SHERIFF APPEAL COURT

[2023] SAC (Crim) 7
SAC/2023/000161/AP

Sheriff Principal A Y Anwar
Sheriff Principal D C W Pyle
Appeal Sheriff B Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in

Appeal by Stated Case against Conviction

by

DAVID DI PINTO

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: Ogg, Sol Adv; Renfrew Defence Lawyers, Paisley
Respondent: McKenna, Sol Adv, Crown Agent

6 October 2023

Introduction

[1] On 13 March 2023, the appellant appeared for trial on a summary complaint. He was convicted of the following charge:

> "(002) on 19 December 2021 at Hampden Park, Glasgow, you DAVID DI PINTO did behave in a threatening or abusive manner which was likely to cause a reasonable

> person to suffer fear or alarm in that you did cause a disturbance, repeatedly shout and swear, did utter a sectarian remark and you did flail your arms at police; CONTRARY to Section 38(1) of the Criminal, Justice (Scotland) Act 2010 and it will be proved in terms of Section 74 of the Criminal Justice (Scotland) Act 2003 that the aforesaid offence was aggravated by religious prejudice."

[2] The appellant was fined £500. A victim surcharge of £20 was imposed. He was made subject to a Football Banning Order for a period of 12 months.

[3] The appellant appeals against that part of his conviction which relates to section 74 of the Criminal Justice (Scotland) Act 2003.

[4] The issue arising in this appeal is whether the appellant's behaviour was aggravated by religious prejudice: did the appellant's use of the word "hun" display malice or ill-will towards members of the Protestant faith?

The facts

[5] On 19 December 2021, Celtic Football Club were playing Hibernian Football Club in the Scottish League Cup final at Hampden Park, Glasgow. The appellant was highly intoxicated. He was behaving in an aggressive manner and was shouting and swearing at other supporters in the crowd. Two police constables who were on duty at the match were approached by members of the public who complained about the appellant's behaviour. The police constables approached the appellant and asked him to refrain from causing a disturbance. The appellant shouted at them, "Fuck you, hun cunts." The constables advised the appellant that he was under arrest. The appellant shouted at the officers, "I'm no goin' anywhere ya fuckin cunts." He began to flail his arms. The constables handcuffed him and removed him from the stadium.

Evidence led at trial

[6] The facts were agreed by joint minute. The appellant accepted at trial that he was guilty of a contravention of section 38 of the 2010 Act but denied that the offence was aggravated by religious prejudice.

[7] The procurator fiscal depute led evidence from one of the constables, PC Atkinson. When asked what he understood by the phrase "hun cunts", PC Atkinson explained that he understood the appellant to have inferred that PC Atkinson was a supporter of Rangers Football Club. He added that he understood "hun" to be a derogatory term used in the west of Scotland for a supporter of Rangers FC. In cross-examination, PC Atkinson confirmed he was not an expert in theology and stated "hun" was a slang term for a fan of Rangers FC. No other evidence was led at trial by the Crown. The appellant elected not to lead any evidence.

The summary sheriff's decision

[8] In the absence of evidence dealing directly with the issue, the summary sheriff ("the sheriff") was invited by the Crown to accept, as a matter of judicial knowledge, that the word "hun" was a sectarian remark used as an offensive slur directed against an individual of the Protestant faith. The Crown relied upon *Walls* v *Brown* 2009 J.C. 375.

[9] The sheriff agreed. He noted that the phrase "hun" was generally accepted as being a derogatory phrase directed against fans of Rangers FC. He also found, as a matter of judicial knowledge, that Rangers FC is perceived to have predominantly Protestant support.

The appeal

[10] The stated case posed the following questions:-

1. Did I err in determining that it is within judicial knowledge that the term "hun cunts" is a sectarian remark?

2. Did I err in making finding in fact 10?

3. Did I err, in finding in fact 11, that the Section 38 contravention was aggravated by religious prejudice in terms of Section 74 of the Criminal Justice (Scotland) Act 2003?

[11] Finding in fact 10 was in the following terms:

> "The appellant's use of the term phrase "hun cunts" amounted to a sectarian remark which was derogatory to persons of the Protestant Faith"

[12] A fourth question which related to the imposition of the Football Banning Order did not pass the sift and is accordingly not before this court.

Submissions

[13] The appellant invited the court to answer all three questions in the stated case in the affirmative. It was submitted that the term "hun" was not anti-Protestant. It is a slang term used predominantly, although not exclusively, by supporters of Celtic FC to describe supporters of Rangers FC. That ought to have been within judicial knowledge; however, it was not within judicial knowledge, nor could it be inferred, that the term "hun" was also a slur for an individual of the Protestant faith. It was not reasonable to infer that the term directed against the police constables was sectarian in nature. The constable had not indicated that he understood the terms was directed at those of the Protestant faith. The use of the word "hun" did not contain a religious aspect nor disclose malice and ill-will towards a religious group or a group with a perceived religious affiliation. A "hun" was a member of a warlike nomadic people from Central Asia who invaded and ravaged Europe. The term

had been directed at the police. The appellant did not know the constables. Rangers FC had not been playing in the match.

[14] It was submitted that the present appeal was not the mirror image of *Walls* v *Brown*. The term "hun" was not used in the same context as the slur used in *Walls* v *Brown.* The offensive terms referred to in *Walls* v *Brown* had been conceded to have a religious aspect. The term "hun" did not have the required religious aspect necessary for a contravention of section 74 of the 2003 Act. The sheriff had erred in concluding it was within judicial knowledge that it did.

[15] The advocate depute submitted the inference the sheriff made was not contrary to PC Atkinson's evidence, but rather in accordance with it. While the word "hun" does have other meanings, the sheriff was entitled to infer on the facts before him that it was a sectarian slur. *PF, Glasgow* v *Ward* [2021] HCJAC 20 at paragraphs [16] – [20] set down the test for what could be said to be within judicial knowledge. It was reasonable for the sheriff to make the findings in fact that he did as they were within judicial knowledge.

Decision

[16] The issue arising in this appeal is a narrow and focussed one: is it within judicial knowledge that in a footballing context, the term "hun" is used by some factions of the population as a derogatory description of members of the Protestant faith? As such, was the offence of which the appellant was convicted aggravated by religious prejudice in terms of section 74 of the 2003 Act?

[17] Section 74 of the 2003 Act provides as follows:

> **"74 Offences aggravated by religious prejudice**
>
> (1) This section applies where it is—

(a) libelled in an indictment; or

(b) specified in a complaint,

and, in either case, proved that an offence has been aggravated by religious prejudice.

(2) For the purposes of this section, an offence is aggravated by religious prejudice if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.

(2A) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4A) The court must—

(a) state on conviction that the offence was aggravated by religious prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

(5) For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice.

(6) In subsection (2)(a)—

'membership" in relation to a group includes association with members of that group;

and

'presumed' means presumed by the offender.

> (7) In this section, '*religious group*' means a group of persons defined by reference to their—
>
> (a) religious belief or lack of religious belief;
>
> (b) membership of or adherence to a church or religious organisation;
>
> (c) support for the culture and traditions of a church or religious organisation; or
>
> (d) participation in activities associated with such a culture or such traditions."

[18] Section 74(2)(a) applies where malice or ill-will is evinced towards a victim based on the victim's membership or perceived membership of a religious group, or of a social or cultural group with a perceived religious affiliation.

[19] It matters not, in the present case, whether Rangers FC were playing in the football match, whether the appellant knew the constable to have been a supporter of Rangers FC or whether he knew the constable to be a member of the Protestant faith.

[20] Nor is it of any consequence that the constable did not expressly state whether he understood the reference to "hun" to be a reference to a particular religious faith, if the use of the term is generally understood as such within society and can be deemed to be within judicial knowledge.

[21] The scope of judicial knowledge was recently discussed by the High Court in *PF, Glasgow* v *Ward*. Delivering the opinion of the court, Lord Matthews referred to the definition of facts deemed to be within judicial knowledge provided in Wilkinson: *Evidence* (at page 128):

> "facts which are common knowledge, either in the sense that every well informed person knows them or that they are generally accepted by informed persons and can be ascertained by consulting appropriate works of reference are deemed to be within judicial knowledge".

[22] Judicial knowledge may in appropriate circumstances be local in nature. In *Oliver* v *Hislop* 1946 J.C. 20, the Lord Justice Clerk (Cooper) had little difficulty in concluding that a

sheriff in Selkirk did not require expert evidence on the meaning of technical terms used in local statutes for the regulation of Tweed fisheries. Similarly, in *PF Glasgow* v *Ward*, the court found it unnecessary for evidence to be led before a "Glasgow sheriff" that a figure depicted on T-shirts worn at a football match at Celtic Park was that of a member of a proscribed Irish republican terrorist group such as the IRA, designed to antagonise Linfield FC supporters who are perceived to be predominantly Protestant.

[23] It was not necessary in the present case for evidence to be led as to the sectarian connotations of the term "hun". The historic sectarian tensions within Glasgow and particularly between supporters of Rangers FC and Celtic FC are well understood in Scotland. It is also well understood that supporters of Rangers FC are perceived to be predominantly of the Protestant faith and that supporters of Celtic FC are perceived to be predominantly of the Catholic faith. The fact that the word "hun" is used as a derogatory term to describe supporters of Rangers FC, who are perceived to be predominantly of the Protestant faith, is, in our view, a matter of judicial knowledge. The local knowledge of the sheriff who had little hesitation in concluding that the term "hun" was "sectarian as being an offensive slur directed at someone of Protestant faith" requires to be afforded considerable respect.

[24] There are many theories and much speculation as to the origins of the term "hun". It is variously claimed as a reference to nomadic people who invaded the Roman Empire in the fourth and fifth centuries, as a derogatory name for German soldiers or as a colloquial reference to a savage. We do not accept that in a footballing context those using the term are doing so by any genuine reference to its historic usage. Whatever the historical origins of the word, in its modern usage well informed persons in the west of Scotland recognise that when used in a footballing context, the word has now been adopted as an abusive sectarian

term used to cause offence to those of the Protestant faith, not simply as a reference to a supporter of Rangers FC. It is, in that respect, no different to the use of the term "fenian" as a form of sectarian abuse to describe Celtic supporters who are perceived to be predominantly of the Roman Catholic faith (*Walls* v *Brown*, per Lord Carloway at paragraph 21).

[25] The sheriff was accordingly correct to conclude that when the appellant used the expression "hun cunts", the appellant evinced malice or ill-will towards the police constables based on his perception that they were supporters of Rangers FC and members of the Protestant faith.

[26] It follows that we will answer each of the questions in the negative and refuse the appeal.