IN THE CROWN COURT AT SOUTHWARK

ALISON CHABLOZ

Appellant

- v -

REGINA

Respondent

JUDGMENT

1. The appellant Alison Chabloz appeals against her conviction on 25th May 2018 at the City of Westminster Magistrates' Court [D J Zani] of three offences contrary to section 127(1) of the *Communications Act 2003.*
2. Two of the offences, Charges 1 & 2, relate to a video of the appellant singing two songs [entitled *"(((Survivors)))"* and *"Nemo's Anti-Semitic Universe"*] to an audience at a gathering in a central London hotel in September 2016. A video of her performance was subsequently uploaded to YouTube. The appellant was not responsible for that uploading, but she caused to be embedded in her Blog site [www.tellmemorelies.wordpress.com] a hyperlink, which when clicked upon would take the person visiting that page to the YouTube video.
3. The third offence, Charge 3, relates to a video of the appellant singing a song entitled *"I like the story as it is – SATIRE"*. That performance was not to an audience, and it was the appellant herself who uploaded it to YouTube, in September 2017.
4. Section 127 (1) of the Communications Act 2007 provides as follows:

   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 or of an indecent, obscene or menacing character; or

   (b)causes any such message or matter to be so sent.

5. The respondent [prosecution] case is that all three songs are grossly offensive, with respect to their lyrics and in two cases, the tunes to which they are set. It is not suggested that any of the songs are indecent, obscene or menacing.

6. Charges 1 and 2 allege that the appellant, in embedding the hyperlink to the YouTube video of her performance, caused the two songs to be sent, within the meaning of the section. Charge 3 alleges that, in uploading the relevant video to YouTube, she herself sent the third song. Mr Davies for the appellant submitted that as a matter of law, her admitted digital conduct could not amount to sending anything, or causing it to be sent. The court rejected that submission [see written ruling of 11th February 2019, pronounced in open court yesterday]. We therefore proceed on the basis that this element of each alleged offence has been proved.

7. Mr Davies, while not accepting that what the appellant did in respect of YouTube necessarily involved any use of a <u>public</u> electronic communications network, realistically accepts that this court at least is bound to follow the decision of the Administrative Court in <u>Chambers v DPP</u> [2013] EWHC 2157(Admin). We therefore proceed on the basis that this further element of each charge is also proved.

8. What remains at issue, and is hotly contested in respect of each charge, is whether the relevant song was "grossly offensive." The prosecution case is that the lyrics of each song are no more than a collection of anti-Semitic tropes or motifs, with a particular emphasis on Holocaust denial. Furthermore two of the songs are in whole or part set to the tunes of well-known Hebrew songs, which the prosecution say is no accident, but rather a deliberate attempt to increase the insulting effect of each. In those circumstances, they argue, each song is "grossly offensive."

9. The appellant, while effectively accepting that all three songs are offensive, [she describes them as "close to the bone"] denies that any of them is grossly offensive. In evidence she variously described them as "silly songs" "parody" and "satire". She asserts that these proceedings are an affront to her freedom of speech, and that both these proceedings and what came before them have involved her being targeted and harassed by those who

simply dislike her views. She is on her own admission an adherent of what she describes a revisionist view of history in relation to the Holocaust.

10. Guidance as to the approach to be adopted by the tribunal of fact in determining whether material is "grossly offensive" for the purposes of section 127(1) is to be found in the decision of the House of Lords in DPP v Collins [2006] UKHL 40. It is an objective question of fact: in short, would reasonable persons find the material grossly offensive? In this case we must determine that question, in relation to each song, by applying the reasonably enlightened, but not perfectionist, standards of an open and just multiracial society. Each song must be judged in context and with regard to all relevant circumstances. A song will almost certainly be grossly offensive if couched in terms liable to cause gross offence to those to whom it relates: in those circumstances reasonable persons would be expected to find it grossly offensive. In this context we record our finding of fact that each song relates to Jews generally.

11. In addition there is a mental element to the offence. Even if we are sure that a particular song is grossly offensive, the appellant is not guilty unless we are also sure either that she intended it to be grossly offensive to Jews, or at the very least was aware that it might be perceived as being grossly offensive to them.

12. As we have already observed, the appellant here asserts that her freedom of speech is being infringed. That is said on her behalf by counsel and was explicitly asserted by the appellant in her own evidence. The right to free speech and free expression is a crucial one in a democratic society, and is in this jurisdiction protected both at common law and by Article 10 of the European Convention on Human Rights [ECHR]. However these rights are not unqualified. As the House of Lords found in DPP v Collins, section 127, while interfering with the right to free expression, is a clear statutory restriction, directed to a legitimate objective, namely preventing the use of a public electronic communications network for attacking the reputation and rights of others, which restriction goes no further than is necessary in a democratic society to achieve that legitimate objective.

13. The House of Lords in that case found no infringement of Article 10 rights by the operation of section 127. Furthermore the jurisprudence of the European Court of Human Rights is clear that article 17 of the Convention

operates to remove from Article 10 protection speech or other expression which is contrary to the fundamental Convention values of tolerance, social peace and non-discrimination: see M'Bala M'Bala v France [app no.25239/13] and Norwood v UK (2004) 40 EHRR SE 11.

14. As we have again already observed, the appellant identifies with what she describes as historical revisionism in relation to the Holocaust. Our factual conclusion, formed with the particular benefit of hearing her give evidence, can be more plainly expressed: she is a Holocaust denier. However it is important to bear in mind, as Mr Davies understandably stresses, that there is no crime of Holocaust denial in this jurisdiction. Material which consists of or includes Holocaust denial can only found liability under section 127 if it is grossly offensive. No type of speech, Holocaust denial included, can be characterised as grossly offensive *per se*: the question of whether particular speech is grossly offensive is always fact-specific.

15. That said, no tribunal of fact is required to proceed on the basis of absurdity or fiction. The Holocaust – by which we mean the systematic extermination of millions of people, predominantly although not exclusively Jews, by the forces of Nazi Germany and their collaborators, between 1941 and 1945 - happened. World War II is surely the best documented and most extensively studied period of modern history, and the Holocaust is one of the best documented aspects of that conflict, if not the best. A mass of evidence, of various kinds, attests to it. Moreover the Holocaust has been the subject of extensive judicial enquiry, from the Nuremberg Trials onwards, in a number of jurisdictions.

16. In this jurisdiction, the judgment at first instance of Gray J in the celebrated libel trial of Irving v Penguin Books Ltd. and Lipstadt (appeal at [2001] EWCA Crim 1197) is particularly pertinent. In that case the essential historicity of the Holocaust was not actually in dispute. However there was dispute about the nature and extent of the evidence as to what happened at the most notorious of all the locations with which the Holocaust is associated, namely Auschwitz: a place which is indeed referred to in one of the songs with which we are here concerned. Gray J said this [at 13.91 of first instance judgment, reproduced at para. 33 of CA judgment] :

"Having considered the various arguments....it is my conclusion that no objective, fair-minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews."

17. That conclusion, upheld by the Court of Appeal, seems to us to be sufficient without more to establish for these purposes that the Holocaust is a historical fact. We also observe that Parliament, in enacting the *War Crimes Act 1991*, was recognising that the Holocaust occurred; the purpose of that statute was to enable persons who were not British citizens at the time to be prosecuted for killings carried out during the Holocaust. Indeed there was one successful prosecution of an individual for killing of Jews while serving as a collaborationist policeman in Belorussia (R v Sawoniuk: appeal at [2000] EWCA Crim 9).

18. We therefore take judicial notice of the fact that the Holocaust occurred. We agree with Mr Mulholland QC for the prosecution that the undoubted historical fact of the Holocaust represents part of the context in which these songs must be judged. That is not however the same as asserting that the Holocaust is not an appropriate subject for historical enquiry, debate or artistic treatment. Nor do we ignore the fact that, as with any aspect of history, new evidence will inevitably emerge, and historical judgments will alter. We also acknowledge that many commonly held ideas or assumptions about the Holocaust do not have a firm historical basis. We further acknowledge that the recollections of individual witnesses as to their part in the events of the Holocaust may [as is the case with any witness to an event or circumstance] be unreliable, exaggerated or even deliberately untruthful.

19. We now turn to our findings of fact. Much of the evidence was agreed. We heard from only three witnesses in person: from Gideon Falter and Steven Silverman who were called by the prosecution, and from the appellant herself.

20. Both Mr Falter and Mr Silverman are members of an organisation called the Campaign Against Antisemitism, which originally instituted these proceedings as a private prosecutor. Given that the prosecution was subsequently taken over by the Crown Prosecution Service, we regard that as irrelevant. While the evidence of both witnesses was of some assistance in relation for example, to questions such as the identities of persons mentioned in the songs, the genesis of certain Holocaust denial arguments and the identification of Hebrew songs, we attach no further significance to it. In particular we are careful not to substitute the judgment of either witness as to what is or is not grossly offensive for our own.

21. So far as the defendant herself is concerned, we remind ourselves that she is of good character. While that cannot be a defence to the charges, we take that into account in her favour both as to the likelihood of her committing any criminal offence as alleged, and in assessing the credibility of her evidence.

22. We have reached a number of general conclusions about the appellant, having listened with care to her evidence. As already noted, she is a Holocaust denier. While not a historian, as we recognise [she describes herself first and foremost as a musician], she clearly has an extensive, albeit highly selective, interest in history. During her evidence she made rapid-fire reference to a bewildering array of sources, although it was striking how dismissive she was of anything that might contradict the narrative to which she subscribes. Furthermore she is manifestly anti-Semitic, and utterly obsessed with what she perceives to be the wrongdoing of Jews and their disproportionate influence in politics, the media and banking in particular. In relation to questions involving the Holocaust in particular, and Jews more generally, she appears to us quite simply to have lost all

sense of perspective. While that is neither attractive nor to her credit, we emphasise that anti-Semitism is not a crime, just as Holocaust denial is not. Nor can the fact that somebody is a Holocaust denier or an anti-Semite prove that anything she writes or sings is grossly offensive. However her anti-Semitism and her attitude to the Holocaust are in our judgment highly relevant to her state of mind so far as her musical compositions are concerned.

23. We turn then to the three charges, and the three individual songs to which they relate. We stress that we have given quite separate consideration to each. While each song has Holocaust denial at its heart, in no case do the lyrics restrict themselves to that. Rather they weave together Holocaust denial and hateful attacks on Jewish people generally, by reference to well-known anti-Semitic tropes, for example about Jews being usurers, politically manipulative, responsible for conflicts around the world and deserving of being expelled from places they have lived.

24. We turn to Charge 1, the song entitled ((("Survivors.)))" We are sure that it is grossly offensive. It makes tasteless reference to a number of identifiable Holocaust victims or survivors. We have received written evidence demonstrating that the accounts of one of them, a woman called Irene Zisblatt, have been subject to apparently cogent academic criticism from a an individual who cannot sensibly be accused of being a Holocaust denier. This song's treatment of the Holocaust is not however characterised by sober discourse or measured consideration. Rather, its currency includes jovial references to Dr Jozef Mengele, the Auschwitz physician notorious for his sadistic experiments on Jewish and other children; to the bodies of babies being burnt; and to the death in a concentration camp of one particular child, Anne Frank. Shortly after seeking to extract humour from her death, the suggestion that her celebrated diary was not actually her work, and the supposed financial wrongdoings of her father and the charity established in her name, the song moves on to a denunciation of bankers and warmongers. A central theme of this song is that the Jews exploit the Holocaust for financial gain. What is particular repellent is that the song is sung in a spiteful parody of a Yiddish or similar accent, and is

set to the tune of a celebrated Hebrew song, *Hava Nagila*. We consider that it is by no means excessive to describe this song as disgusting.

25. We turn to Charge 2, and "Nemo's Anti-Semitic Universe." We are sure that it is grossly offensive. We take into account that its ostensible target is somebody with whom the appellant had, as she told us, argued fiercely on social media. However in truth this song is not an attack on one person: it uses the medium of an attack on the appellant's adversary to attack and traduce Jewish people as a whole. It incorporates tropes about the supposed Jewish worship of money, and in a particularly sickening misuse of words, describes Auschwitz [a place where, as we remind ourselves, countless children were industrially murdered] as a "holy temple" and a "theme park." For the avoidance of doubt we make it clear that in reaching our decision we have disregarded the last 12 lines of the song, which are an expression of the author's views about the state of Israel and Zionism. While we doubt that the appellant's professed concern for the Palestinian people and the wrongs done to them has an altruistic origin, and we acknowledge that some would find these lines highly offensive, we do not consider them to be grossly offensive.

26. We are also sure that the song to which Charge 3 relates "I prefer it this way – SATIRE" is grossly offensive. It blames Jews for their sufferings, and brands them as thieves, liars and usurers. That is woven into sickening holocaust-related references to shrunken heads, soap, lampshades and smoke coming from crematorium chimneys. We unhesitatingly reject the appellant's evidence that this song was at least in part motivated by a benevolent desire to free Jewish people from the shackles of "atrocity propaganda" about the Holocaust. We are sure that she wrote and performed it because she hates Jews, a conclusion in which we are fortified by the fact that this song is partly set to the tune of another well-known Hebrew song. We add that the inclusion of the word "Satire" in the song title can neither remove nor conceal its grossly offensive nature. We adopt in that regard the observations of the European Court of Human Rights, in M'Bala M'Bala v France [at para 40] to the effect that a hateful and blatant display disguised as an artistic production may be just as dangerous as a full-frontal and undisguised attack.

27. We turn finally to the appellant's *mens rea*. We are sure, in relation to each song, that the appellant positively intended it to be grossly offensive to Jews. We are further satisfied that that, although part of her intended audience on YouTube was persons sharing her own warped outlook, she embedded the hyperlink [Charges 1 and 2] and uploaded the video [Charge 3] in the hope that those who saw and heard the songs would include Jewish people who would be grossly offended by them.

28. We therefore affirm the appellant's convictions on all three charges.

HHJ Christopher Hehir

Ms M Rego

13th February 2019