

OF IMPLICATION, INSINUATION AND INCITEMENT

R v Jones [2010] 3 All ER 1186 (CA)

1 Introduction

Can the crime of incitement be committed by insinuation? Can a conversation about growing tomatoes by implication actually be a conversation about the crime of producing cannabis? These are the questions which arise from the recent English case of *R v Jones* ([2010] 3 All ER 1186 (CA)). Although the English law relating to the way in which encouraging crime is criminalised has recently changed, the similarities between the previous (common-law) position in England (which was the law to be applied in *Jones*) and the current South African law make for a useful comparison between these systems, and it is to this that we now turn.

2 Facts

In terms of section 4(1)(a) of the Misuse of Drugs Act of 1971, it is an offence in English law to produce cannabis, although the offering for sale or supplying of the paraphernalia associated with smoking cannabis is not illegal. Moreover, the offering for sale or supplying of the equipment required to grow cannabis, or books which explain how to do so, or even cannabis seeds, is not illegal. The shops which engage in selling or supplying such goods therefore need to ensure that they do not act illegally in inciting the commission of the offence of producing the controlled drug cannabis (see par [1]).

The appellant was the proprietor of such an establishment. He was convicted in the Crown Court of four counts of incitement to produce cannabis, and sentenced to ten months' imprisonment. His employee was similarly convicted. The conviction followed a police operation targeting such businesses. An undercover officer, posing as John, a novice cannabis grower, was sent into the shop to make a "test" purchase, whereupon he asked the appellant for advice on growing the plant. After what was alleged to be a pretence that they were discussing tomatoes, this advice was freely dispensed. The four charges were based on visits to the shop on four different days by the client, where he was supplied with such advice, which was alleged to amount to incitement to produce the drug (see par [2]-[4]).

Counsel for the appellant raised arguments *inter alia* relating to disclosure by the prosecution, abuse of process by the police, that is, that the appellant had been entrapped, whether the appellant's conduct could indeed be said

to fall within the bounds of incitement, and the judge's summing up for the jury (par [9]).

3 Judgment

The Court of Appeal dismissed each of the arguments raised on behalf of the appellant. It was held that the Crown's failure to disclose all the documents relating to the authorisation of the undercover operation, which defence counsel alleged would disclose whether the undercover officer had stayed within the bounds of the operation, did not constitute a reason to overturn the conviction. It was held that the mere statement by the trial judge that the authorisation had been properly given neither weakened the prosecution case nor assisted the defence case, and that the question of unauthorised action on the part of the officer could be assessed by the recorded evidence (par [10]).

With regard to the question of whether the appellant had been unlawfully trapped into committing the offence, reference was made (par [11]) to the yardstick set out in the leading case of *R v Looseley, A-G's Ref (No 3 of 2000)* ([2001] 4 All ER 897 par [23]), "whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances". It was however conceded by defence counsel that the test in this regard, given the specialisation of the shop, was not an ordinary member of the public as such, but rather a member of the public who was prepared to break the law (by growing cannabis). The court held that it could consequently not be argued that such a person would have desisted from the topic when (as occurred) the appellant instructed him that he could not talk about cannabis – "had the prospective purchaser not been prepared to consider breaking the law, there would have been no purpose (save only for the intellectually curious) in going into the shop" (par [11]). Thus the context was all-important when the appellant indicated that whilst it was unlawful to speak about cannabis-growing he was quite prepared to discuss tomato-growing. The judge in the court *a quo* considered that in none of the conversations were the participants fooled that the discussions were really about cannabis rather than tomatoes (par [14]):

"[T]his is a sham because the defendant thought that by talking about tomatoes but meaning cannabis this would circumvent the law...The defendant had the choice to say nothing at all to John, but instead gave advice to John which he pretended to be about tomatoes."

The judge was happy to refer the matter to the jury for decision in this regard, an approach which met with the full approval of the Court of Appeal, which held (following Lord Hutton in *Looseley*, and distinguishing the decision in *R v Moon* [2004] All ER (D) 167) that a drug dealer "will not voluntarily offer drugs to a stranger unless first approached and that this approach may need to be and can be persistent without crossing the line". Whilst the police did not have a specific basis for targeting this shop, it was therefore appropriate to test the way it operated.

“This prosecution was not an abuse of the court’s process but properly engaged the court in a task for which...the jury were uniquely qualified to judge: if the jury were not sure that the appellant had in fact incited the officer to produce cannabis because the references to tomatoes were not a sham or he did not go sufficiently far in what he said, he was entitled to be acquitted.” (par [15])

The next point taken by defence counsel – which is the basis for the discussion which follows – was that the appellant had no case to answer: that the appellant’s conduct did not constitute incitement, as more than mere encouragement is required, “urging” or “spurring on” had to occur (par [17]). It was accepted that merely offering goods for sale by the appellant was not contrary to the law, but that although the nature of the shop provided the context, in assessing whether incitement was present the language used by the appellant was critical (par [19]). Furthermore, it was argued that the appellant lacked the required intention to incite, as his intention was not to instigate a crime, but rather to make a sale (par [20]). The trial judge found that the appellant had indeed offered positive encouragement, and moreover, that given the context the appellant had “the intention that the person who he was selling the equipment to was going to be able to produce the cannabis because otherwise the whole exercise would be pointless” (par [22]). The matter was therefore properly laid before the jury, who returned a guilty verdict. The Court of Appeal held that it was indeed “eminently open to the jury to conclude the use of the word ‘tomatoes’ was no more than a device to avoid the use of the word ‘cannabis’ in an attempt to provide a figleaf or pretence at observing the law” (par [23]).

Finally the Court dealt with arguments raised by the counsel for the appellant in relation to the summing up of the trial court judge. It was however held that any failure in the summing up did not render the verdicts unsafe.

4 Incitement

The essence of incitement is that someone who unlawfully communicates with another person with the intention of influencing him to commit a crime is liable to conviction for those acts of incitement (Burchell *Principles of Criminal Law* 3ed (2005) 642). The rationale for this form of liability, as with the other inchoate offences of attempt and conspiracy, is the culpable intention of the accused – that he is aiming to commit a crime, and indeed acts in order to achieve this – as well as that it functions to facilitate crime prevention (Ormerod *Smith & Hogan Criminal Law* 11ed (2005) 349; Simester *et al Simester and Sullivan’s Criminal Law – Theory and Doctrine* 4ed (2010) 285). In relation to the latter aspect, the consideration that the crime provides the authorities with an opportunity to intervene in a criminal scheme before any serious damage occurs is a key underlying purpose of incitement (Snyman “Die Misdad Uitlokking” 2005 *THRHR* 428 429). Further justifications for the crime of incitement are that it functions as a deterrent (Burchell 620), and that it serves to protect the community where the inciter sets a criminal scheme in motion involving a large group of

people, which is much more difficult to control, and thus potentially more dangerous (Snyman 2005 *THRHR* 430).

Liability for incitement has however been criticized on the basis that the inciter is far removed from the complete crime, and that his actions are therefore not manifestly dangerous (Clarkson, Keating and Cunningham *Clarkson and Keating Criminal Law Text and Materials* 6ed (2007) 535). Given that incitement can be committed by mere words, its criminalization needs to be consistent with the right to freedom of expression (set out in s 16 of the South African Constitution of 1996; see generally Hoorntje "The Right to Freedom of Expression and the Criminal Law – the Journey Thus Far" 2005 *Obiter* 459; and see further Ormerod 357-358 in relation to Art 10 of the European Convention on Human Rights). However, given that the right to freedom of expression is not unqualified, provided that the limitation of the right is reasonable and justifiable in terms of Constitutional norms, there is no question of the crime of incitement being regarded as unconstitutional.

(a) *English law*

The decision in *Jones* is consistent with the preceding case law on incitement, as it is clear that "an inference of ... encouragement ... can be drawn from the totality of circumstances" (Simester and Sullivan *Criminal Law – Theory and Doctrine* (2000) 259).

As noted above, it was argued in *Jones* (par [16]) that at most the advice given could amount to assisting someone in the cultivation of cannabis, which in turn could not be established because a necessary ingredient was the actual commission of the offence, and thus the conduct complained of could not be regarded as incitement. The response of the court is instructive. In response to the argument of counsel that the appellant's conduct amounted to mere encouragement, rather than "urging" or "spurring on" (par [17]), the court referred to the dictum in *R v Marlow* ((1997) *Crim LR* 379) that encouragement must "involve words or actions amounting to a positive step or steps aimed at inciting another to commit a crime". The factual scenario in *Marlow*, interestingly enough, related to the conviction of an author of a book on the cultivation and production of cannabis of incitement to commit an offence under the Misuse of Drugs Act. The breadth of the application of the requirement is evident in the case of *Goldman* ([2001] *Crim LR* 822), where a man who offered to buy indecent photographs from a company advertising them for sale was held to have attempted to incite the company to distribute the indecent photographs.

Significantly, the court's exposition of the law refers to the South African position. The judgment cites *R v Smith* ([2004] All ER (D) 79), where Clarke LJ approved the following dictum from the leading South African case of *Nkosiyana* (1966 (4) SA 655 (A) 658), describing an inciter thus:

"one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion,

proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or arousal of cupidity.”

(Further support for the *Nkosiyana* dictum in English law may be found in *Goldman supra* and Ormerod 351.) The court in *Jones* proceeded to point out that not every encouragement necessarily amounts to incitement, but only such encouragement which stimulates the commission of a crime (par [18]; for similar reasoning see Ormerod 351). *In casu*, the court held that merely offering goods for sale which could be used for an illegal purpose was not enough for liability, however where specific evidence of incitement to commit the offence could be established, then liability for incitement could follow (par [19]; see Ormerod 351; see also *Invicta Plastics v Clare* [1976] *Crim LR* 131). Despite the argument of counsel that the appellant did not have the necessary intention to incite crime, it was held that the *actus reus* of incitement was established by the “positive encouragement ... to engage in the activity” (par [21]), and that the intention to incite could be inferred from the context of the conversation (“otherwise the whole exercise would be pointless” – par [22]). What of the fact that the entire conversation consisted of advice in growing *tomatoes*? The court dismissed this objection as follows (par [23]):

“[I]t was eminently open to the jury to conclude that the use of the word ‘tomatoes’ was no more than a device to avoid the use of the word ‘cannabis’ in an attempt to provide a figleaf or pretence at observing the law.”

It is noteworthy that subsequent to the facts giving rise to the decision in *Jones*, the English law relating to incitement changed significantly. After the Law Commission’s critical assessment of the crime (Law Com No 300 *Inchoate Liability for Assisting and Encouraging Crime* (2006)), and in particular the conclusion that there was a significant lacuna in the existing law in relation to the situation where a person tried to assist in the commission of a crime, but did not communicate a desire to commit the offence to anyone. In terms of the English law, there could be accessory liability where the crime was committed, but there would not be any liability if it were not committed: a result which would be difficult to justify (*ibid* 21-23; see discussion in Simester *et al* 286-287). Rather than recommending a statutory revision of the crime of incitement, the Law Commission suggested that it be abolished and replaced by new offences of assisting and encouraging crime, which would be broader in scope. These new offences were duly enacted by the Legislature in Part 2 of the Serious Crime Act 2007, which came into force on 1 October 2008. A discussion of these new offences falls outside the scope of this note (but see discussion of these offences in Ashworth *Principles of Criminal Law* 6ed (2009) 458ff; Simester *et al* 287ff).

(b) *South African law*

In terms of South African law, provided a communication by the accused to the incitee has occurred, in order to influence the incitee to commit a crime, the *actus reus* of incitement would be established. Provided the accused

intended the communication to reach the incitee's mind, the required element of intention would further be established, and liability for incitement could follow (for discussion of the requirements for incitement liability, see Burchell *South African Criminal Law and Procedure Vol I* (2011) 541ff; and Snyman 298ff).

Although previously actual persuasion was required for liability to ensue (see, eg, *R v Sibiya* 1957 (1) SA 247 (T)) this is no longer the case, as per the leading case of *Nkosiyana* (see *dictum* cited above). However, merely describing unlawful conduct, piquing curiosity or arousing greed does not amount to incitement (Snyman 299). Moreover the words must be sufficiently specific in order for liability to ensue (Snyman 300). Whilst intention to incite is required, the effect of the incitement is not taken into account (Burchell (2011) 547). Moreover, *dolus eventualis* is sufficient – thus all that need be required is that the accused foresee the possibility that his communication would influence the incitee's mind to commit a crime (Burchell (2011) 544; Snyman 302). Thus the accused must know or foresee that the incitee would act with the intention to commit a crime (Snyman 302; and see also *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) 822 in this regard).

As indicated, the case of *Nkosiyana* is the leading case on incitement. It was acknowledged as early as the 1891 case of *R v Ungwaja* 12 NLR 284 that incitement was a crime at common law (see also *R v Fortuin* 1915 CPD 757), and this was confirmed in *R v Nihovo* 1921 AD 485 (after a statutory attempt to provide for incitement liability, in s 15(2) of Act 27 of 1914 was too vague to be successful – see De Wet and Swanepoel *Strafreg* 2ed (1960) 177). This position was cemented by section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 (which replaced s 15(2) of Act 27 of 1914), which criminalises incitement of either a common-law offence or a statutory offence. However the early case law typically focused on the presence of persuasion, such that a mere request or suggestion would fall short of an incitement (Gardiner, Hoal and Lansdown *Gardiner and Lansdown South African Criminal Law and Procedure Vol I* 6ed (1957) 131 (hereinafter “Gardiner and Lansdown”); and see eg, *R v Sibiya* 1957 (1) SA 247 (T) 250). The language of section 18(2)(b) – “incites, instigates, commands or procures any other person to commit an offence” did not entirely resolve this issue. Although it was held in *R v Port Shepstone Investments* (1950 (2) SA 812 (N)) that it was not necessary, for liability for incitement to follow, that the inciter “use persuasion or argument, exercise authority or pressure, or offer inducement”, the Appellate Division did not find it necessary to pronounce upon the correctness of this view on appeal (*R v Port Shepstone Investments* 1950 (4) SA 629 (A) 635). Writing in 1957, Gardiner, Hoal and Lansdown (Gardiner and Lansdown 128) state further that incitement “connotes some act of inducement or persuasion on the part of the inciter”, thus bolstering the view that active persuasion was required for incitement liability.

The case of *Nkosiyana* arose out of the appellants' efforts to arrange the assassination of the Transkeian political leader Kaiser Matanzima, which

founded due to their unknowingly enlisting the assistance of a South African secret agent and a member of the Security Police to achieve this. In challenging their convictions for incitement and attempted incitement on appeal, counsel for the appellants argued that incitement required “some element of intended persuasion”, which was absent in this case due to the complaisance of the agents they were seeking to employ to carry out the killing. Holmes JA rejected this contention, in so doing laying down a definition of incitement (cited above), as well as a test which remains the classic exposition of this notion to date (658H-659A):

“The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime.”

The *Nkosiyana dictum* has found favour in the criminal courts (see, eg, *S v Dreyer* 1967 (4) SA 614 (E); and *S v Imene* 1979 (2) SA 710 (A)), in respect of labour-related unrest (eg, *Dunlop South Africa Ltd v Metal and Allied Workers Union* 1985 (1) SA 177 (D); *National Union of Metal Workers of South Africa v Gearmax (Pty) Ltd* 1991 (3) SA 20 (A); and *SA Forestry Co Ltd v Africa Wood and Allied Workers Union* [1999] JOL 4894 (LC)), and in matters before the Broadcasting Complaints Commission (eg, *National Commissioner SAPS v etv (Pty) Ltd* [2010] JOL 25644 (BCCSA)).

In his comprehensive treatment of the law relating to incitement, Snyman cautions that there is a need to qualify some of the examples in Holmes JA’s description (2005 *THRHR* 432-433). He first asserts that not all incidences of suggestion would amount to incitement, and that the context should be determinative. If by this he means that the assessment of incitement liability should include considerations of objective reasonableness, then this would undermine the clear test formulated in *Nkosiyana*: “whether the accused reached and sought to influence the mind of the other person towards the commission of a crime”. Since liability for incitement can be based on *dolus eventualis*, once it has been established that the accused engaged the incitee’s mind, then it suffices that the accused foresaw the possibility of the incitee acting on this communication and committing the envisaged crime, and continued in his “approach to the other’s mind”. Snyman’s second reservation addresses “arousal of cupidity”, where he argues that simply suggesting that someone would look good in a particular car or in particular clothing is no more incitement than an advertisement communicating the same message (2005 *THRHR* 433). Again it could be argued that provided that the accused has reached the mind of the other party, his intention will be determinative of liability. If an advertisement were placed with the intention of motivating or encouraging someone to commit a crime – for example, enticing a child to purchase prohibited pornographic materials – then this would indeed amount to incitement.

The formulation of incitement in *Nkosiyana* has also found favour in Zimbabwe (see the Rhodesian cases of *R v Dick* 1969 (3) SA 267 (R); and *S v Savory* 1973 (4) SA 417 (RA), where the *dictum* of Holmes JA was applied). In the absence of recent South African cases where the *dictum* in *Nkosiyana* was discussed, two recent Zimbabwean cases provide useful

insights. In *S v Tsvangirai* ([2005] JOL 14931 (ZH)) the accused was charged with high treason, it being alleged that he had requested certain persons to assassinate the President and stage a military coup in Zimbabwe, whilst he was outside the country. Having examined the evidence, the court describes incitement in terms of the test in *Nkosiyana*. In the absence of any proof that there was a plot or conspiracy to carry out the treasonous acts, the court pointed out that it was incumbent on the State to prove that the accused had requested (*ie*, incited) the individuals to assassinate the President or to organise a coup. There was no evidence of such a request however. Instead the court held that there was evidence of a discussion of what may occur should the President be eliminated, and that a mere discussion “is not, in the absence of evidence of an incitement or conspiracy, treason” (37). In the context of a charge of treason, merely expressing hostile sentiments in the absence of incitement (or conspiracy) would not amount to the crime of treason, “not because there is no overt act, but because there is no hostile intent” (40). To reformulate this statement in the language of the *Nkosiyana* dictum, although through the discussion there has been a communication, a “reaching of the mind of the other person”, unless the accused intentionally sought to influence the mind of the other person towards the commission of the crime (*in casu* treason), no criminal liability could ensue.

The second instructive Zimbabwean case is that of *S v Paradza* (2007 JDR 1319 (ZH)), where the accused was a judge charged with two counts of contravening section 4(a) of the Prevention of Corruption Act [Chapter 9:16] by inciting a fellow judge to act contrary to his duties as a public officer in releasing the passport of a friend of the accused, which passport had been withdrawn as the friend was facing murder charges. The *Nkosiyana* dictum was highlighted by both defence counsel and the presiding judge, with the judge emphasising that the “decisive question is the intention of the accused” (14). The court found that in respect of the approach to both his brother judges, the accused had made a request, *ie* that he had both reached the mind of the other party, and sought to influence them. The question was whether what he requested was corrupt, *ie* had he sought to influence them to commit a crime? Albeit that the requests were indirect and guarded, and were part of a discussion, the court held that the accused had indeed urged or requested the other judge to exercise his discretion in a particular way, “to do an act which is contrary to or inconsistent with his duties” (154), and thus found him guilty as charged.

5 Concluding remarks

Given the breadth of the South African (and Zimbabwean) law relating to incitement, it is evident that should a case arise in South Africa (or Zimbabwe) on similar facts to those upon which *Jones* was based, liability for incitement would surely follow. As Snyman states, for liability for incitement to follow in the context of the South African law, the inciter must intend to arouse in the incitee the intention to commit the crime, as well as the intention to put the criminal plan into action (301-302). It is submitted that

the South African courts would be similarly unimpressed with the fact that any plant other than cannabis (in local parlance “dagga”) is mentioned in a discussion which clearly pertains to the illegal cultivation of this drug.

Since it is the conduct and intention of the inciter which is paramount, incitement may be committed even in respect of a police trap, who has no intention of committing the crime in question (*S v Ismail* [2006] JOL 15497 (C)), as was the case in *Jones* (for a discussion of South African law on entrapment, see Subramanien and Whitear-Nel “The Exclusion of Evidence Obtained by Entrapment: An Update” in this volume; for discussion of the English position see Ashworth “Re-drawing the Boundaries of Entrapment” 2002 *Crim LR* 161; and Squires “The Problem with Entrapment” (2006) 26 *Oxford Journal of Legal Studies* 351).

It is submitted that the difficulties perceived by the English Law Commission in respect of the scope of the crime of incitement, and more particularly that an act of encouragement or assistance to commit an offence did not attract criminal liability where such encouragement or assistance was not communicated and no substantive offence was committed, would not arise in South Africa. In such a situation, the fact that the encouragement or assistance did not reach the mind of the person intended would not preclude a charge of attempted incitement.

To conclude, as Holmes JA noted in *Nkosiyana* 660B-C, “[s]uggestion has ever been a familiar instrument of temptation, since the days of Genesis 3, 1-6”. Even where such suggestion occurs in an encoded form, as in *Jones*, where the incitee’s mind is reached, in that he understands what is being referred to, and where the commission of a crime is intended by the incitor, then incitement can indeed be committed by insinuation.

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