APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 7
HCA/2023/550/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT
delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the Appeal from the Sheriff Appeal Court

by

DAVID DI PINTO

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: AN Ogg (sol adv); Paterson Bell Solicitors (for Renfrew Defence Lawyers, Paisley)
Respondent: Cameron KC, AD; the Crown Agent

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2 February 2024

Introduction

[1] This appeal concerns whether the use by the appellant of the term "hun", to describe the police when arresting him at a football game, is sectarian and constitutes an aggravation by religious prejudice of a statutory breach of the peace. This involves a consideration of

what constitutes judicial knowledge and how such knowledge interacts with contrary evidence.

The charge and sentence

[2] On 13 March 2023, the appellant was convicted, on a summary complaint, of a charge which libelled that:

> "on 19 December 2021 at Hampden Park, Glasgow you … 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, and did utter a sectarian remark and you did flail your arms at police; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (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."

[3] The appellant was fined £500 and made subject to a Football Banning Order for a period of 12 months.

The Criminal Justice (Scotland) Act 2003

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

> "(2) … an offence is aggravated by religious prejudice if –
>
> (a) at the time of committing the offence … 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.
>
> …
>
> (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."

The trial

[5] At the trial, almost all of the facts were agreed by joint minute. The appellant accepted that he was guilty of a contravention of section 38 of the 2010 Act. He took exception only to the elements in the libel concerning the uttering of a sectarian remark and the religious aggravation.

[6] In terms of the joint minute, the summary sheriff found in fact that, on 19 December 2021, Celtic were playing Hibs in the Scottish League Cup final at Hampden. The appellant was drunk. He was behaving in an aggressive manner; shouting and swearing at other supporters. Two police officers were approached by members of the public who complained about his behaviour. The officers asked the appellant to refrain from causing a disturbance. The appellant shouted at them, "F… you, hun c..ts". The officers told the appellant that he was under arrest. This time the appellant shouted at the officers, "I'm no goin' anywhere ya f…..g c..ts". He began to flail his arms about. He was handcuffed and removed from the stadium.

[7] Although, as the sheriff reported in his stated case, "the entirety of the factual elements" had been agreed in the joint minute, the procurator fiscal depute nevertheless led evidence from one of the officers about what had happened. The officer said that it was unusual for the police to go into a football crowd and remove a spectator, but the appellant's

behaviour was "getting out of control". The PFD asked the officer what he understood by the word "hun". The officer explained that the appellant was saying that he (the officer) was a Rangers fan. "Hun" was a derogatory term used in the West of Scotland for Rangers fans. In cross-examination, the officer accepted that he was not an expert in theology. He repeated that "hun" was a slang term for a Rangers fan. This was the only evidence in point. The appellant did not testify.

[8] Notwithstanding the officer's evidence, the PFD invited the summary sheriff to accept that, as a matter of judicial knowledge, the word "hun" was a sectarian remark used as an insult to Protestants (cf *Walls* v *Brown* 2009 JC 375) and hence an expression of religious prejudice evincing malice and ill will. The defence agent submitted that the appellant should only be convicted under deletion of the reference to a "sectarian remark" and the religious prejudice aggravation. "Hun" was a reference to Rangers fans and had no religious connotation. The agent did not go into the origins of the word.

[9] The summary sheriff commented that he was being asked to decide the meaning of "hun" in the absence of "any expert evidence or reference to [relevant] authorities". He nonetheless agreed with the PFD's submission and determined that "hun" was a sectarian remark, being generally accepted as such. Although it was an offensive or derogatory term directed against fans of Rangers, it was not restricted in that way. As a matter of judicial knowledge, Rangers were "perceived to have a predominantly Protestant support". Whatever its origins, "hun" was now seen as an offensive or derogatory term that "is directed towards someone of Protestant faith … inextricably linked to the perception that fans of Rangers … are predominantly Protestant" (stated case para 23). The sheriff regarded it as significant that there was nothing about the police to identify them as Rangers fans. He rejected the defence submission that the word related exclusively to Rangers fans. In light of

his judicial knowledge, he did not rely on the officer's evidence. He found in fact (10) that the appellant's use of the words "hun c..ts" amounted to "a sectarian remark which was derogatory to persons of the Protestant faith". He therefore convicted the appellant as libelled, including (ff (11) the religious aggravation).

The Sheriff Appeal Court

[10] The SAC considered that the issue was a narrow and focussed one: was it within judicial knowledge that, in a footballing context, the term "hun" was used by some factions of the population as a derogatory description of members of the Protestant faith? As such, was the offence aggravated by religious prejudice in terms of section 74 of the 2003 Act? It did not matter whether: Rangers were participants in the football match; the appellant knew that the officers were supporters of Rangers; or he knew that the officers were Protestants. It was of no consequence that the officer, who gave evidence, did not expressly state whether he understood the reference to "hun" was to a particular religious faith, if the use of the term was generally understood as such within society and could be deemed to be within judicial knowledge.

[11] The SAC adopted the test, of what facts were within judicial knowledge, as that in Wilkinson: *Evidence* (at 128) and applied in *PF, Glasgow* v *Ward* [2021] HCJAC 20 (at para [17]). The facts had to be "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". They could be local in nature (*Oliver* v *Hislop* 1946 JC 20). It was not necessary to have evidence about the sectarian connotations of the word. The sectarian tensions in Glasgow, notably between Rangers and Celtic supporters, were well understood in Scotland; the fans being predominantly

respectively Protestant or Catholic. As a matter of judicial knowledge, "hun" was used as a derogatory description of Rangers supporters. The sheriff's local knowledge, that it was not only sectarian but also "an offensive slur directed at someone of Protestant faith", required to be afforded considerable respect.

[12] The SAC considered (para [24]) that there were many theories and much speculation about the origins of "hun"; notably a reference to the invaders of the Roman Empire, to German soldiers in the World Wars, or as a colloquialism for a savage. These were not relevant in the football context. In modern usage, in that context, the well-informed person in the West of Scotland would recognise that it is an abusive sectarian term to cause offence to Protestants and not simply as a reference to a Rangers supporter. It was no different from "Fenian", relative to Catholics (*Walls* v *Brown* 2009 JC 375). The summary sheriff's conclusion was correct. The appellant evinced malice or ill-will towards the police upon his perception that they were Rangers supporters and Protestants. The appeal was refused.

Submissions

Appellant

[13] Judicial knowledge was as described in Wilkinson: *Evidence* (at 128, above) and adopted in *PF Glasgow* v *Ward*, in which it was said (at para [16]), citing *Herkes* v *Dickie* 1958 JC 51 (at 56), that a matter requiring proof could not be established by using the judge's private knowledge. Facts within judicial knowledge were those that could be immediately ascertained from sources of indisputable accuracy or which were so notorious as to be indisputable (Walker & Walker: *Evidence* (5th ed) at para 11.6.1, approved in *Valentine* v *McPhail* 1986 SCCR 321 at 326; and *Lord Advocate's Reference (no 1 of 1992)* 1992 SCCR 724 at 737). Notoriety must reflect social change (*Doyle* v *Ruxton* 1993 SCCR 431). The facts, which

were within judicial knowledge, should be limited to those of common knowledge, although that could vary between different localities (Walkers at para 11.7.4). It was wrong for a judge to prefer his own local knowledge to the evidence (*Laidlaw* v *MacNeill* 1994 SCCR 460). Judicial knowledge did not include a judge's own experience, when direct evidence was available (Raitt: *Evidence* (3rd ed) at para 14.19). It was restricted to matters which were beyond dispute. Its function was not to usurp the function of evidence (*ibid*).

[14] The *Oxford English Dictionary* gave a number of definitions of "hun", including a colloquial term in Scots or Irish for "a Protestant or a supporter or player for Rangers". The origins in relation to Rangers fans were not clear. An article in the Irish Post on 7 June 2016 attempted to identify whether it was offensive and sectarian or merely a derisive but innocuous term for Rangers. Various theories of the origin were canvassed. These included that it came from a description of Rangers players as "no better than the 'huns'" because they had, at the time of the First World War, taken jobs in the shipyards rather than enlist. It may have been connected with the predominance of Rangers fans as employees of the part German owed Harland and Wolff shipyard in Govan. An alternative was that it related to the loyalty of Rangers fans to the Queen; ie "the German house of Wettin". The author of the article said that the word was a derisive but innocuous term for Rangers and their fans until the year 2000. A year later, according to the article, Celtic had blocked their fans from using the term on their website. The term had been applied by Celtic fans to supporters of Hearts. The Nil by Mouth charity described it as sectarian and abusive, used negatively against Protestants.

[15] Reference was made to a verdict of not proven by a sheriff at Glasgow relative to a religiously aggravated breach of the peace when a banner containing the word was unfurled at Celtic Park. In 2008 a Celtic fan had been convicted at Glasgow Sheriff Court of the

religious aggravation for wearing a t-shirt with "dirty horrible huns" written on it. The sheriff court case identified by the Irish Post was *PF Glasgow* v *Ward*, March 2012, unreported, Sheriff Swanson, involving the unfurling of a banner. The 2008 case was *PF Glasgow* v *Devlin*, October 2008, unreported, Sheriff Peebles. Mr Devlin had elected to wear the t-shirt near Ibrox on the night of Rangers' loss in the final of the UEFA Cup.

[16] The Article continued by saying that in 2015 the Scottish Football Association found a Celtic player guilty of making offensive comments by reciting a song containing the word on Dutch television. This related to a song with the rhyming lyric "the huns are deid". According to the SFA's compliance officer, who was coincidentally the sheriff in the appellant's case, this was offensive, but the allegation was not that it was sectarian or based on religion. In the same year, Rangers fans had begun to lobby the First Minister to prohibit the use of the word. The Article concluded that "many Rangers fans and independent organisations now consider the word sectarian". This was a relatively recent change as, whilst some regarded it as a catch-all reference for Rangers, Protestantism and Unionism, "many … have always considered it a slang term for Rangers fans". It depended on who was using it, to whom and in what context.

[17] In October 2016 the communication's watchdog Ofcom's social attitude survey ranked the offensiveness of the term as "mild", and of "little concern" (as was "Jock").

[18] Thus it was not demonstrably indisputable that "hun" was either an abusive sectarian term or one which was adopted to cause offence to those of the Protestant faith. To allow judicial knowledge to be applied, the meaning of hun would have to be immediately ascertainable from sources of indisputable accuracy or be so notorious as to be indisputable. That could not be said to be the case. The police officer had testified to his understanding of the word and the lack of alternative proof could not be cured from the sheriff's own

knowledge. The meaning of the word was disputed and it was not for the sheriff to usurp the function of evidence or to ignore what the officer had said.

Crown

[19] The Advocate depute accepted that, in terms of *Herkes* v *Dickie*, the private knowledge of the judge could not mend a lack of proof. The law was as stated in Wilkinson: *Evidence* at 128 (above). A party could not secure a wrong result by disputing what was "demonstrably indisputable" (Davidson: *Evidence* at para 3.01 citing Morgan: *Some Problems of Proof* at 42; see eg *Doyle* v *Ruxton* 1998 SCCR 467 at 470 on alcohol levels of beer; see also *Walls* v *Brown* and *Oliver* v *Hislop* 1945 JC 20 in which the court had regard to dictionary definitions). "Hun" was used predominantly by Celtic supporters to describe Rangers supporters. The only issue was whether it had a sectarian content and amounted to a religious aggravation. Rangers had a predominantly Protestant support. Whatever its origins, "hun" was an offensive or derogatory term to describe someone of the Protestant faith. It was proper for the sheriff to draw on his own judicial knowledge to infer that it was sectarian and a religious aggravation.

Decision

[20] The fundamental problem for the respondent is that the Procurator Fiscal Depute elected to lead evidence from a Glasgow police officer, who was presumably involved in crowd control at the match, on what the appellant's use of the word "hun" meant. He replied that it was a reference to the officer being a Rangers fan. An accusation of being such a fan is neither sectarian nor religious in content. This evidence was uncontradicted. If the meaning of "hun" was judicial knowledge, evidence of its meaning would be

inadmissible (Walker & Walker: *Evidence* (5th ed) at para 11.6), at least in so far as it contradicted that knowledge. Given that the officer expressed a clear view on what it meant, presumably in the specific context of the football match, it was hardly legitimate for the PFD to request the sheriff to ignore this evidence on the basis of contrary judicial knowledge.

[21] There is no significant dispute on what facts fall within judicial knowledge. As was said in *PF Glasgow* v *Ward* [2021] HCJAC 20 (Lord Matthews, delivering the Opinion of the Court, at para [17]) and citing Wilkinson: *Evidence* 128, they are:

> "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" (emphases added).

The answer to the first question, of whether every well-informed person knows that "hun" refers to Protestants generally, as distinct from Rangers fans in particular, must be in the negative. Unless it is to be assumed that the police officer was an *ignoramus*, it is immediately clear that not every well-informed person is imbued with the relevant knowledge including police in the stadium.

[22] The answer to the second question, of whether the facts averred can be ascertained by consulting appropriate works of reference, must also be in the negative. The most obvious reference works are dictionaries. The *Scottish National Dictionary* gives, as the primary definition, "Abusive name for a person who supports, or a footballer who plays for, Rangers …". Two prominent Scottish novelists are cited; Irvine Welsh referring to Hibs playing "the huns in the semi at Hampden" and Christopher Brookmyre, from Glasgow, mentioning "policing the Huns' next visit". It cannot be said that these comments, both in the football context, are referring not to Rangers or their fans but to Protestants generally. The secondary definition is certainly as an "Abusive term for a Protestant", but the

derivation of this is Michael Munro's *The Patter* (1985); a slim and often amusing volume which is intended as "a defining guide to the language of … Glasgow". Mr Munro's description of "hun" is not in the context of abuse but:

> "A nickname for a Protestant. *Also* a vague *non-sectarian* insult much used in football chants like 'The referee's a hun' or 'Go home ya hun'" (emphases added).

This definition is adopted as a fifth meaning in the *Oxford English Dictionary* which thus describes "hun" as referring to "A Protestant" but also to "a supporter of or player for Rangers …".

[23] It is true that the summary sheriff has a degree of familiarity with the language and lore of the West of Scotland, no doubt the members of the Sheriff Appeal Court do too. This court also has a collective familiarity. It may be that individual judges and sheriffs will have their own views on what the word might mean in particular contexts but, as Professor Raitt put it (*Evidence* 3th ed at para 14.19):

> "Judicial knowledge does not include a judge's own personal experience of a particular matter where direct evidence is available which might have a bearing on the subject. Judicial notice is restricted to matters that are beyond dispute and not those that are in issue between the parties. The function of judicial knowledge is only to note the existence of a matter beyond dispute, not to usurp the function of evidence on a contested matter."

[24] It was undoubtedly disputed that the appellant's use of the term "hun" in its particular context referred to Protestants as distinct from Rangers supporters. The evidence, such as it was, pointed to the latter. The term, as a reference to Protestants, is not "so notorious as to be indisputable" (Walker & Walker at para 11.6). That is essentially an end of the matter. There may be cases in which there is other evidence which makes it clear that a person intended to use a word in a sectarian sense or in a manner demonstrating religious prejudice (eg *Walls* v *Brown* 2009 SCCR 711), but this is not one of them. The appeal must be allowed in so far as the conviction relates to the uttering of a sectarian remark and to the

religious aggravation. The first three questions in the stated case fall to be answered in the affirmative.

Addendum

[25] If a religious prejudice aggravation is to be libelled in respect of remarks which are thought to be directed, at least initially, at Rangers supporters, care will have to be given to how exactly such a libel can reflect the provisions of section 74 of the 2003 Act. There is a flaw in a syllogism whereby: (i) a remark is directed against Rangers supporters; (ii) most Rangers supporters are Protestants; therefore (iii) the remark is directed towards Protestants and is therefore religious. That is a *non sequitar*. Whatever perceptions may exist about Rangers and their supporters, neither can be described as a "religious group" or similar. They are respectively a football club and their fans. Their objective is not related to the promotion of religious faith or a way of life but winning leagues and cups. Rangers supporters exist throughout the world, but they can hardly be described a group. Even if they were, the fact that most Rangers fans may be Protestant, in the very broad sense of coming from that part of European society that emerged from the Reformation, does not make them a group with religious affiliations. Many of the fan base will be secular in outlook, albeit they may profess a tribal loyalty or an irrational antipathy towards the opposition supporters for 90 minutes on a Saturday afternoon or a Wednesday night. A person who attends at Ibrox, however fanatical, will not think that he or she is attending a religious ceremony as distinct from a sporting event. The court agrees, in general terms, with the judgment to a similar effect in *McClung* v *Doosan Babcock*, unreported, Employment Tribunal, Glasgow, 23 August 2022; in particular (para 59) under reference to the "*Everyone-Anyone Rangers FC Charter*" (2020) which emphasises that any shared bond between the

supporters generally is in Rangers and not as part of a religion or political bulwark. Care should thus be taken to avoid stereotyping, especially if it is based on the activities of a marginal element in the stands, and incorporating any such general classification into judicial knowledge.

Sentence

[26] The summary sheriff did not specify the proportion of the fine (if any) which was attributable to the religious aggravation as he should have done (2003 Act, s 74(4A(d)). However, it is only the length of the Football Banning Order which is under challenge on the basis of the deletion of the two elements from the conviction. There is no doubt that football fans, of whatever hue, enjoy the raucous atmosphere of the stadium and the, sometimes insulting, chants which are directed at the opposition (usually the supporters rather than the players). As was alluded to by the police officer, it is unusual for the police to be asked by members of the crowd to remove an individual. This is no doubt partly because the individual will normally be supporting the same team as those around him. However, as was said in *Walls* v *Brown* (Lord Carloway, delivering the Opinion of the Court at paras [18] and [20]), there are limits and some spectators will prefer wanting to watch at least some of the game rather than abusing opposition supporters for no other reason than that they are simply that. What the appellant, whose address in Renfrew might suggest he was supporting Celtic rather than Hibs, found objectionable about the Hibs, or maybe even the Celtic, support will remain a mystery, but the court has no difficulty in holding that a one year banning order was a very modest penalty. The fourth question will be answered in the negative.