Neutral Citation Number: [2025] CICA (Crim) 1

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

FROM THE GRAND COURT CRIMINAL DIVISION

CRIMINAL APPEAL 9/2021

Ind# 0070/2020

SC# 01868/2019

BETWEEN

SANDRA TERESA HILL

Appellant

AND

HIS MAJESTY THE KING

Respondent

Before:

The Rt Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon Sir Michael Birt, Justice of Appeal

Appearances: Mr Edward Fitzgerald CBE, KC and Ms Amelia Fosuhene of Brady Law for the Appellant
Ms Victoria Ailes instructed by the Office of the Director of Public Prosecution for the Respondent

Date of Hearing: 9 May 2025

Judgment Delivered: 29 May 2025

The President:

1. On 6 August 2020 Mrs Hill, to whom we grant leave to appeal against conviction, was convicted in the Grand Court following a judge-alone trial before Justice Roger Chapple (Acting). The Director of Public Prosecutions, for reasons which will become apparent, did not contest the appeal.

The conviction

2. Under the rubric "**Use of an ICT service to defraud, abuse, annoy, threaten or harass,**" section 90 of the Information and Communications Technology Act (2017 Revision) ("the ICT Act") provides:

> *"(1) A person who knowingly uses an ICT network or ICT service to defraud, abuse, annoy, threaten or harass any other person commits an offence and is liable, on summary conviction, to a fine of ten thousand dollars and to imprisonment for one year, or, on conviction on indictment, to a fine of twenty thousand dollars and to imprisonment for two years.*
>
> *(2) In addition to imposing any penalty under subsection (1), the Court may, by order, restrain the person from using ICT services or ICT networks as it sees fit*."

3. In the present case, the Appellant was fined CI$3,000. A restraining order was made.

The facts and the judgment below

4. The Appellant was the broadcaster of a podcast from what was known as the Cayman Marl Road ("CMR") website. The podcast was accessible to the public at large by following a link on the CMR website and associated platforms. Between February 2019 and February 2020, when the judge ordered it be taken down, there was available on the website what was described as a hard-hitting exposé. It lasted about an hour and concerned the complainant in the case, a man called Mathew Leslie. Mr Leslie had stood in two elections on a platform of transparency and trust. He and the Appellant had previously briefly worked together. The podcast, which the judge found amounted to a character assassination of Mr Leslie, described him in terms of being a sexual predator and dishonest in his personal dealings. It amounted, said the judge, to a relentless onslaught on Mr Leslie's character and reputation. He found the Appellant to be "*obsessed with the crusade she had been conducting against Mr Leslie…to the extent that she had lost all sense of proportion, perspective and objectivity.*" He found she believed what was said to be true.

5. The judge made a preliminary ruling during the course of the complainant's evidence. He was concerned that the complainant was being cross-examined as to the truth of what was said in the podcast. He concluded the truth was irrelevant and stopped the cross-examination. At [36]-[37] he said:

> *"36. A person can be abused, harassed etc by material which is true as well as by material which is not true. In this jurisdiction, criminal libel still exists- to be found at s. 171 to s. 179 of the Penal Code. These sections contain detailed provisions creating a number of defences to a charge of criminal libel. By way of example, s.174 provides a defence that "the matter is true and it was for the benefit of the public that it should be published." Section 176 onwards contain highly detailed provisions as to when good faith, fair comment and so on can provide a defence. The short point is this: neither of these provisions, nor anything like them, appear in s. 90 of the ICT Law. As a basic rule of construction, one can be confident that the legislature did not proceed in ignorance of such provisions in the Penal Code. The fact they do not appear in s. 90 means that no such defences are available to this charge.*
>
> *37. To summarize, I conclude that the prosecution must prove the following:*
>
> *(i) That Mrs Hill knowingly used an ICT network of service, as to which there is no dispute;*
>
> *(ii) That as a matter of fact, Mr Leslie was abused, annoyed, threatened or harassed by her use of the network;*
>
> *(iii) That when she used the network, she either intended to abuse, annoy, threaten or harass Mr Leslie, or that she was aware that this would be the likely result."*

6. The judge accepted that section 11 of the Bill of Rights was engaged. At [42]-[43] he said:

> "*42. There is no dispute that the right of freedom of expression is a qualified right. Section 11 does not provide the citizen with an unfettered freedom to express himself in any way he chooses, regardless of the rights, sensibilities and interests of others. The right of freedom of expression must be balanced against other interests and perspectives.*

43. Essentially in this case, assuming I am satisfied so I feel sure that the basic ingredients of the offence are made out, I have to balance Mrs Hill's rights against the need, if such there be, to protect Mr Leslie's rights, reputation and sensibilities…"

7. At [45] the judge said:

"*I am required to ask myself three questions, as follows:*

i. *Is the potential interference with the right to freedom of expression prescribed by law?*

ii. *Is the interference in pursuit of one of the legitimate aims under s. 11(2) of the Bill of Rights?*

iii. *Is the prosecution and conviction of the defendant "necessary in a democratic society*?"

Discussion

8. Schedule 2 of the Cayman Islands Constitution Order 2009 in Part I sets out the "*Bill of Rights, Freedoms and Responsibilities."* Section 11 of the Bill of Rights provides:

"*(1) No person shall be hindered by government in the enjoyment of his or her freedom of expression, which includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence or other means of communication.*

(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telecommunications, posts, broadcasting or other means of communication, or public shows or entertainments; or

(c) for the imposition of restrictions on public officers in the interests of the proper performance of their functions."

9. By section 23 of the Bill of Rights the court is "*obliged to make a declaration*" if legislation is found to be incompatible with any part of the Bill of Rights. By section 25:

> "*In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the Rights set out in this Part."*

10. Both parties agreed that no question of a declaration of incompatibility arises in this case.

11. Article 10 of the European Convention of Human Rights (ECHR) also applies to the Cayman Islands. That provides:

> "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, 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."*

12. Although there is a difference of wording between section 11 and Article 10, it is not for present purposes material. We shall therefore restrict our consideration to section 11.

13. On the judge's interpretation, the scope of section 90(1) is wide. An accused need not intend to abuse, annoy, threaten or harass a person by what is said. The likelihood that a person would be

abused, annoyed, threatened or harassed suffices. It is irrelevant that what is said is or may be true. Evidence going its truth is inadmissible. There is no defence of public interest or fair comment.

14. *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 the Supreme Court considered whether a criminal provision which restricted the freedom to assemble and to express opposition to the provision of abortion treatment services in Northern Ireland, was within the legislative competency of the Northern Ireland Assembly having regard to the rights to freedom of conscience, speech and assembly guaranteed by Articles 9, 10 and 11 of the ECHR. At [54]-[60], Lord Reed PSC, in a judgment with which Lord Kitchin, Lord Burrows, Lady Rose, Lord Lloyd-Jones JJSC, Lord Carloway and Dame Siobhan Keegan agreed, set out the approach to criminal offences which interact with the ECHR. At [54] Lord Reed said:

> "*Where a defendant relies on article 9, 10 or 11 Convention rights as a defence to a protest-related offence with which he is charged, the first question which arises is whether those articles are engaged. The conduct in question will fall outside the scope of those articles altogether if it involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society."*

15. There is no question of the Appellant's conduct falling outside the scope of section 11. Section 11 is engaged.

16. At [55-57] Lord Reed went on to say:

> "*55. If articles 9, 10 or 11 are engaged, the second question which arises is whether the offence is one where the ingredients of the offence themselves strike the proportionality balance, so that if the ingredients are made out and the defendant is convicted, there can have been no breach of his or her Convention rights. If the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, the court does not have to go through the process of verifying that a conviction would be proportionate on the facts of every individual case…*
>
> *56. Where the conduct in question falls within the scope of articles 9, 10 and 11, and proof of the ingredients of the offence does not in itself ensure the proportionality of a conviction, then the possibility arises that a conviction might be incompatible with the Convention rights. Given the court's general duty not to act incompatibly with Convention rights…it is accordingly necessary to consider a third question:*

whether there is a means by which the proportionality of a conviction can be ensured.

57. *If the offence is statutory, the interpretative duty imposed by section 3 of the Human Rights Act may enable the court to construe the relevant provision in a way which renders it compatible with the Convention rights, either by interpreting it in such a way that a conviction will always meet the requirements of proportionality, or by interpreting it so as to allow for an assessment of the proportionality of a conviction in the circumstances of individual cases. For example, a defence of lawful or reasonable excuse may provide a route by which a proportionality assessment can be carried out, where the defence can properly be interpreted, having recourse if need be to section 3 of the Human Rights Act, as including the exercise of Convention rights."*

17. In *R v Casserly* [2024] EWCA Crim 25, the Court of Appeal of England and Wales, presided over by the Lady Chief Justice, considered the interaction between section 1 of the Malicious Communications Act 1988 and Article 10 [of the ECHR]: see [3]. By section 1:

> *"(1) Any person who sends to another person-*
>
> *(a) a letter, electronic communication or article or any description which conveys-*
>
> *i) a message which is indecent or grossly offensive;*
>
> *ii) a threat; or*
>
> *iii) information which is false and known or believed to be false by the sender; or*
>
> (b) *any article or electronic communication which is, in whole or in part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.*"

18. The Appellant sent an email to a councillor with multiple disabilities which questioned her ability to discharge her functions. The email concluded: "How does a councillor that has limited reading ability, profoundly deaf, and partially sighted feel that they can make a difference?" The

prosecution alleged that the view expressed in the conclusion was grossly offensive and that in sending it the defendant's intention was to cause the complainant distress or anxiety. At trial the judge rejected a defence submission that any direction to the jury on the meaning of 'grossly offensive' had to take due account of the complainant's public role and the defendant's free speech rights. He directed the jury to decide whether the email was 'grossly offensive' by reference to the straightforward meaning of the language and the standards of ordinary, decent people. On appeal it was argued that the directions were inadequate; they failed to take due account of the common law right to free speech, or the corresponding Convention right under Article 10.

19. At [35] the Lady Chief Justice said:

> "*Article 10(1) of the Convention guarantees the right to "impart and receive information and ideas." This is a fundamental right, the scope of which is not limited to information or ideas on political issues or "serious criticism." As Mr Friedman [counsel for the Appellant] has rightly reminded us, the common law right of free speech covers the same ground and is also regarded as a fundamental norm. The two rights can properly be approached on the basis that they are co-extensive."*

20. Having decided that on the facts Article 10 was engaged, the Lady Chief Justice went on to say [42]-[44]:

> "*42. The question then becomes whether the process was compatible with that fundamental right. In our judgment it was not.*
>
> *43. The right to free speech is qualified. There are circumstances in which it can be restricted or, in the language of the Convention, interfered with by the state. But the common law right to freedom of speech is "subject only to clearly defined exceptions laid down by common law or statute" and Article 10(2) prohibits interference with the Convention right unless it is "necessary in a democratic society" for one or more of a limited number of legitimate aims…The legitimate aims listed in Article 10(2) include the prevention of…crime…[and] the protection of the…rights of others…" That does not mean, however, that the criminal law automatically or invariably prevails over the right of free speech. An interference with free speech is only necessary for this purpose if it corresponds to and is proportionate to a "pressing social need."*

> *44. A series of cases involving the criminal law and speech or behaviour that is (or is claimed to be) politically motivated has led to the identification of three broad categories of case: (i) those in which, on a proper analysis, the applicable criminal law does not interfere with fundamental rights at all, so there is no need for any proportionality assessment; (ii) those in which the criminal law does or may interfere with such rights but proof of the ingredients of the offence will, without more, be sufficient to render a conviction proportionate; (iii) those in which the law does or may interfere with fundamental rights but the ingredients of the offence do not of themselves meet the proportionality requirement, so that the court is required to address it: see Abortion Services at [52] to [61]."*

21. As we have said, under section 11 of the Bill of Rights, it is not a contravention of a person's "*enjoyment of his or her freedom of expression*" if the restriction "*is reasonably justifiable in a democratic society…for the purpose of protecting the rights, reputations and freedoms of other persons…*"

22. At [47]-[48] the Lady Chief Justice said:

> *"47. What could be achieved on the facts here, and what was required, was a Convention-compliant interpretation and application of the language of s 1 [of the Malicious Communications Act] to the facts of the case.*
>
> *48. Drawing on the authorities referred to above, and in this context, we would identify the following considerations:*
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> *i) Whether a message is "grossly offensive" is a question of fact to be answered objectively by reference to its contents and context, not its actual effect…*
>
> *ii) The question is whether the message goes beyond the limits of what is tolerable in our society…*
>
> *iii) The answer must reflect society's fundamental values…Those values include the great weight to be given to free speech, the need for tolerance of statements and opinions that some might find offensive or upsetting, and the special need for tolerance on the part of those in public positions…*

iv) *The context of the speech must be considered. In a democratic society political speech is to be given particular weight. The Strasbourg jurisprudence identifies a hierarchy of speech, with political speech at its apex. The greater the value of the speech in question, the weightier must be the justification for interference. The proportionality assessment must include some evaluation of the kind of speech under consideration;*

v) *Accordingly, where freedom of speech in a political context is engaged, and there is a case to answer, it is essential that the offence be defined in terms which reflect the enhanced meaning of "grossly offensive"…"*

23. There are Crown Prosecution Service (CPS) guidelines in respect of the application of section 1 of the Malicious Communications Act. Implicit in them is a recognition that section 1 involves interference with freedom of expression. At [49]-[52] the Lady Chief Justice said:

"49…As the CPS Guidelines state, "prosecutors should only proceed with cases under section 1…where the interference with freedom of expression is necessary and is proportionate." There must be sufficient evidence that the communication in question, in its particular context, is "more than offensive, shocking or disturbing" and goes "beyond the pale of what is tolerable in society." We are not persuaded, however, that the prosecution of the appellant was itself unlawful. Nor do we accept that the case should have been dismissed at the outset or withdrawn from the jury at any stage. It would, in our judgment, have been open to a reasonable jury properly directed to conclude from the 3 June email, and other evidence in the case that the email conveyed a grossly offensive message and that at least one of the appellant's purposes in sending it was to cause distress or anxiety to the complainant. There was therefore properly a case to go before the jury. The proportionality issue could and should have been addressed by suitably tailored legal directions.

50. But, as indicated, we are persuaded that the jury was not properly directed on both limbs of the s 1 offence, namely the sending of grossly offensive communication with the necessary intention.

51. Points ii) to vi) were either not addressed at all or were addressed only inadequately. There was no direction on the importance of free speech as a fundamental value in society; on the need for public figures to have particular

tolerance; or on the need for the prosecution to prove that at least one of the appellant's purposes (in the sense of objectives) in sending the 3 June email was to cause distress or anxiety to its recipients (or any other person to whom he intended its contents or nature to be communicated).

52. Without aiming to dictate in what precise terms the jury should have been directed in order to safeguard the appellant's right of free speech, the following points needed to be made. The jury should have been directed that the law protects freedom of speech because it is part of living in a free and democratic society. Whether a communication is so grossly offensive that it amounts to a criminal offence and loses the protection of freedom of speech, depends on its content, the context in which it was sent and the purpose(s) of the sender…"

24. Having concluded that the directions "*fell materially short of what was required*," the court concluded the conviction was unsafe and quashed it: see [53] and [54].

Analysis

25. While both parties agreed that the judge's directions fell significantly short in several ways requiring the conviction to be quashed, there was what in the final analysis was a somewhat sterile argument as to the basis upon which the court should act in doing so. Mr Fitzgerald submitted that this case falls squarely within the final of Lord Reed's three categories: the conduct criminalised by section 90(1) falls within the scope of section 11 and proof of its ingredients do not necessarily ensure that a conviction will be compatible with the rights under section 11. Accordingly, in accordance with the court's duty not to act incompatibly with the Constitution, it is required to consider whether there is a means by which the proportionality of a conviction can be ensured. In other words, the court should approach the matter in the same way as did the Lady Chief Justice in *Casserly*.

26. Ms Ailes submitted it is not necessary for the court to go so far. Freedom of speech is a fundamental human right protected by the common law. The principle of legality requires that such rights cannot be overridden by general or ambiguous words. As Lord Hoffman said in *Reg. v Home Secretary, Ex p. Simms* 2 AC 115 at 131F:

> "*In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be*

subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

27. Ms Ailes submitted that having regard to the principle of legality and on the basis of a proper and ordinary interpretation of section 90(1), its scope is not so broad as to require consideration of the Constitution. It is unnecessary to have regard to section 11 or the interpretative obligation under section 25.

28. We do not agree. While it may be possible in the present case to seek to interpret section 90(1) without reference to the Constitution, since the enactment of section 11 of the Bill of Rights, and the court's interpretive obligation under section 25, the fundamental right to free speech under the common law is expressly protected under the law of the Cayman Islands. In our view it is to that express constitutional protection for the citizen to which the court should have regard rather than what might be thought to be the somewhat more opaque concept of the principle of legality. Accordingly, that is what we shall do.

29. There is little disagreement of substance between the parties. As Ms Ailes put it, the judge wrongly framed the issues principally by reference to the rights of others. He did not, as he was required to do, approach what was said by reference to what is permissible in a free and tolerant society having regard to the importance of the fundamental right to free expression and all the circumstances. He did not adequately direct himself on the need to give *"great weight for free speech"* or the need for tolerance of a wide range of opinions (*Casserly* principle (iii)). Neither did he direct himself that he must give particular weight to free speech given the context that the allegations concerned a person who sought to be elected on a platform of transparency and trust (*Casserly* principle (iv)). Although he did give some consideration to freedom of journalistic expression, he did not ultimately regard it as applicable.

30. An important aspect of the relevant context was the truth or otherwise of what was said in the podcast. Ms Ailes put it in this way: it 'may have been open to the learned Judge not to hear evidence on the question whether the defendant's allegations were true. But, having taken that approach, he should have directed himself that it was a part of the relevant context to consider

whether those allegations could still be regarded as abusive, annoying or harassing notwithstanding that he had left open the possibility that they might be true, and to consider the extent to which it might be appropriate to give protection to those who make allegations against public figures, in order that the truth of those allegations may be examined, even if they are not professional journalists, in the particular context of the case before him (Casserly principles (ii) and (iv) .'

31. Mr Fitzgerald went further. He submitted that whether what was said was true is a crucial element of any assessment of the proportionality of criminalising it. The judge should have heard evidence going to it. He should at least have considered what evidence there was before him which went to the issue.

32. In our view, the truth or otherwise of what was said is plainly highly relevant when assessing the proportionality of criminalising it. There is a significant difference in criminalising the expression of what is or may be true and criminalising what is false. Although we can understand why he did so, it does seem to us, the judge should not have excluded evidence going to the truth of what was said. He should have proceeded on the basis that what was said was, or may have been, true. However, that is not to say that a finding that what is said is, or may be, true, inevitably means that a conviction is disproportionate, or that a defendant's conduct can never amount to harassment. That must depend upon all the circumstances.

33. Moreover, we agree with the Mr Fitzgerald that the Appellant's belief that what she was saying was true should have been an important element of the judge's consideration of the proportionality of criminalising what she said. That is not to say that a belief in the truth of what is said necessarily makes disproportionate a conviction. That must depend upon all the circumstances, not least the basis of such belief. For there is a considerable difference in promulgating what, on a reasonable assessment of the available evidence, you believe to be true, and a belief reached without any sound basis.

34. In the result, and for the reasons we have set out, we agree that this appeal must be allowed and the conviction quashed. In fairness to the judge, we should observe that the helpful and focussed submissions made to us were not made to him.

35. We have two final observations.

36. First, our quashing of the conviction does not mean that on a proper application of the law and consideration of all the relevant evidence, it necessarily follows that it would not have been open to the judge to convict.

37. Second, the allegations in this case go back now some six years. Although we will consider any submissions to the contrary, we doubt that it would now be in the public interest for this case to be re-tried.