In The Supreme Court of Bermuda

CIVIL JURISDICTION
2021: No. 55

IN THE MATTER OF SECTIONS 8, 9 AND 15(1) OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF ARTICLES 9AND 10 OF SECTION ONE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BETWEEN:

BARBI BISHOP

Applicant

-and-

THE QUEEN

Respondent

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Victoria Greening of Resolution Chambers for the Applicant**
	Shakira Dill- Francois, Deputy Solicitor General, for the Respondent
Dates of Hearing:	**14 July 2021**
Date of Judgment:	**27 August 2021**

JUDGMENT

whether a social media post arguably constitutes a breach of section 68(1)(a) of the Electronic Communications Act 2011; whether commencement of proceedings under section 68(1)(a) is in breach of applicant's fundamental right of freedom of expression under section 9 of the Bermuda Constitution Order; whether the restriction of applicant's fundamental right of freedom of expression is reasonably justifiable on grounds of public order; whether commencement of criminal proceedings against the applicant is proportionate to the legitimate aim being pursued

HARGUN CJ

Introduction

1. In these constitutional proceedings commenced by Ms. Barbi Bishop, (the "**Applicant**") under section 15 of the Bermuda Constitution Order 1968 (the "**Constitution**") the Court is asked to consider the extent to which actions which may constitute an offence under section 68 (1)(a) of the Electronic Communications Act 2011 (the "**Act**") may nevertheless be protected under sections 8 and 9 of the Constitution.

Background

2. The background to this matter is set out in the affidavit of Police Inspector Paul Simons dated 12 April 2021. In that affidavit Inspector Simons states that on the 25 May 2020, Mr. George Floyd, an African American male, died in Minneapolis, Minnesota from being handcuffed and being pinned to the ground by police officers. The arrest, which was captured on video, caused outrage and sparked tensions both in the United States and internationally.

3. Mr. Floyd's death became part of the "BLACK LIVES MATTER" campaign which is dedicated to fighting racism and violence against the black community, especially in the form of police brutality

4. To support the Black Lives Matter movement, a protest was organised here in Bermuda by a group of local supporters. The march was highly publicised and was to take place on 7 June 2020.

5. On 3 June 2020, it was reported to the Professional Standards Department (the "**PSD**") of the Bermuda Police Service (the "**BPS**") that the Applicant, a serving police officer, posted what was considered to be an inflammatory and racist meme on her Facebook and Instagram pages. The meme depicted a black background with a cartoon image of a white Jeep running over white stick people, accompanied with red wording "ALL LIVES SPLATTER. NOBODY CARES ABOUT YOUR PROTEST. KEEP YOUR ASS OUT OF THE ROAD".

6. Inspector Simons states that at the material time, he was aware that the "All Lives Splatter" meme had been in circulation since 2017. It represents the death of Ms. Heather Heyer, who was killed in Charlottesville, Virginia on 12 August 2017, by Mr. James Alex Fields Jr. Mr. Fields was an alleged neo-Nazi and white supremacist, who drove a Dodge Challenger into a crowd of counter-protesters at a white nationalist rally. Approximately 19 other individuals were also seriously injured, as a result of the collision. The report of this incident appears in the New York Times of 12 August 2017 and records that:

> *"The city of Charlottesville was engulfed by violence on Saturday as white nationalists and counter-protesters clashed in one of the bloodiest fights to date over the removal of Confederate monuments across the South.*
>
> *White nationalists had long planned a demonstration over the city's decision to remove a statute of Robert E. Lee. But the rally quickly exploded into racial taunting, shoving and outright brawling, prompting the governor to declare a state of emergency and the National Guard to join the police in clearing the area.*
>
> *These skirmishes mostly resulted in cuts and bruises. But after the rally at a city park was dispersed, a car bearing Ohio license plates plowed into a crowd near*

the city's downtown mall, killing a 32-year-old woman. Some 34 others were injured, at least 19 in the car crash, according to a spokesman for the University of Virginia Medical Center.

…

Witnesses to the crash said a gray sports car accelerated into a crowd of counter demonstrators - who were marching jubilantly near the mall after the nationalists had left - and hurled at least two people in the air.

…

The planned rally was promoted as "Unite the Right" and both its organizers and critics said that they expected it to be one of the largest gatherings of white nationalists in recent times, attracting groups like the Ku Klux Klan and neo-Nazis and movement leaders like David Duke and Richard Spencer.

Many of these groups have felt emboldened since the election of Donald J. Trump as president. Mr. Duke, a former Imperial wizard of the Ku Klux Klan, told reporters on Saturday that the protesters were "going to fulfill the promise of Donald Trump" to "take our country back."

7. Inspector Simons states that the post resulted in local social media backlash. On 7 June 2020, local outrage was further manifested during Bermuda's Black Lives Matter march, where protesters loudly chanted for the Applicant to be dismissed by the BPS. Additionally, on the same date, the local activist organisation, Social Justice Bermuda, posted an open letter on their Facebook page, which was accompanied with a partial picture of the Applicant, and the "ALL LIVES SPLATTER" meme:

"A Bermuda Police Service officer, Barbi Bishop (Harris) posted this inflammatory meme in reaction to the protest in Bermuda in solidarity with the Black Lives Matter Movement in the US…

Barbi Bishop (Harris)' post is not only violently racist, it is abhorrent from someone sworn to protect the community. We call on the Bermuda Police Service

to terminate her immediately. Suspension is not enough, this image was posted days ago.

Black people living in Bermuda cannot afford to have their freedoms and rights jeopardized by people like her that have no commitment to integrity while enforcing the law of the land. The overt racism calls into question every case she has ever been involved in.

This is why the Black Lives Matter movement exists. This is why we march. We call on the Bermuda Police Service to terminate Barbi Bishop (Harris) immediately, review her past cases, and implement implicit bias training for all officers."

8. The reference to "*suspension*" in the open letter from Social Justice Bermuda, refers to the present disciplinary proceedings pending against the Applicant arising out of this incident. It appears from the Record of Interview attended by the Applicant with Inspector Simons and the Summary of Evidence that by that date the Applicant had been suspended from duty by the BPS pending an investigation into the alleged gross misconduct arising from these allegations.

9. On 3 June 2020 a report was made to the PSD of the BPS that the Applicant, as a serving police officer, posted an inflammatory and possibly racist meme on both her Facebook and Instagram social media pages. It appears that on 5 June 2020 Superintendent Murray of PSD served the Applicant with Notice of Alleged Breach of the Standards of Professional Behaviour, pursuant to section 14 of the Police Conduct Orders 2016. An Amended Notice was served upon the Applicant on 17 July 2020 by Inspector Taylor. On 21 July 2020 a Re-Amended Notice was served upon the Applicant by Inspector Simons alleging that the Applicant may have committed criminal offences relating to the Telecommunications Act 1986 and the Electronic Communications Act 2011. It appears that the disciplinary proceedings served upon the Applicant as long ago as 5 June 2020, alleging gross misconduct, are still pending, and the Applicant remains suspended from duty.

10. The Court was told by Miss Greening, counsel for the Applicant, that the objectionable post could only be seen by the Applicant's "*Friends*" on Facebook and Instagram and that the Applicant immediately removed the post following the outcry outlined above. Even though the post had been removed, it appears that on 13 August 2020, a charge was approved by the Director of Public Prosecutions (the "**DPP**") for an offence contrary to section 68(1)(a) of the Act. The Applicant was later charged with the offence on 21 October 2021. On 13 November 2020, the Applicant appeared before the Magistrates' Court and pleaded not guilty to the offence. The Applicant elected to be tried summarily. On 21 January 2021, the Applicant filed this constitutional application seeking to strike out the criminal proceedings against her.

The Constitutional provisions

11. The Applicant relies upon section 8 (Protection of freedom of conscience) and section 9 (Protection of freedom of expression) of the Constitution. The relevant provisions provide that:

> "**Protection of freedom of conscience**
>
> *8 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.*
>
> *(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required—*

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

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited interference of persons professing any other religion or belief,

Protection of freedom of expression

9 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required—

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

(ii) for the purpose of protecting the rights, reputations and freedom of other persons…"

The Constitutional framework

12. The Constitutional framework relating to the provisions providing for fundamental rights and protections was considered by the Court in *Brewster v The Premier of Bermuda* [2021]

SC (Bda) 57 Civ (23 July 2021) and appears at paragraphs 13 to 19 of that judgment. In summary:

(a) The framework of the Constitutional provisions relating to fundamental rights, including sections 8 and 9, contemplates that in the first instance it is for the applicant to show that there has been a *prima facie* breach of a fundamental right and in this regard the applicant bears the burden of proving this breach.

(b) Once the applicant has discharged the burden of showing a *prima facie* breach of a fundamental right set out in Chapter 1 of the Constitution, the respondent must prove that the measures limiting the protected right are *reasonably required* in the interests of (i) defence, public safety, public order, public morality or public health; or (ii) for the purposes of protecting the rights, reputations and freedom of other persons.

(c) The requirement of showing that a measure restricting the protected right is *reasonably required* was considered by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, lands and Housing* [1999] 1 AC 69, where the Privy Council held that the respondent must prove (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

(d) In considering whether the measure designed to meet the legislative objectives is rationally connected to it the court employs a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective.

(e) When the burden of establishing the measure limiting the protected right is reasonably required has been discharged by the respondent, the applicant may

nevertheless show that the "*provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society*". The applicant bears the burden of showing that the measure is nevertheless not reasonably justifiable in a democratic society.

Legal Issues raised

13. Legal issues raised by the applicant in this application are:

    (a) Whether the decision by the Director of Public Prosecutions to prosecute the Applicant under section 68 (1) (a) of the Act and the pending criminal proceedings are in breach of the Applicant's fundamental rights under sections 8 and 9 of the Constitution.

    (b) If the answer to the question in (a) above is in the affirmative, whether the institution of the present criminal proceedings is nevertheless justifiable on the grounds of public order or public morality; or for the purposes of protecting the rights and freedoms of other persons.

Whether the decision to prosecute is in breach of sections 8 and 9 of the Constitution

14. The Applicant contends that by posting the message on Facebook and Instagram the Applicant was exercising her fundamental freedom of expression enshrined in section 9 of the Constitution. The Applicant argues that the institution of a criminal proceedings against her based upon the fact that she posted a message on Facebook and Instagram, which is alleged to be grossly offensive, necessarily infringes upon a fundamental right of freedom of expression.

15. On the face of it the decision to prosecute the Applicant for posting the message on Facebook and Instagram would appear to be in breach of her rights under section 9 of the Constitution. The posting of the message was clearly an exercise of right of free

"*expression*" on the part of the Applicant and exercise of her Constitutional right to "*impart ideas and information without interference*".

16. The Court should add that the inquiry which the court is engaged in at this stage is not whether the Court can interfere with the discretion of the DPP to prosecute the Applicant. The Court is not concerned with considering the circumstances in which it is appropriate to interfere with the discretion of the DPP, as was the case in *Police Constable GA v The Director of Public Prosecutions* [2021] SC (Bda), 1 Civ (5 January 2021). The Court is dealing with a different issue: whether the decision of the DPP amounts to a breach of the Applicant's fundamental rights enshrined in sections 8 and 9 of the Constitution.

17. Indeed, the House of Lords reached the same conclusion in *Director of Public Prosecutions v Collins* [2006] UKHL 40. In that case Mr. Taylor who held strong views on immigration and asylum policy and the provision of public support to immigrants and applicants for asylum, ranted and shouted and referred to "*Wogs*", "*Pakis*", "*Black bastards*" and "*Niggers*". Some of those who received the calls and heard the messages described themselves as shocked, alarmed and depressed by his language.

18. Mr. Taylor was charged with sending messages of grossly offensive, obscene or menacing character by means of a public telecommunications system contrary to section 127(1)(a) of the English Communications Act 2003, which is in the same terms as section 68(1)(a) of the Bermuda Act. Lord Bingham held at [14] that section 127(1)(a) does of course interfere with a person's right of freedom of expression before going on to consider whether the restriction was nevertheless justifiable.

19. The Supreme Court of Canada came to a similar conclusion in *R v James Keegstar* [1990] 3 SCR 697, a decision referred to in the judgment of Kawaley CJ in *Ayo Kimathi v Attorney General for Bermuda* [2017] Bda LR 40. Mr. James Keegstra was a high school teacher and his teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "*treacherous*", "*subversive*", "*sadistic*", "*money-loving*", "*power hungry*" and "*child killers*". He taught his classes that Jewish people seek to destroy Christianity and are

responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "*created the Holocaust to gain sympathy*" and, in contrast to the open and honest Christians, were said to be deceptive, secretive, and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and in exams. If they failed to do so, their marks suffered.

20. Mr. Keegstra was convicted of an offence under section 319 of the Criminal Code which provides that everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of an indictable offence. Mr. Keegstra challenged the conviction on the ground, *inter alia*, that it was in breach of his freedom of speech under section 2 (b) of the Canadian Charter of Rights and Freedoms (the "**Charter**"), which provides that everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. Dickson CJ, before moving on to see whether the impugned provision is nevertheless justified, held that section 319 does indeed constitute an infringement of the freedom of expression guaranteed by section 2 (b) of the Charter.

21. The real issue in this case is whether the decision to prosecute the Applicant under section 68(1)(a) of the Act, on the basis that her Facebook and Instagram postings were grossly offensive, was reasonably required in the interests of the public order or public morality; or for the purposes of protecting the rights and freedoms of the persons. As noted above in considering the issue whether it was reasonably required the respondent must prove (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right of freedom are no more than is necessary to accomplish the objective. The Court turns to consider these three limbs of the *deFreitas* test.

Is the legislative objective sufficiently important to justify limiting a fundamental right?

22. In considering the corresponding English provision to section 68(1)(a) of the Act Lord Bingham in *Collins* held that the purpose of the legislation was to prohibit the use of a service

provided and funded by the public for the benefit of the public for the transmission of communication which contravenes the basic standards of our society. Lord Bingham explained at paragraph 6 and 7:

> *"6…The genealogy of this section may be traced back to section 10(2)(a) of the Post Office (Amendment) Act 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene or menacing character.*
>
> *…*
>
> *7. This brief summary of the relevant legislation suggests two conclusions. First, the object of section 127(1)(a) and its predecessor sections is not to protect people against receipt of unsolicited messages which they may find seriously objectionable. That object is addressed in section 1 of the Malicious Communications Act 1988, which does not require that messages shall, to be proscribed, have been sent by post, or telephone, or public electronic communications network. The purpose of the legislation which culminates in section 127(1)(a) was to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society. A letter dropped through the letterbox may be grossly offensive, obscene, indecent or menacing, and may well be covered by section 1 of the 1988 Act, but it does not fall within the legislation now under consideration.* (emphasis added)

23. The object of the legislative provision, as described above, is to prohibit the use of an electronic network to contravene basic standards of our society which must include the prohibition against making racist remarks against a segment of our society.

24. The reasoning of Lord Bingham applies equally to the use of the Internet by private social networks such as Facebook, Instagram and Twitter. This was so held by the Divisional Court in England in *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin), by the Lord Chief Justice at [23] – [25]:

21. It was agreed before the magistrates that the appellant's message was sent using the "Twitter" social networking site which fell within the description of a "public electronic communications network". It was, however, a ground of appeal to the Crown Court that the message was not sent by a public electronic communications network. By the date of the hearing in the Crown Court there was a formal admission in these terms:

> *"Twitter is a privately owned company which operates via a public electronic communications network. Messages which are posted on the Public Timeline of Twitter are accessible to all those who have access to the internet".*

22. When we examined the issue in argument, Mr Cooper accepted that a message on public "Twitter" is accessible to all who have access to the internet, and therefore, by inference, to the public, or to that vast section of the public which included anyone who chose to access a timeline consisting of any of the posted key words by use of a search engine.

23. In her judgment in the Crown Court Judge Davies addressed this issue when rejecting a submission that there was "no case" for the appellant to answer. She said:

> *"The "Twitter" website although privately owned cannot, as we understand it, operate save through the internet, which is plainly a public electronic network provided for the public and paid for by the public through the various service providers we are all familiar with ... The internet is widely available to the public and funded by the public and without it facilities such as "Twitter" would not exist. The fact that it is a private company in our view is irrelevant; the mechanism by which it was sent was a public electronic network and within the statutory definition ... "Twitter", as we all know is widely used by individuals and organisations to disseminate and receive information. In our judgment, it is inconceivable that grossly offensive, indecent, obscene or menacing messages sent in this way would not be potentially unlawful"*

25. In this case the Applicant does not contend that the Court should declare that section 68(1)(a) of the Act is contrary to sections 8 and 9 of the Constitution. Section 68(1)(a) of the Act, as a legislative provision, is plainly consistent with the terms of section 8 and 9 of the Constitution. It was indeed so held by Lord Bingham in *Collins* at [14].

26. The focus of the challenge made by the Applicant and the focus of the Court's inquiry is whether the message posted by the Applicant is protected by section 9 of the Constitution, even though the facts may otherwise constitute an offence under section 68(1)(a) of the Act. As Kawaley CJ noted in *Kimathi* at [65] when constitutional relief is sought, the main battle almost invariably takes the form of assessing whether or not the interference complained of is reasonably required in one or other of the permitted public interest grounds. In the context of this case, the Respondent contends that, the legislative objective is to ensure that a public electronic communication service is not used in such a way so as to "*grossly offend*" members of the community and that includes posting messages that attack or use pejorative and discriminatory language with references to a person or group on the basis of their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.

27. The Constitutional provisions dealing with protection of freedom of conscience (section 8) and protection of freedom of expression (section 9) recognise that not all speech has equal value and not all speech is equally protected by the Constitutional provisions. On one side of the spectrum the courts recognise that freedom of political debate is essential to the continued existence of a democratic society and in that context the freedom of expression has to be jealously guarded by the courts. Save in exceptional circumstances the courts are unlikely to uphold legislation on the basis that it is "*reasonably required*" if it has the effect of restricting expression of political debate. This has been recognised in several cases by the Privy Council including *Worme v Commissioner of Police* [2004] UKPC 8 (cited by Kawaley CJ in *Kimathi* at [64]), where Lord Rodger held at [19]:

> *"19. In considering in more detail the arguments advanced by counsel for both parties in their helpful submissions, their Lordships bear in mind the importance that is attached to the right of freedom of expression, particularly*

in relation to public and political matters, guaranteed by section 10 of the Constitution. The spirit of the statement of the European Court of Human Rights in Lingens v Austria (1986) 8 EHRR 407, 418-419, at para 42, that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention" has been reflected in decisions of courts throughout the world. In Hector v Attorney General of Antigua [1990] 2 AC 312, 318, for instance, Lord Bridge of Harwich said:

> *"In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind."*

28. On the other end of the spectrum is "*hate speech"* or "*hate propaganda*", a term used by Dickson CJ in *Keegstra*, to denote "*expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group*." In relation to hate speech or hate propaganda courts are much more likely to conclude that a legislative provision restricting the freedom of expression of hate speech is "*reasonably required*" in the interests of the public order, public morality; or for the protection of rights of third parties. The reasons why the courts of a number of jurisdictions have been unwilling to accord constitutional protection to hate speech or hate propaganda, as explained by Dickson CJ in *Keegstra* (in a passage cited by Kawaley CJ in *Kimathi* at [83]) are twofold. First, it increases the incidence of violence and discrimination against the targeted group. Secondly, by attracting individuals to its cause, and in the process creates serious friction and division within various cultural groups in society.

29. In *Kimathi* Kawaley CJ noted that these observations by Dickson CJ albeit made in different sociological context, appeared to him to have general application and apply equally in the Bermudian context and he referred to the observations made in the Pitt Report at [84].

30. Dickson CJ had no doubt in *Keegstra* that the objective of the provision in the Criminal Code making it an offence to promote hatred against an identifiable group fully justified the attendant restriction of section 1(b) of the Charter. He held that "*a powerfully convincing legislative objective exists such as to justify some limit on freedom of expression*."

31. In *Collins* in which Mr. Taylor ranted and shouted and made references to "*Wogs*", "*Pakis*", "*Black bastards*", and "*Niggers*" it was "*grossly offensive*" and was contrary to the terms of section 127(1)(a) of the Communications Act 2003. Lord Bingham accepted that section 127(1)(a) did restrict Mr. Taylor's right to freedom of expression as guaranteed by article 10 of the European Convention but in this case, it was justified based upon the legislative objective. Lord Bingham held at [14]"

> *"14. Miss Oldham did not contend that this conclusion would be inconsistent with article 10 of the European Convention, given effect by the Human Rights Act 1998, and she was right not to do so. Section 127(1)(a) does of course interfere with a person's right to freedom of expression. But it is a restriction clearly prescribed by statute. It is directed to a legitimate objective, preventing the use of a public electronic communications network for attacking the reputations and rights of others. It goes no further than is necessary in a democratic society to achieve that end."*

32. In *Kimathi* Kawaley CJ defined the central legal issue in that case as being whether "*the impugned statements made by the Applicant, which were undoubtedly offensive to persons of European descent and homosexuals, arguably cross the boundaries of constitutionally protected free speech into the domain of legally unprotected "hate speech"?*

33. In *Kimathi* the applicant had advanced the thesis that the problem faced by the black community was that white people were pushing a homosexual agenda, a genocidal agenda, which was a modern version of the violence perpetrated during the slave era to subjugate black men and women and strip them of their culture, identity and dignity. Images of effeminised black men were being widely circulated today just as in the slave era; strong rebellious men

were humiliated to deter other black men from adopting truly masculine behaviour. All forms of sexual perversion, which included child abuse, rape, bestiality, and homosexuality, emanated from Europeans and could be concisely described as "*white sex*". Support for gay rights was being promoted internationally by countries such as the United States with a view to destroying black communities.

34. The applicant's proposed solution was the "*Straight Black Pride Movement*" ("SBPM"), a way of creating a safe zone for people of African descent with shared African values who are willing to commit to (a) heterosexual relationships between black people, (b) only patronizing businesses owned by other straight black persons, (c) conducting oneself in a dignified manner and having nothing to do with homosexuals ("*we don't let freaks in our environment*"). The possibility of establishing a SBPM Chapter in Bermuda was floated.

35. In that context Kawaley CJ held, at [85], that the Applicants expression was "*hate speech*" and was not protected by section 9 of the Constitution:

> *"In summary, I find that section 9 of the Constitution does potentially authorize the State to, depending on the circumstances of any particular case, sanction "hate speech" without having to establish a risk of actual violence of physical harm. What qualifies as "hate speech" is ultimately a fact specific question. But the central ingredient is statements which have the capacity to result in hatred for and discrimination against the targeted groups."*

36. It needs to be noted that there are material differences between the facts in *Collins, Keegstra* and *Kimathi* on the one hand and the facts in this case.

37. In *Collins*, Mr. Taylor held strong views and was pursuing a campaign against the immigrant community and had been making the "*grossly offensive*" comments on a regular basis for a period of over 2 years. He was charged with the criminal offence primarily to stop him from making the grossly offensive telephone calls.

38. In *Keegstra*, Mr. Keegstra was a high school teacher from the early 1970s until his dismissal in 1982 and it appears that throughout this period he engaged in hate speech towards the Jewish people in teaching his students and expected his students to reproduce his teachings in class and in exams. If they failed to do so, their marks suffered. Mr. Keegstra was clearly on a campaign, over a long period of time, to impress his racist views upon the student body.

39. In *Kimathi*, Mr. Kimathi not only believed in his views, which were characterised as "*hate speech*" by Kawaley CJ, but he was on a campaign to persuade African American and African Bermudians to adopt his views. Again, he was on a campaign to convert other people to his views.

40. The posting of a clearly inflammatory and potentially racist meme by the Applicant on her Facebook and Instagram pages clearly is not in the same category as *Collins*, *Keegstra* or *Kimathi*. It does not appear that this post was part of a campaign to change any views. Significantly, the post was taken down immediately upon realising that it was highly inflammatory.

41. Having said this the Court cannot accept the Applicant's submissions that the meme, at its highest, is a crude road safety advertisement/caution for the benefit of persons protesting the streets or that the words used merely expressed a negative view of the protest and protesters.

42. The submission on behalf of the Applicant relies heavily on the literal meaning of the words and what is depicted by the objectionable image. In *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffmann, in the context of interpretation of contracts, famously said that the meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. Lord Hoffmann was articulating the philosophical linguistic distinction between "*semantic content*" and "*pragmatic content*". Semantic content is the literal meaning of the words used. However, what is relevant is the meaning conveyed to the recipient of the words used which depends upon the context and the background in which the words were used, the pragmatic content.

43. The social media post made by the Applicant on 3 June 2020 was not made out of the blue with no connection to any other event. It was clearly in response to the protest march about to take place on 7 June 2020 in solidarity with the Black Lives Matter movement. The timing of the post and the use of the words "ALL LIVES SPLATTER" leave no room for any other interpretation.

44. "Black Lives Matter" is a slogan or phrase known throughout the world, used to highlight racism against black people. In particular it highlights violence suffered by African Americans at the hands of the Police and the lack of opportunities afforded to the African American community. It is common knowledge that the slogan was widely used after the death of Trayvon Martin, an unarmed African American young man who was shot in 2012 by neighborhood watch volunteer George Zimmerman. The movement captured worldwide attention in 2020 after the murder of George Floyd, an unarmed African American, who was murdered by Derek Chauvin, a police officer who knelt on his neck.

45. It is also common knowledge that the "ALL LIVES SPLATTER" meme has been in circulation since 2017 and represents the death of the protester who was killed by an alleged neo-Nazi and white supremacist, who drove his Dodge Challenger into a crowd of counter protesters at a white nationalist rally.

46. It is with this background and in this context the march organised in support of the "Black Lives Matter" movement has to be viewed. It is reported that approximately 7000 people attended the march, which was the largest number of persons to attend a march in Bermuda.

47. The march organised in support of the "Black Lives Matter" movement was not merely showing solidarity with the movement in the United States but was also highlighting the historical and current divisions and disparities within Bermuda. This is an essential part of the context and was highlighted by Kawaley CJ in *Kimathi* at [84]:

> *"…The last (to my knowledge) Royal Commission to examine social and racial relations in Bermuda reported nearly 40 years ago: 'Report of the Royal*

Commission into the 1977 Disturbances', July 14, 1977 (the "Pitt Report")9 . The central theme running through the Pitt Report was a broad political consensus that Bermuda's best interests lay in effectively evolving away from a racially divided society dominated by a privileged white minority towards a more equitable 'integrated' or non-racial society. That consensus implicitly underpins the fundamental rights and freedoms protected by the Bermuda Constitution. Public disorder was identified as a risk flowing from perceptions of racial injustice. The Pitt Report (parts of which have a disturbingly current ring to them) made the following observations (at paragraph 9.19), which in my judgment reflect the sort of broad public policy concerns which should be borne in mind in Bermuda today when defining the limits of free speech in our unique social context:

"Many Bermudians will remember the slogan that was publicised in Britain during World War Two: 'Careless talk costs lives'. Bermudians must have the courage to enter into and persevere in a similar campaign which will remove the hostile attitudes generated by the sort of remarks which add to the problems rather than assist in resolving them. Bermuda is too small and too complicated for separation to be a viable alternative to bigotry…"

48. With this background and context it can be appreciated that the post made by the Applicant is capable of being considered as "*grossly offensive*" by reasonable people in this multi-racial and multi-cultural community. There is clearly the potential of offending people, as was indeed the case, and the potential for public disorder, as can be seen from the reaction of those who attended the march and the reaction from the group Social Justice Bermuda. The object of section 68(1)(a) of the Act, as stated by Lord Bingham in *Collins*, is to prohibit the use of a public electronic communications service which contravenes the basic standards of our society such as posting messages which are "*grossly offensive*". The posting of "*grossly offensive*" messages has the potential of negative impact upon public order. Accordingly, the Court would be prepared to hold that the legislative objective is sufficiently important to justify limiting the fundamental right of freedom of expression set out in section 9 of the Constitution subject to

the important consideration whether the means used to impair the right of freedom are no more than is necessary to accomplish the objective (see paragraphs 51 to 66 below). For present purposes the Court is prepared to hold that the first limb of the *deFreitas* test can be satisfied.

Is the measure designed to meet the legislative objective rationally connected to it?

49. As noted earlier, a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective.

50. Section 68 (1)(a) of the Act is designed to ensure that the general public does not use the electronic communication service by sending messages that are grossly offensive or of an indecent or obscene or menacing character. In principle, compliance with the terms of section 68(1)(a) of the Act can reasonably be expected to contribute towards the maintenance of public order and public morality. Accordingly, the second limb of the *deFreitas* test would appear to be satisfied.

Are the means used to impair the right of freedom no more than is necessary to accomplish the objective?

51. In considering whether the Court is satisfied that the means used to impair the right of freedom are *no more than necessary* to accomplish the object, it is relevant to keep in mind that the jurisprudence in relation to article 10 of the European Convention (upon which section 9 of the Constitution is based) imposes stringent requirements before there can be any infringement of the freedom of expression. The jurisprudence shows that any justification put forward by the respondent must be "*convincingly established*". The burden of proof is on the respondent. Secondly, a measure that interferes with the freedom of expression is only justified if it is prescribed by law, pursues one or more of the legitimate aims in article 10(2), and is shown *convincingly* to be "*necessary in a democratic society*". Thirdly, the court must consider whether the interference complained of (in this case the prosecution of the Applicant) (1) corresponds to a pressing social need, (2) is *proportionate* to the *legitimate aim* pursued and (3) is supported by reasons which are relevant and sufficient.

52. In relation to these requirements reference can be made to *Percy v Director of Public Prosecutions* [2001] EWHC 1125 (Admin), a decision of the Divisional Court, where Hallett J held at [43]:

> "*Where the right to freedom of expression under Article 10 is engaged, as in my view is undoubtedly the case here, it is clear from the European authorities put before us that the justification for any interference with that right must be convincingly established. Article 10(1) protects in substance and in form a right to freedom of expression which others may find insulting. Restrictions under Article 10(2) must be narrowly construed. In this case, therefore, the court had to presume that the appellant's conduct in relation to the American flag was protected by Article 10 unless and until it was established that a restriction on her freedom of expression was strictly necessary"*

53. The latest decision to follow the decision of the House of Lords in *Collins* is *Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin), another decision of the Divisional Court, where Warby J held at [35] that the following strict requirements must be established before there could be any interference with the freedom of expression:

> *"... A measure that interferes with freedom of expression is only justified if it is prescribed by law, pursues one or more of the legitimate aims identified in Article 10(2), and is shown convincingly to be "necessary in a democratic society". "Necessary" is not synonymous with "indispensable", but nor is it as flexible as such terms as "useful" "reasonable" or "desirable". One must consider whether the interference complained of (1) corresponds to a pressing social need, (2) is proportionate to the legitimate aim pursued and (3) is supported by reasons which are relevant and sufficient. The authorities are cited in Connolly at [19], [23-27]. Some of the consequences of this approach are spelled out in the harassment authorities I have cited. But the points made in those authorities are not confined to cases of harassment. They apply to that crime and tort because, and to the extent that, it engages the right to freedom*

of expression, and applies to a course of conduct. The same general principles must apply to the present context.

54. Warby J held that a prosecution under section 127(2)(c) of the Communications At 2003 was plainly an interference by the state with the defendant's right to freedom of expression and that it was the obligation of the state to justify the prosecution. Warby J held at [42]-[43]:

> *"42. A prosecution under s 127(2)(c) for online speech is plainly an interference by the state with the defendant's Convention right to freedom of expression. This case is no different in principle from that of Connolly. Yet the sole reference to the Convention in the prosecution opening came in response to the defence applications. The essential submission was that "There has been … no denial of Article 10 rights to the Defendant. Article 10 does not give free reign to anyone to be offensive or gives an absolute defence to an offence that necessarily has about it purpose the prevention of a person abusing another by communication, speech or writing or other expression." The Judge dealt with the Convention issues as follows:-*
>
> *"[13] In considering your evidence, I have reminded myself of Article 10 and accept fully an individual's right to free expression and the right to take part in public debate, and that Twitter is used by many people for that purpose. However, Art 10 rights are not unfettered and I do not find your communications to be part of a debate, they are merely personal comments aimed at Ms Hayden. We teach our children to be kind to each other and not to call each other names in the playground and there is no reason why, simply because some thing is on social media, we should not follow that rule as adults and think about what is being written before sending messages, and not send 'stupid throw away comments', as described by you in xx. [19] I am asked by your counsel not to criminalise Twitter and shut down free speech. That is not my intention, there should be no restriction on proper debate, but I do not find that what you did was in furtherance of any debate as I hope I have explained."*

43. This is an unstructured approach that lacks the appropriate rigour. The Crown evidently did not appreciate the need to justify the prosecution, but saw it as the defendant's task to press the free speech argument. The prosecution argument failed entirely to acknowledge the well-established proposition that free speech encompasses the right to offend, and indeed to abuse another. The Judge appears to have considered that a criminal conviction was merited for acts of unkindness, and calling others names, and that such acts could only be justified if they made a contribution to a "proper debate". Neither prosecution nor Judge considered whether some more demanding interpretation of s 127 or addressed the question of what legitimate aim was pursued, or, more importantly, whether the conviction of this defendant on these facts was necessary: whether it was a proportionate means of responding to some pressing social need."

55. Given that prosecution under the Communications Act 2003 is likely to involve considerations of article 10 of the European Convention the English prosecuting authorities have established "***Guidelines on prosecuting cases involving communications sent via social media****."* The Guidelines provide that the statutory provisions must be interpreted consistently with free speech principles in article 10:

*"**The High Threshold at the Evidential Stage***

33. Every day many millions of communications are sent via social media and the application of section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 to such comments creates the potential that a very large number of cases could be prosecuted before the courts. Taken together, for example, Facebook, Twitter, LinkedIn and YouTube, they are likely to be hundreds of millions of communications every month.

34. In the circumstances there is the potential for a chilling effect on free speech and prosecutors should exercise considerable caution before bringing charges

under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. There is a high threshold that must be met before the evidential stage in the Code for Crown Prosecutors will be met. Furthermore, even if the high evidential threshold is met, in many cases a prosecution is unlikely to be required in the public interest (see paragraph 42 onwards).

35. Since both section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 will often engage article 10 of the European Convention on Human Rights, prosecutors are reminded that these provisions must be interpreted consistently with the free speech principles in article 10, which provides that:

"Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…"

36. As the European Court of Human Rights has made clear, article 10 protects not only the speech which is well-received and popular, but also speech which is offensive, shocking or disturbing (Sunday Times v UK (No. 2) [1992] 14 EHRR 123):

> *"Freedom of expression constitutes one of the essential foundations of a democratic society… It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also as to those that offend, shock or disturb…"*

37. Freedom of expression and the right to receive and impart information are not absolute rights. They may be restricted but only where a restriction can be shown to be both:

- *Necessary; and*
- *Proportionate.*

These exceptions, however, must be narrowly interpreted and the necessity for any restrictions convincingly established.

56. The Guidelines also set out when a prosecution is not warranted in the public interest:

"43. Since section 1 of the Malicious Communications Act 1988 and section 127 of the Communications At 2003 will often engage article 10 of the European Convention on Human Rights, no prosecution should be brought unless it can be shown on its own facts and merits to be both necessary and proportionate.

44. A prosecution is unlikely to be both necessary and proportionate where:

a. *The suspect has expressed genuine remorse;*

b. *Swift and effective action has been taken by the suspect and/or others for example, service providers, to remove the communication in question or otherwise block access to it;*

c. *The communication was not intended for a wide audience, nor was that the obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question; or*

d. *the content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which the public interest upholds and respects freedom of expression.* (emphasis added)

57. Courts have recognised that unless prosecutions in relation to social media postings are confined to those cases which are absolutely necessary and justified there would be a serious risk of criminalising the conduct of a significant part of our society. In the context of Bermuda such an outcome is bound to cause serious adverse consequences for the individuals concerned including being denied entry to the United States. In *Karsten v Wood Green Crown Court* [2014] EWHC 2900 (Admin), a case dealing with a prosecution under section 127(1)(a) of the Communications Act 2003 relating to a message "*Ask if he is Jewish. Ask him if he's eating kosher*", Laws LJ observed that "*The courts need to be very careful not to criminalise speech which, however contemptible, is no more than offensive. It is not the task of the criminal law to censor offensive utterances*."

58. The jurisprudence from the European Court of Human Rights has emphasised that in considering whether criminal proceedings are proportionate, the Court should consider the existence of other measures which would interfere to a lesser extent with the freedom of expression. In *Lehideux and Isorni v France* [1998] ECHR 90 the Court stressed "*the seriousness of a criminal conviction for publicly defending the crimes of collaboration*" and referred to "*the existence of other means of intervention and rebuttal, particularly through civil remedies*". The Court found that the criminal conviction of the applicants was disproportionate and, as such, not necessary in a democratic society.

59. In contrast, the European Court of Human Rights did not consider that the termination of the employment contract of a teacher in a private secondary school was disproportionate in view of the circumstances of the case (See: *Seurot v France* (No. 57383/00, 18 May 2004). It was also noted by Kawaley CJ in *Friedman v Minister of Labour, Home Affairs & Public Safety* [2004] Bda LR 51, by reference to the Canadian decision in *Regina v Jahelka* (1988) 43 D.L.R. (4th) 111 at 119-120, that private employers or citizens generally may, in appropriate circumstances as a matter of private law, have greater latitude to take legal action (whether in contract or in tort) in respect of offensive words which cause private injury.

60. Having regard to the legal requirements outlined above the Court turns to consider whether in this case the prosecution of the Applicant under section 68(1)(a) of the Act is proportionate to the legitimate aim being pursued and whether it is supported by reasons which are relevant and sufficient. In other words, is the Court satisfied, based on the reasons and evidence adduced by the Respondent, that the prosecution of the Applicant under section 68(1)(a) of the Act is no more than necessary to accomplish the objective? The burden of proof, as noted above, in relation to these requirements rests with the Respondent.

61. In considering whether the prosecution of the Applicant is proportionate to the legitimate aim being pursued, the Court takes into account the following relevant factors.

62. First, on the evidence before the Court this is not a case where the Applicant has a history of engaging in conduct which potentially contravenes the terms of section 68(1)(a) of the Act. The objectionable post was not part of a campaign to change any views. In this respect the present case is not in the same category as *Collins*, *Keegstra* and *Kimathi* (discussed at paragraphs 31 to 40 above).

63. Second, the objectionable post was not accessible by the public at large but was only accessible by the Applicant's "*Friends*" on Facebook and Instagram.

64. Third, the post was taken down immediately upon realising that it was highly inflammatory.

65. Fourth, the Applicant is presently suspended from duty by the BPS pending an investigation into allegations of gross misconduct arising out of the very incident which forms the basis of the charge under section 168(1)(a) of the Act. In the event the charge of gross misconduct is proved the Applicant faces the prospect of loss of her employment with the BPS.

66. Having regard to the circumstances outlined above and in particular to the fact that the Applicant is already facing disciplinary proceedings for gross misconduct, pursuant to the Police Conduct Orders 2016, which, if proved, may result in her dismissal from the BPS, the Court is not satisfied that the concurrent criminal proceedings under section 68(1)(a) are no

more than necessary to accomplish the legitimate aim being pursued. It follows that the third limb of the *de Freitas* test is not satisfied in this case and consequently the Court is unable to conclude that the restriction upon the Applicant's right to freedom of expression is reasonably required in the interests of public order and public morality pursuant to the terms of section 9(2)(a)(i) of the Constitution.

Conclusion

67. The Court has found that the posting of the meme by the Applicant is capable of being considered "*grossly offensive*" by reasonable people in this multi-racial and multi-cultural community. The posting of "*grossly offensive*" messages has the potential of negative impact upon public order. In principle, the objective sought to be achieved by section 68(1)(a) is sufficiently important to justify limiting the fundamental right of freedom of expression.

68. However, in the circumstances of this case as set out in paragraphs 62 to 66 above and in particular the fact that the Applicant is already facing disciplinary proceedings for gross misconduct based upon the same facts which, if proved, may result in a dismissal from the BPS, the Court is not satisfied that the concurrent criminal proceedings under section 68(1)(a) are no more than necessary to accomplish the legitimate aim being pursued.

69. Accordingly, the Court declares that the present criminal proceedings against the Applicant under section 68(1)(a) of the Electronic Communications Act 2011 (*The Queen v Barbi Bishop 920CR00455*) are in breach of the Applicant's fundamental right to freedom of expression under section 9 of the Constitution. The Court further orders that the said criminal proceedings against the Applicant be dismissed.

70. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 27th day of August 2021

NARINDER K HARGUN
CHIEF JUSTICE