



Case No: 1801273043

IN THE WESTMINSTER MAGISTRATES' COURT

Date: 6th December 2019

B e f o r e :

SENIOR DISTRICT JUDGE (CHIEF MAGISTRATE) EMMA ARBUTHNOT

**Majuran Sathananthan
v
Brigadier Andige Fernando**

**Is charged in the alternative with the
following:**

1. On 4th February 2018 outside the Sri Lankan High Commission 13 Hyde Park Gardens, with intent to cause those persons harassment, alarm or distress and without lawful excuse used threatening, abusive or insulting words or behaviour or displayed a sign of other visible representation which was threatening abusive or insulting, thereby causing Mr Priyantha Perera, Mr Gokulakrishnan Narayanasamy and Mr Majuran Sathananthan harassment, alarm or distress contrary to Section 4A (1) and (5) of the Public Order Act 1986
2. On 4th February 2018 outside the Sri Lankan High Commission 13 Hyde Park Gardens, London W2 2LU used threatening or abusive words or behaviour

or disorderly contrary to section 5 (1) and
(6) of the Public Order Act 1986

**Majuran Sathananthan was represented by Peter Carter QC leading Shanthi
Sivakumaran instructed by Public Interest Law Centre
Brigadier Andige Fernando was represented by Nicholas Wayne**

Judgment

Summary

1. This case has had a protracted history which is set out in two earlier judgments attached. The trial took place on 18th October 2019 and 19th November 2019 when the defendant did not appear but was represented.
2. On 4th February 2018 there was a demonstration by Tamil sympathisers who were protesting on Sri Lanka's National Day outside the High Commission near Hyde Park. It was a peaceful demonstration but involved flag waving and chanting. There were about five or six police there initially and about 50 or 60 protesters. At one point the police moved the protesters as they were blocking the road. The police did not need to make any arrests at any point.
3. During this demonstration, Brigadier Fernando, in uniform, was outside the High Commission when he made three cut-throat gestures by drawing his fingers across his throat. This action is clearly shown on the video and still photographs which have been exhibited.
4. I received a number of detailed submissions on various matters of law from Peter Carter QC and Nicholas Wayne and I was very grateful for their assistance.

Evidence

5. I heard evidence from a number of witnesses who saw the gesture. Mr Sabeshraj Sathiyamoorthy took the video. He said when he saw the gestures he felt angry but then went on to another demonstration this time at Downing Street before making a complaint at Wembley police station at 11.30pm the same day. He said he had not made an immediate complaint to the police because his English was not very good and it did not occur to him. It was only in cross-examination that he said he was very frightened by what he saw. A friend of his who saw the video suggested he should go to the police for his protection.

6. Mr Gokulakrishnan Narayanasamy was the organizer of the protest. There were two groups protesting in favour of independence for Tamil Elam which he described as their homeland. He was holding a placard and was about 14 feet away from the defendant at the time. Mr Narayanasamy thought the Brigadier was focusing on him when he made the gestures I have described above. He said he had suffered mental health problems after the incident and was very frightened by what he saw. It must be said I found this part of his evidence to be exaggerated. The police were present and he made no complaint at the time although I accept that it may well have affected his previous depression and anxiety. It was only after Mr Narayanasamy spoke to his solicitors that he went to the police.
7. Mr Majuran Sathananthan was also attending the protest that day. He is the private prosecutor of this case. He said that the Brigadier was observing them for a long time. He took photographs of the protest. One of the exhibits shows the Brigadier taking a selfie with the protestors in the background. When the defendant made the gestures, Mr Sathananthan thought they were focused on him. The effect on Mr Sathananthan was that he thought the Brigadier was conveying to him that he would kill him by cutting his throat. He was frightened. He was worried too that his family in Sri Lanka may be harmed. He went to Wembley police station the following day.
8. Despite the complaints to the police they did not arrest the defendant. During Mr Sathananthan's evidence it became clear that he had launched the prosecution against the defendant within a couple of days of the incident and many months before the police had decided not to prosecute.
9. The final witness was Mr Pryanthan Perera. He saw the gesture. He did not know the officer but knew that he was an army officer and found out his name later. He noticed the Brigadier and another man in a white shirt taking photographs. Mr Perera said that he still felt frightened when remembering the incident because the Brigadier took his photograph and he believed he could be killed by him. He believed the Brigadier could do anything because he has spies here. He said he was so upset he went straight home. Later when he saw the incident on social media, he felt terrified.
10. The next day he made a complaint at Chingford police station. He said when he went to the police he knew that a private prosecution had started and he could not remember if he told the police that. He got involved in the private prosecution to protect himself. Six months later he heard the police were not proceeding with the prosecution.
11. What he found upsetting was that the Brigadier had made the gestures to show that he had the power to do anything to him. Social media could be seen by anybody around the world, not just Tamils.
12. The Defendant did not appear but was represented. Mr Wayne called Sir Peter Heap, a retired Ambassador including three years in Colombo. He attended the High Commission for the National Day reception. He noticed that there was a demonstration going on and he saw 50-60 protestors. He described it as very active, with lots of noise and chanting which supported various Tamil Elam groups. He said

it was a hostile event and the protestors were using loud hailer and trying to disrupt the reception.

13. Sir Peter said he did not know the Brigadier well but had met him that day. He was performing the role of defence attaché, introducing people, particularly military people and escorting them in and out of the reception. He said a defence attaché was a recognized diplomatic role. Primarily the attaché is there to report to their own government on military matters and to liaise with the armed forces and have a view on military matters. This was as part of a diplomatic team which would all work together at functions.
14. He did not witness the cut-throat gestures made by the Brigadier. In cross-examination he was asked why he was at court to give evidence and he said he was not entirely sure. He agreed that it was routine that diplomats are told to obey the rules of the country they are in. He agreed that threatening members of the community is not part of the role of a diplomat.
15. Sir Peter had said that on 4th February 2018 he had recognised flags of the LTTE which was a proscribed organisation in this country. In cross-examination he had to admit that the flags he had identified were not LTTE but other ones of a slightly different colour.

Submissions

16. In argument Mr Carter for the prosecution contended there was no legitimate reason for the Brigadier's actions and they were not part of his official duties at the time. On the 1st March 2019 I had ruled on the diplomatic immunity point and that ruling should not be revisited.
17. The defence were contending that there was no valid summons before the court because the prosecution was commenced when he was still a diplomat. Mr Carter relied on *Reyes v Al-Malki & Anor* [2017] UKSC 61 (18 October 2017) and said that case made it clear that diplomatic immunity did not apply in this case as the gestures were not part of his official functions.
18. Mr Carter said that any potential unfairness amounting to an abuse of process had been taken care of by the proceedings. The witnesses had been challenged and all the issues had been explored. There had been no failings in disclosure.
19. Mr Wayne, for the Brigadier, argued that no valid summons before the court. There had been no jurisdiction for the court to grant the summons when the defendant was still a diplomat. The private prosecutor had been in breach of the duty of candour by failing to tell the court that the defendant was a Brigadier and a military attaché protected by diplomatic immunity. The prosecutor should have told the court that the matter was being investigated by the police at the time the information was laid. He failed to do that. The court had been misled deliberately and in those circumstances the summons was defective *ab initio*.
20. The information had not disclosed the fact that the Brigadier was protected by diplomatic immunity and the reissue of the summons on 9th August 2019 was invalid.

21. Mr Wayne set out the difference between a private prosecution and how the offence would have been investigated. There were a number of officers present at the protest. They could have been asked whether they had seen the gesture and whether harassment or distress was caused at the time. The fact that it was a private prosecution should not put the brigadier in a worse position than he would have been in had it been otherwise.
22. Mr Wayne invited the court to look at the elements of the section 4A offence. He accepted he could not argue the gestures were not capable of being threatening behaviour but he pointed out that alarm or distress were strong words and must not be trivialized. The distress must be an emotional disturbance. Harassment could be not grave but not trivial either.
23. As to the intention of the Brigadier, the court had not heard from him but should consider whether the gesture could be an impulsive act without that intent. Mr Wayne relied on Sir Peter Heap calling the demonstration hostile. He suggested that the Brigadier was angered by others with different views and this was a regrettable action but not necessarily intended to cause alarm or distress.
24. The next question was whether the witnesses really suffered harassment, alarm or distress or whether this was situation of confected outrage. There were many people filming on that date not just the Brigadier. The witnesses would have known it was a gesture made in the heat of the moment. He asked the court to consider whether alarm etc was really caused or whether the Tamil groups protesting saw an opportunity to advance a cause.
25. Mr Wayne pointed out that three of the complainants did not make an immediate complaint, they went on to Downing Street and cannot have been distressed. The cameraman, Mr Sathiyamoorthy, may have been influenced by others. The court should consider whether there was a degree of organization and coordination. If there was, could the court exclude the possibility that what took place was not genuine but confected outrage for political purposes. An indication of that was going straight for a private prosecution rather than waiting for a police investigation.
26. In terms of the reasonableness of what the Brigadier did, if it was an impulsive act in a stressful situation Mr Wayne asked to court whether it deserved a criminal conviction.

Ruling

27. I have previously ruled that the defendant is not protected by diplomatic immunity. I see no reason to re-visit that ruling. I find that a valid information was laid on 6th February 2018 and valid summonses were issued by this court on 22nd February and 9th August 2018. The information was laid within the period of six months.
28. I accept there is no evidence that the court was informed that the defendant was protected by diplomatic immunity at the time the summons was issued but in any event I do not find that the defendant's status would have prevented the summons being issued. I have already found that before the summons was issued the court would have considered all it was required to.

29. I do not find there is an abuse of process in this case. The defence have cross-examined witnesses and have called evidence. The basic acts which underlie this prosecution have not been challenged. I cannot see that police disclosure would have assisted the defence or undermined the prosecution case. In any event such information is not in the hands of the prosecutor. I can see no unfairness to the defendant in the conduct of this case. The burden of establishing an abuse is on the Brigadier on the balance of probabilities and he has failed to discharge that burden.
30. The right to bring a private prosecution is not curtailed even when a defendant has accepted a caution (*R (Lowden) v Gateshead Magistrates' Court* [2017] 4 WLR 43). I can see no reason why an information cannot be laid by a private prosecutor whilst waiting for a police investigation to conclude. I dismiss the defence application for a stay of the proceedings.

Findings

31. I have no doubt that the cut-throat gestures were made on 4th February 2018. It is accepted that Brigadier Andige Fernando is the man in uniform shown in the video and stills making the gestures.
32. The next issue is whether he intended the gestures to cause the named complainants harassment, alarm or distress. I have no doubt he intended to cause at the least alarm. They were purposeful gestures, made as the Brigadier was staring at these protesters. The Brigadier was a senior officer in uniform wearing medals. Unlike the other senior officer there, his body language appeared to be arrogant and intimidating. There were three gestures and not just one. In the context of the relationship between Sri Lanka and Tamil Elam protesters he must have known that it would have been alarming at the very least to the protesters who saw him do this.
33. The next issue for the court is whether I can be sure the complainants were caused harassment, alarm or distress. I have no doubt that alarm was caused to all three and that Mr Perera was distressed by what he saw.
34. I find the defendant guilty of the section 4A charge.
35. The section 5 is an alternative. I adjourn it sine die.

Senior District Judge (Chief Magistrate) Emma Arbuthnot
6th December 2019