not be sure what the video taken by Mr Bussetti had in fact showed, whether it encapsulated the whole incident taking place at the bonfire, none of it, part of it, whether it had audio and if so what could be heard and whether it showed the effigy or the bonfire or anything grossly offensive to any person.

22. The prosecution did not then apply for an adjournment to remedy any deficiency in the prosecution evidence as they are able to do in line with authorities such as **Narinder Malcolm v DPP [2007] EWHC 363 (Admin).**

23. In light of this I would rephrase the questions drafted in this appeal to these:

    1. Did the court err in law in acquitting on the basis that the prosecution could not prove that the video produced in evidence at the trial was that which had been sent as a message by the defendant, given that it was not in issue he had sent by means of a public electronic communications network a message containing a video taken at the same event to that produced in evidence?

    2. Did the court err in deciding that without seeing the video taken by the defendant it could not be sure that it was in fact similar in content to the video shown and subsequently uploaded onto YouTube by a person unknown?

    3. In all the circumstances was I required to consider whether the content contained in a video I could not be sure I had seen was grossly offensive to members of the public or victims of the Grenfell tragedy?

Senior District Judge (Chief Magistrate) Emma Arbuthnot

29th October 2019

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.