Case No: T20207137

IN THE CROWN COURT
AT THE CENTRAL CRIMINAL COURT

Handed down remotely on the date opposite:

Date: 08/07/2020

Before:

MR JUSTICE WARBY

- -

Between:

The Queen
- v -
Nigel Wright

- -
- -

Julian Christopher QC and Teresa Hay (instructed by **Crown Prosecution Service**) for the **Prosecution**
John McNally (instructed by **Ringrose Law LLP**) for the **Defendant**
William Bennett QC and Gervase de Wilde (instructed by **Slateford Limited**) for the **Complainant**

Hearing date: 2 July 2020

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RULING ON COUNT 5

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and copies of this version as handed down may be treated as authentic.

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MR JUSTICE WARBY

Mr Justice Warby:

1. The defendant faces three counts of blackmail, contrary to s 21(1) of the Theft Act 1968 (counts 1 to 3), and two of contaminating goods, contrary to s 38(1) of the Public Order Act 1986 (counts 4 and 5). All five charges relate to statements made to, and acts he is alleged to have carried out in respect of, one of the major national supermarket chains ("the Complainant").

2. At the Plea and Trial Preparation Hearing on 13 May 2020, the defendant was arraigned on counts 1 to 4. He pleaded not guilty to each. He was not arraigned on count 5, pending an application to dismiss. At the Pre-Trial Review on 2 July 2020, Mr McNally advanced that application. Having heard him and Mr Christopher QC for the prosecution I refused the application, for reasons to be given later in writing. The defendant was arraigned on count 5 and pleaded not guilty. These are my reasons for allowing count 5 to proceed.

The case in outline

3. Key features of the prosecution case, as set out in a Case Summary for the purposes of the PTPH, are as follows:

   (1) Between May 2018 and February 2020 the Complainant was the subject of a blackmail campaign conducted in the name of "Guy Brush" by letters sent by post to many different branches, and by emails from **guybrush911@protonmail.com**, claiming that contaminated food had been placed on the shelves of numerous stores, the details of which would only be provided upon payment of bitcoin, and that if payment were not made such activities would continue.

   (2) Initially the contamination was said to take the form of salmonella injected into cans; latterly sharp pieces of metal inserted into jars of baby food. The money demanded began as 100 bitcoin, and rose to 200 bitcoin (worth approximately £1.4m in February 2020).

   (3) In November and/or December 2019 two customers, shopping in two of the Complainant's stores, bought jars of baby food in which they later discovered small sharp pieces of metal as they were in the process of feeding the contents of the jars to their children, both under a year old. One of the stores was in England, in Rochdale. The other was in Scotland, in Lockerbie.

   (4) The Complainant had notified the police when the first letter was received. Undercover work culminated in the transfer by undercover officers of a total of 13.9 bitcoin into two different cryptocurrency wallets, all of which was subsequently under the control of the defendant.

   (5) The defendant is alleged to have been the person who made the threats, and who carried them out by contamination of the jars of baby food that were bought by the customers. At the material times he was living with his wife and their two children in a caravan on farmland at Market Rasen, Lincolnshire, where they keep 120 sheep.

4. There is as yet no defence statement. One is due to be served on 9 July 2020, pursuant to a direction I gave at the PTR. No criticism can be made of the defence, as the

pandemic has made it extremely difficult for the defendant and his legal team to meet. They have had two 1-hour consultations since his arrest. I do however have an informal document submitted by Mr McNally for the PTPH which helpfully indicates the general nature of the case that, on the instructions he then had, he considered was likely to be advanced.

(1) The defendant will not dispute producing or sending the letters relied on by the prosecution. His defence to the counts of blackmail will essentially be that of duress.

(2) It will be denied that he is guilty of an offence relating to Rochdale. He did not place any such items or play any part in such conduct (assuming it happened as alleged).

(3) It will be denied that he is guilty of contaminating the goods relating to Lockerbie, and in any event the court has no jurisdiction to try such a charge.

Count 5

5. Count 5 is intended to reflect the allegations in relation to Lockerbie. It is in these terms:-

> "**STATEMENT OF OFFENCE**
>
> CONTAMINATING GOODS, contrary to section 38(1) of the Public Order Act 1986.
>
> **PARTICULARS OF OFFENCE**
>
> NIGEL WRIGHT on or before the 29th day of November 2019 with intent to cause public alarm or anxiety or injury to members of the public consuming or using the goods or economic loss to any person by reason of the goods being shunned by members of the public or economic loss to any person by reason of steps taken to avoid any public alarm or anxiety, injury or loss, contaminated or interfered with goods. [Lockerbie]"

6. The prosecution case is that on 29th November 2019 the Defendant placed a jar of Heinz Sweet and Sour Chicken flavour baby food which had been contaminated with two pieces of sharp metal on a shelf in a store in Lockerbie. The jar was bought by the witness Morven Smith, who discovered the pieces of metal when feeding the food to her son on 13th December 2019. In interview, the defendant admitted placing the jar in the store. It is however accepted that the placing of the jar in the store did not constitute an offence under s 38(1) because it took place in Scotland. In interview, the defendant denied contaminating the jar himself. The allegation which Count 5 is meant to encapsulate is that it was he who contaminated the jar. The prosecution case is that he did that within England and Wales, in all probability at his home address.

Public Order Act 1986, s 38

7. Section 38 provides as follows:

"*Contamination of or interference with goods with intention of causing public alarm or anxiety, etc.*

38.—(1) It is an offence for a person, with the intention—

(a) of causing public alarm or anxiety, or

(b) of causing injury to members of the public consuming or using the goods, or

(c) of causing economic loss to any person by reason of the goods being shunned by members of the public, or

(d) of causing economic loss to any person by reason of steps taken to avoid any such alarm or anxiety, injury or loss,

to contaminate or interfere with goods, or make it appear that goods have been contaminated or interfered with, or to place goods which have been contaminated or interfered with, or which appear to have been contaminated or interfered with, in a place where goods of that description are consumed, used, sold or otherwise supplied.

(2) It is also an offence for a person, with any such intention as is mentioned in paragraph (a), (c) or (d) of subsection (1), to threaten that he or another will do, or to claim that he or another has done, any of the acts mentioned in that subsection.

(3) It is an offence for a person to be in possession of any of the following articles with a view to the commission of an offence under subsection (1)—

(a) materials to be used for contaminating or interfering with goods or making it appear that goods have been contaminated or interfered with, or

(b) goods which have been contaminated or interfered with, or which appear to have been contaminated or interfered with.

(4) A person guilty of an offence under this section is liable—

(a) on conviction on indictment to imprisonment for a term not exceeding 10 years or a fine or both, or

(b) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

(5) In this section "goods" includes substances whether natural or manufactured and whether or not incorporated in or mixed with other goods.

> (6) The reference in subsection (2) to a person claiming that certain acts have been committed does not include a person who in good faith reports or warns that such acts have been, or appear to have been, committed."

8. I have been referred to no authority on the interpretation or application of any of these provisions.

The application

9. In his skeleton argument, Mr McNally advanced four main propositions as to the true construction of s 38:

   (1) no offence was created for Scotland, and, in any event,

   (2) no claim for extra-territorial jurisdiction for an English Court or extra-territorial effect as it relates to that offence was made by Parliament, such that

   (3) the indictment (count 5) as drawn [Lockerbie] is not justiciable before this Court and should be quashed, and

   (4) in any event, properly construed the Act requires proof that contaminated goods are 'placed' within the jurisdiction. In this case, this element is lacking in fact and/or incorrectly pleaded and cannot be cured by amendment.

10. In support of these submissions, Mr McNally referred to the provisions about "extent" contained in s 42(2) of the 1986 Act. These identify some provisions of the Act which extend to Scotland. Section 38 is not one of those provisions. It is expressly excluded. However, in the light of the pleading of count 5, the prosecution's factual case, and the concession that this Court cannot try this defendant for placing contaminated goods on the shelf of a supermarket store in Scotland, the first two issues do not arise.

Issues

11. There are two issues for my decision. The first is the one raised by Mr McNally's fourth submission. He argues that s 38 creates an offence with three ingredients, reflected in (1) the "intention" clauses (subsections (a)-(d)); (2) the "means" clauses, which identify what must be done to goods, and (3) a "location" condition, as to the circumstances in which the goods must be placed. It is submitted that the location condition is "the mechanism whereby it is established that a public order offence is committed", and qualifies each of the "means" clauses which precede it.

12. The upshot is, says Mr McNally, that no offence of contamination is committed unless the contaminated goods are placed "in a place where goods of that description are consumed, used, sold or otherwise supplied", which is located within England and Wales. Count 5 is defective for failing to specify such a location. It is irremediable. The only possible amendment would be to add Lockerbie as the "place where goods are … sold", which would render the count unlawful on its face.

13. Mr McNally seeks to draw support for his construction of s 38(1) from the terms of s 38(3), which creates an offence of "simple possession" containing no location

condition. He submits that no offence under s 38(3) would be committed if the items were simply held (in England or Wales) with a view to their placement in Scotland.

14. The second issue is raised by a supplemental or secondary argument, advanced orally by Mr McNally at the PTR. This was to the effect that, even if the location condition does not govern all three of the ways in which the offence is committed, so that an offence can be committed by contaminating goods in a place in England or Wales which is not "a place where goods are … sold" etc, it is still necessary to look at the "intention" clauses, and to keep in mind that this is a public order offence. Construing s 38(1) in that light, he submits, the court should conclude that a charge of carrying out contamination in England with the intention of causing alarm or distress in Scotland is legally invalid and unsustainable.

Assessment

15. In my judgment, the answer to the first issue is clear. On the true construction of s 38(1) there are three ways in which an offence can be committed: by contaminating goods (or interfering with them); by making it appear that that has happened; and by placing contaminated goods in a place where such goods are sold, etc. The third version of the offence is only committed if the goods are placed "in a place [in England and Wales] at which goods of that description are consumed, used, sold or otherwise supplied". The prosecution are right to concede that placing contaminated goods on the Lockerbie store shelf could not amount to an offence in English law. The a*ctus reus* is performed outside the jurisdiction. But neither of the first two ways of committing the offence includes any "location condition" to do with the place where the goods are sold, etc. Count 5 alleges the first version of the offence. The *actus reus* of that version is "to contaminate or interfere with goods". Proof that the defendant did this somewhere in England and/or Wales would be sufficient.

16. This, to my mind, is the natural and ordinary construction of the words of s 38(1). It is the interpretation that struck me on a first reading. There are five good and sufficient additional reasons to support that conclusion:

(1) Punctuation. The placing of commas is important. The prosecution skeleton argument on this point is compelling. I can do no better than quote it:-

> "The Defence contention relies upon the comma immediately preceding "in a place where" as indicating that the location condition applies to each of the three methods of committing the offence. However, it is submitted that
>
> (i) the true function of this comma is to act in conjunction with the comma preceding it to delineate the phrase "or which appear to have been contaminated or interfered with"; and
>
> (ii) if the Defence contention were correct then the first of those two commas would have been omitted, so that this part of the subsection would have read
>
> > to contaminate or interfere with goods, or make it appear that goods have been contaminated or interfered with, or to place

> goods which have been contaminated or interfered with or which appear to have been contaminated or interfered with, in a place where goods of that description are consumed, used, sold or otherwise supplied."

(2) Drafting style. The form of s 38(1) is to list first of all the possible states of mind first, and then the acts which will amount to an offence if performed with such a state of mind. The "location condition" appears at the very end of the section. If the draftsman had intended the location condition to apply to all three versions of the offence, one would expect it to appear before the three methods were listed.

(3) Contextual words. The heading to the sub-section would have been "*Contamination of or interference with goods at place of sale …".* The construction I favour is supported by the words that in fact appear in the heading. It is also supported by the long title of the 1986 Act, which describes it as (among other things)

> "An Act to abolish the common law offences of riot, rout, unlawful assembly and affray and certain statutory offences relating to public order; to create new offences relating to public order; to control public processions and assemblies; to control the stirring up of racial hatred; to provide for the exclusion of certain offenders from sporting events; *to create a new offence relating to the contamination of or interference with goods* …"

(Emphasis added).

(4) A purposive assessment. The wording just cited indicates a Parliamentary intention to criminalise the contamination of goods. The defence contention would circumscribe that offence so that, even if the requisite *mens rea* is established, an offence is committed only if the contamination takes place in a place – such as a shop, pub or restaurant - where the goods are sold, etc. This would mean that, for example, no offence would be committed by a food production worker with a grudge who maliciously poisons food on the production line with intent to cause his employer economic loss. No explanation has been offered as to why Parliament might have intended to limit the offence in this way.

(5) Coherence. It is obvious that a number of people might participate in a course of conduct that culminated in the placing of contaminated goods on a supermarket shelf, or conduct which was intended to culminate in such an act. Although it is possible for goods to be contaminated on the shelf, it is inherently more likely that this would be done at home, or some other remote location. The contaminator might not be the person who places the goods, or an accessory to that act. On the defence interpretation, the act of contamination would not be an offence. The contaminator could only be guilty of an offence of possession, under s 38(3). Mr McNally has suggested no reason why Parliament should have wished to create a gap of this kind.

17. Mr Christopher relied on some passages from Hansard as a further and alternative basis for reaching the same conclusion, pursuant to the doctrine explained in *Pepper v. Hart* [1993] AC 593. In the circumstances, however, it is not necessary nor would it be appropriate for me to examine these materials. As Mr Christopher and Mr McNally agree, though for different reasons, the words of s 38(1) are not obscure or ambiguous.

Examination of Hansard would therefore be an unjustified intrusion into Parliamentary privilege.

18. As for Mr McNally's secondary argument, he conceded that this might raise issues for trial, but be insufficient to justify the dismissal of Count 5 at this stage. In my judgment, this was a proper concession. First, this is an important point of principle that should not be adjudicated upon without further legal argument. Secondly, although I shall not make a definitive ruling on these points, my provisional view is that, on the face of it, Parliament intended to criminalise an act of contamination carried out in this jurisdiction with any of the listed intentions, regardless of the location at which the defendant might intend that any alarm, anxiety, injury or loss should be sustained. I do not, at present, find the argument that the intended location of such events is an essential ingredient of the offence a persuasive one. The wording of the subsection does not seem to lend it any support. The argument from the "public order" nature of the offence is rather broad and unspecific. I do not think it enough to rely on the short title of the Act. As is clear from the long title cited above, it had a variety of purposes, not limited to public order.

19. In any event, as Mr Christopher pointed out, s 38(1) lists four different categories of intention. Proof of any one of these will suffice. The defence submission focussed on the intention of causing public alarm or anxiety (s 38(1)(a)). Count 5, on its face, relies on that sub-paragraph, but it also relies on s 38(1)(c) and (d). Even if it could be said that it is not an offence to contaminate goods with an intention to cause alarm or anxiety in Scotland, the Complainant is a company based in England and Wales, which is where any economic loss would be felt. The prosecution says that it will allege that the contamination here fell within s 38(1)(c), and that this is not a case in which the blackmailer could say that his activities were aimed exclusively at Scotland.

20. These matters may need to be revisited in the light of the evidence and any further arguments at trial. But I have not been persuaded that the factual allegations in support of Count 5 are incapable in law of amounting to an offence contrary to s 38(1).