

Decision of District Judge Amanda Kelly in the case R v Venetia Carter, Diana Warner, Stephen Gower and Susan Hagley held at Horsham Magistrates Court on 14th and 15th March 2023.

Introduction:

This trial concerns a protest that took place on 21st September 2021 by the Insulate Britain group which is committed to persuading the government to fully fund and take responsibility for the insulation of all social housing in Britain by 2025. The protest involved approximately 38 protestors blocking both clockwise and anticlockwise carriageways of the M25 motorway between junctions 9 and 10 during morning rush hour by standing or sitting on the tarmac with banners, thereby bringing traffic to a standstill. The four defendants whose case I am trying were each part of the protest that took place on the clockwise carriageways of the motorway. It is agreed that the protestors were spread out across the four carriageways for just over 13 minutes but that the ongoing disruption lasted longer than this period, although it is impossible to assess exactly how long this was. The four defendants are each charged with willful obstruction of the highway contrary to 137 of the Highways Act 1980.

Burden of proof:

As with any criminal trial, the burden of proof rests upon the prosecution. It is for the prosecution to prove that each defendant is guilty. The defendants do not have to prove their innocence. And the way that the prosecution succeeds in proving guilt in this particular case is by making me sure of the following in respect of each of the defendants.

Firstly, that the defendant in question was on a public highway.

Secondly, that the defendant in question obstructed that highway

In this case, there is no dispute that these first two matters have been established.

However, the prosecution must also prove to the criminal standard that the defendant did not have a lawful excuse and in the context of this particular case, the defendants argue that they did have a lawful excuse in that their actions were a legitimate expression of their rights under Articles 10 and 11 of the European Convention on Human Rights, namely their right to freedom of expression and freedom of assembly and they argue that to convict them of

obstruction of the highway would amount to a disproportionate interference with those Convention rights.

The disputed issue:

In this case there is no dispute that the defendants were in fact exercising their rights under Articles 10 and 11 and that the reasons that led them to take part in this protest were sincerely held. And whilst it is not part of my role as a judge to express any view on the merits or otherwise of those reasons, or the efficacy of the protest in achieving the outcomes sought, or the alternative forms of protest that might have been adopted, I do find without hesitation that the reasons giving rise to the protest relate to very important issues and that these issues are of considerable breadth, depth and relevance. The defendants each came across as being extremely articulate, passionate and sincere in expressing their concerns surrounding the issues highlighted by the Insulate Britain group and their personal reasons for getting involved in protest action.

On the part of the police and prosecuting authorities and, subsequently, the court in trying and potentially convicting them, the following is also true: Conviction and any sanction that follows from conviction would clearly amount to an interference with the protestors' Convention rights. Conviction for a criminal offence clearly brings with it lasting implications for a person – not only in terms of potential employment or travel, but also a person's social standing. There is a significant social stigma to having broken the criminal law. A fine or other sanction also brings with it a further interference.

Nevertheless, it is also true that when it comes to prosecuting people for obstructing the highway, such interference is prescribed by law – the offence charged, namely willful obstruction of the highway, is a statutory criminal offence contrary to section 137 of the Highways Act 1980. I find that it is also the case that any such interference would be in pursuit of a legitimate aim as set out in para.2 of Article 10 or 11, namely, to protect the rights of others and also to prevent of crime and disorder. To convict and impose some form of sanction on those who disproportionately interfere with the rights of others to free passage along a highway is likely to deter others from acting in a similar manner in the future.

It therefore all comes down to a difficult balancing act. It is for me as the judge in this case to balance the rights of the defendants to pursue their convention rights, against the rights of others to go about their daily lives and their right to free passage along a highway without interference from others. I also have

regard to the potential for protests such as these to spark an angry and even violent response from others.

Thus, the key issue for me to determine in this trial is whether or not the prosecution has made me sure that on the particular facts of this case a conviction would not be a disproportionate interference with the defendants' Article 10 and/or Article 11 rights? If the prosecution has made me sure of this then I must find the defendant whose case I am considering guilty. If I am not sure, then I must find them not guilty. Although my verdict need not be the same in respect of each defendant, the reality is that in this particular case it almost certainly will be. There was no marked difference between the actions of each defendant or their reasons for being involved.

Findings of fact

Before conducting this important proportionality assessment, I must set out the facts upon which I base my assessment. Many of the facts in this case are agreed and are included in a helpful agreed facts document. The sort of matters to which I must turn my mind and which are relevant to this sort of proportionality exercise were set out by the Supreme Court in the case of *Ziegler [2021] UKSC 23*. I therefore go on to consider these issues.

What role did each defendant play?

Of course, in a protest such as the one I am concerned with, it was clearly a joint action. The very purpose of the action is for individual protestors to come together and coordinate their actions at the same time in order to cause maximum impact. In this case, I have heard that each of the four defendants positioned themselves on one of the carriages of the M25 and each had to be removed by the police. I've heard that the group of protestors stepped out onto the road at slightly different times, with Dr Warner being among the first group to go on to the carriage way; Mr Gower being in the second group; and Ms Carter and Ms Hagley in the third group. The amount of time that each defendant spent actually out on the road was relatively short, approximately 13 minutes.

Both Ms Carter and Ms Hagley glued themselves to the carriageway in an effort to make it harder for them to be removed by the police swiftly. As it happens, their hands were in fact removed quickly before the glue had fully set and without the police using any sort of substance to assist the removal process.

Dr Warner lay down on the carriageway. All four of the defendants had to be physically removed.

What was the importance of the precise location?

Each defendant confirmed in evidence that they were not personally responsible for choosing the location of the protest, but they all agreed that the Insulate Britain group as a whole had chosen the M25 because it is such a major high profile motorway. The defendants spoke of its iconic nature, and the symbolism of it being a road that circles London where the seat of government is located. The defendants pointed out that in order to have any significant impact, their protest needed to be staged in a very significant location. Had they blocked a minor road or stood above the motorway on a bridge, for example, their protest would have been unlikely to have attracted the sort of attention and publicity that they were seeking to attract. To this extent, the M25 was an importance location.

Dr Warner also explained in her evidence that the criteria for choosing the location of this and similar protests included safety, access and avoiding the smart motorways which did not have a hard shoulder and it needed to be a place where two groups on each side could get on the motorway. Her understanding is that there weren't many places that fulfilled that criteria.

However, it was broadly conceded by the defendants that the location of the protest was not specifically and directly linked to the issue of persuading the government to insulate social housing. That said, the defendants did suggest there was not any obvious alternative location at which to stage their protest and which would have been more closely linked to the issue that they sought to highlight.

The date and timing of the protest

The first of the protestors had assembled on the hard shoulder of the motorway by around 7.58am. The first protestor entered the inside lane of the clockwise carriage way at around 0808 hours and was followed fairly quickly by the rest of protestors, including these four defendants. They had all been removed by 0821 and relocated to the grass verge at the side of the hard shoulder. The defendants agreed that they had deliberately chosen rush hour in order to carry out their protest in the full knowledge that this would be likely to cause maximum disruption. Mr Gower said in evidence that the intention

was to impact upon a large number of people but for a relatively short amount of time.

The defendants also gave evidence that this protest, which was part of a series of similar protests, was designed to put pressure on the government in the run up to the 2021 United Nations Climate Change Conference which was being held in Glasgow between 31st October 2021 and 12th November 2021. It was hoped that the protest would attract particular attention at a time when all matters relating to climate change were very much in the media spotlight, both at home and abroad and that this in turn would place particular pressure on the government.

Was the protest violent?

This was a peaceful protest and one that was unlikely to involve any other offence over and above the section 137 offence. Whilst it was anticipated that members of the public were likely to get annoyed and frustrated at being delayed, the defendants gave evidence to the effect that their intention was for an entirely peaceful protest and I have no reason at all to suppose that any of the protestors would themselves have reacted with aggression or violence. Indeed, I accept their evidence that Mr Gower had been assigned the particular role of de-escalating any violence. I also accept that the defendants had considered the safety of motorists in executing their plan.

What was the actual extent of the actual interference the protest caused to the rights of others?

It is impossible to know the true extent of the interference that the protest caused to the individuals caught up in it. However, I take judicial notice that the disruption was significant. Clearly those road users whose journeys were brought to an abrupt stop during the period that the road was blocked would have suffered at the very least 13 minutes' delay, although the likelihood is that the delay would have been significantly greater because it would inevitably have taken quite some time for the traffic to flow freely again. Furthermore, whilst three of the lanes of traffic were opened soon after the protestors were removed from the road, the inside lane remained closed until at least 10am. This would have inevitably slowed down the flow of traffic in the other lanes considerably.

The protest took place on a week day during morning rush hour when the road would ordinarily be full of people trying to get to work, school and other appointments, as well as heavy goods vehicles and other commercial vehicles. I have seen footage from police body worn cameras showing that the traffic was brought to a standstill and was moving very slowly even at 10am. This was in part caused by other drivers "rubbernecking" at the roadside action.

I have not been provided with evidence of the impact of the delay on any individual motorists. Although the police put out a request on social media for anyone to contact them if they had been severely impacted by the protest, I was told that nobody had responded. I have also not heard any evidence about any emergency vehicles being hindered in their journeys. Although the police received phone calls from members of the public reporting the presence of protestors on the road, the police did not make further enquiries with these individuals after the protest was over. Nevertheless, I take judicial notice of the fact that a large number of ordinary members of the public would have been significantly inconvenienced by the delay to the journey and in some cases caused real discomfort or even distress at missing important appointments or being unable to take a comfort break.

On the other hand, it is also fair to point out that the traffic generally moves relatively slowly on the M25 during rush hour traffic and at other times of the day and that the delay caused to any one individual on that particular day may not have been greater than other sorts of incident that typically occurs on a motorway, such as an accident or debris flying on to the road.

It is relevant to note that those individuals who were impacted by the protest were not, as far as is known, members of the government or individuals who had the power to accede to the demands of the Insulate Britain group. They were ordinary members of the public going about their daily lives. To this extent, the protestors were indiscriminate in deciding who would be impacted by their actions.

Of course, it is not only members of the public who were impacted by the protest. A significant number of police officers and police vehicles also had to be deployed to the scene to deal with the protestors and to try to reopen the motorway and arrest and process the defendants. This inevitably means that those police officers in question were diverted away from other important public duties.

Is conviction proportionate?

There is no dispute in this case that the action that the police took in removing the protestors from the road and arresting them was proportionate. It clearly was. But that is not the issue with which I am tasked with deciding. I must consider whether the prosecution has proved to the criminal standard that *conviction* is proportionate.

The mere fact that the protest took place on the M25 does not mean that the defendant's Article 10 and 11 rights cannot have been engaged or that a conviction is necessarily proportionate. Likewise, the mere fact that a very large number of members of the public were impacted by the protest does not mean that conviction is inevitable. Each and every case of this kind requires a very fact-specific and sensitive analysis.

The Supreme Court in *Ziegler* cited at paragraph 68 of its judgment the case of *Primov v Russia* where the European Court referred to the importance of public authorities showing a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of its substance. The court also referred to the inevitability of large scale gatherings in a public place creating inconvenience for the population.

This was a relatively short protest in respect of an issue of considerable importance by four individuals who believed with enormous sincerity in the need to exercise their Article 10 and 11 rights at that particular time and date and at that particular moment in history.

On the very particular facts of this case and in respect of this particular protest, I find that the prosecution has failed to make me sure that a criminal conviction would be proportionate. Although I find that the protest caused significant disruption to a large number of people, I have not been provided with evidence of any grave consequences being caused to any individual person or business over and above the sort of inconvenience that is routinely caused by delays on the M25, such as those caused by accidents or other obstructions entering the road. However, I make it clear that my decision in this case is confined to the particular facts of the protest that took place on 21st September 2021 and cannot in any way be regarded as impacting upon the legality of any other similar action.

For the reasons given, I find the defendants not guilty.