

No. 2016-2

In The
Supreme Court of Scotland

THE WEIRD SISTERS, PETITIONERS,

v.

KINGDOM OF SCOTLAND, RESPONDENT.

*ON WRIT OF CERTIORARI TO
THE SCOTTISH TRIAL COURT*

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the First Amendment of the Scottish Constitution requires reversal of the Sisters' convictions and death sentences because their conduct throughout consisted of protected acts of religious expression.

2. Whether, given the lack of evidence that the Sisters encouraged or facilitated the murder of King Duncan or intended to do so, their convictions and death sentences must be reversed.

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STATEMENT AND SUMMARY OF ARGUMENT

Before the murder of our good King Duncan, foreign and domestic foes besieged Scotland. “Norway himself, with terrible numbers, / Assisted by that most disloyal traitor, / The Thane of Cawdor, began a dismal conflict.” W. Shakespeare, *The Tragedy of Macbeth* Act I, scene ii, lines 52-54 (1st Folio 1623). Lord Macbeth, who led the loyal Scottish forces to victory, was heralded for his bravery and rewarded with the title that had been lost by the traitorous thane. Act I, scene ii, lines 65-67 (“No more that Thane of Cawdor shall deceive / Our bosom interest. Go pronounce his present death, / And with his former title greet Macbeth.”).

But all was not as it seemed: “Fair [was] foul, and foul [was] fair.” Act I, scene i, line 12. Although Macbeth masqueraded before King Duncan as a faithful thane, he was all the while plotting to obtain the crown for himself and his heirs by any means necessary. Act I, scene iv, lines 51-54 (“Stars, hide your fires, / Let not light see my black and deep desires. / The eye wink at the hand; yet let that be / Which the eye fears, when it is done, to see.”). The war had given him a taste for violence; the honors heaped upon him gave him an inflated sense of his importance. It thus was not long before the treacherous Macbeth, with the assistance of his “fiend-like” wife, savagely murdered King Duncan while he slept in the guest chambers of Macbeth’s own castle at Inverness. Act V, scene viii, line 69.

From then, Macbeth’s vicious nature was confirmed. He ruled over Scotland through fear.

The Kingdom was thrown into chaos. Act IV, scene iii, lines 164-69 (“Alas, poor country, / Almost afraid to know itself. It cannot / Be called our mother, but our grave. Where nothing, / But who knows nothing, is once seen to smile; / Where sighs and groans and shrieks that rend the air, / Are made, not marked.”). No man, woman, or child was safe. *See, e.g.*, Act III, scene i, lines 139-40 (“Banquo, thy soul’s flight / If it find heaven, must find it out tonight.”); Act IV, scene ii, lines 83-84 (“He has killed me, mother. / Run away, I pray you!”). At last, with the assistance of the noble King Edward of England, the bloody “butcher” was himself “dispatched” by “the good Macduff,” and the throne was reclaimed for the rightful heir—King Malcolm. Act V, scene viii, line 69; Act III, scene iv, line 16; Act II, scene iv, line 20.

With the true murderer beheaded in battle and his accomplice driven to death by her insanity, the newly-crowned King Malcolm had no one to punish for the murder of his father. So began “the single greatest witch hunt” in Scottish history. The three Sisters, devoted worshipers of the goddess Hecate (a disfavored and deeply misunderstood religious sect), were quickly singled out for punishment.¹ Although to others they may appear “Weird,” the Sisters did nothing remotely approaching the alleged crimes; they neither solicited the murder of King Duncan nor

¹ While the Record refers to the Sisters as “First Witch,” “Second Witch,” and “Third Witch,” those labels are conclusory, likely produced by a male mind prone to stereotyping, and are not evidence.

aided and abetted the same. Nevertheless, the passion of the populace and discriminatory animus against their sect were enough to secure their convictions. *See, e.g.*, Act I, scene iii, line 7 (A well-fed sailor’s wife refuses to share her chestnuts with one of the Sisters, crying “Aroynt thee, witch!”); Act I, scene iii, line 108 (Banquo slanders the three Sisters, querying “What, can the devil speak true?”). Now they are sentenced to die.

But this case never should have gone to the jury. The Sisters did nothing more than perform sacraments required by their faith, and their peaceful acts of worship and prophesizing cannot be the basis for punishment. Regardless, even were the Sisters’ predictions and rituals not fully protected by the First Amendment, these activities do not come close to proving beyond a reasonable doubt that the Sisters either solicited or aided and abetted the murder of King Duncan.

The convictions and death sentences should be reversed.

ARGUMENT

I. THE SISTERS’ CONVICTIONS MUST BE REVERSED BECAUSE THEIR CONDUCT IS PROTECTED RELIGIOUS EXPRESSION

The Sisters have been prosecuted and persecuted merely for practicing their faith. Their convictions run directly afoul of a bedrock principle: “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990). In

particular, these protections extend to soothsayers, prophets, and others who inform men and women about the future. The Sisters' prophecies are thus protected expression—they are nothing like the narrow category of incitement to “imminent lawless action” that can be punished. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Their other supposed culpable acts—which occurred well after King Duncan's murder—were sacramental rites of worship protected by the Kingdom of Scotland's First Amendment.

A. The Sisters Engaged In Protected Religious Activity And Cannot Be Convicted For Peacefully Dispensing Prophecies

1. The record reflects that the Sisters acted well within the realm of protected religious expression. While their faith may seem alien to some, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981)).

Before Macbeth committed his grisly murder, the sum total of the Sisters' supposed acts of “witchcraft” consisted of the following: (1) the First Sister bluffed and blustered about stirring up the seas and disturbing the sailor-husband of a “rump-fed ronyon” (with no record evidence that any harm came to the sailor); (2) the Second Sister addressed Macbeth as Thane of Cawdor; (3) the Third Sister told Macbeth he “shalt be king hereafter”; and (4) the Third Sister told Banquo that he would “get kings, though thou be

none.” See Act I, scene iii, lines 14-25, 50-51, 68. Then they vanished.

This expressive activity is fully protected by the First Amendment; indeed, it is part of the long and valued tradition of soothsayers accurately speaking truth to power. “Government is not free to declare certain beliefs—for example, that someone can see into the future—forbidden.” *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998); see also *Nefedro v. Montgomery Cty.*, 996 A.2d 850, 859-60 (Md. 2010) (invalidating on First Amendment grounds a law that prohibited fortunetelling, and rejecting the notion that fortunetelling is “inherently fraudulent”); *Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa*, 703 P.2d 1119, 1120 (Cal. 1985) (invalidating, under the free-speech provision of California’s Constitution, an ordinance that forbade engaging in the business of “astrology, augury, * * * clairvoyance, crystalgazing, divination, fortune telling, * * * prophecy,” and other similar practices), *overruled in part by Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002). The Sisters’ predictions to Macbeth and Banquo fell well within this protected category of speech, consisted of truthful information, and never crossed the line between prophesizing and inciting direct action.

Prophets and soothsayers have a storied tradition of informing men and women about their fates, warning against bad decisions, and advancing literary narratives. Sometimes prophets bear glad tidings (as, for example, in the case of the angel Gabriel); sometimes they come with dire warnings, see, e.g., Aeschylus, *Agamemnon* (doomed Trojan princess, Cassandra, accurately predicts the downfall

of Troy); W. Shakespeare, *Julius Caesar*, Act I, scene ii (soothsayer appropriately warns Julius Caesar to “[b]eware the ides of March”); and sometimes they come with warnings that help individuals take corrective action to avert catastrophe, *see* Genesis 41:25-36 (Joseph, interpreting Pharaoh’s dreams, warns him of a coming famine and advises him to “store up the grain”). Some soothsayers even give tidings to mortals that cause them to change their own conduct, begging the question whether the prophecy was self-fulfilling. *See* Sophocles, *Oedipus Rex* (Oedipus, while attempting to avoid a prophecy that he will one day kill his father and marry his mother, does just that).

The prophets and soothsayers in all these instances are mere messengers—not criminal instigators. They are typically frail, old, and/or blind, and even the most enraged tyrants do not seek to “shoot the messenger” when they receive unpleasant news. Indeed, persecuting prophets and soothsayers for accurately predicting the future would chill the flow of truthful information, making it more difficult for leaders to obtain valuable insights. Even in the face of potential falsehoods and fallacies, “the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Here, the Sisters did nothing more than inform Macbeth that he would one day be King. As discussed further below, they did not tell him to take action to bring about that result—indeed, they did not voice any opinion as to whether that result was even desirable.

2. If the Sisters' prophecy were (wrongly) construed as advocating the murder of King Duncan, their religious expression still would be protected by the Scottish First Amendment. Those who advocate the violent overthrow of the government cannot be prosecuted unless the advocacy was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447; see *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 244 (6th Cir. 2015) (en banc) (noting that the First Amendment protects offensive religious views just as much as it protects other types of offensive views). "[T]he mere abstract teaching * * * of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961) (omission in *Brandenburg*)).

The Sisters merely told Macbeth that he would be King at some unspecified date "hereafter". Act I, scene iii, line 50. At the time, the Sisters and Macbeth were nowhere near King Duncan. The Sisters had no reason to think Macbeth—driven by his own "[v]aulting ambition, which o'er-leaps itself" (Act I, scene vii, line 27) and his very persistent wife—would seek to bring about the prophesied result, much less that he would do so imminently. In fact, it was many, many hours later—after Macbeth wrote a letter to his wife explaining the prophecy, traveled to see King Duncan, traveled back to his castle, entertained the King at supper, visited with his wife, and chatted with Banquo and Banquo's son Fleance—that Macbeth murdered our good King.

Act I, scene iv-Act II, scene i. That is the antithesis of “imminent.” Macbeth’s actions were his own; they cannot be blamed on the Sisters’ speech.

The Crown’s able counsel may argue that the Sisters’ speech was “integral to criminal conduct” and thus not protected. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468-70 (2010); *United States v. Williams*, 553 U.S. 285, 297 (2008). But that exception to the First Amendment does not apply here. The Sisters did not “[o]ffer[] to engage in [an] illegal transaction[]” with Macbeth or anyone else. *Cf., e.g., Williams*, 553 U.S. at 297 (involving a request to obtain child pornography). They merely dispensed their wisdom and vanished. At most, they engaged in protected (and subtle) advocacy. The Crown cannot relabel that speech “solicitation” to skirt the First Amendment’s protection.

B. The Sisters’ Conduct Following King Duncan’s Murder Is Irrelevant And Is Protected Religious Activity In Any Event

Nor can the Crown salvage the convictions by pointing to other rituals engaged in by the Sisters. Those acts were *after* King Duncan’s murder. *E.g.*, Act IV, scene i, lines 1-37. They thus could not have caused that deed, which already was done.

In any event, these were peaceful and protected acts of sacramental worship. Making a potion using animal parts, for example, is protected religious expression: “The sacrifice of animals as part of religious rituals has ancient roots,” including from the Old Testament. *Lukumi Babalu*, 508 U.S. at 524. And “[g]iven the historical association between animal sacrifice and religious worship,” the Sisters’

contention that animal sacrifice “is an integral part of their religion” cannot be rejected as weird, “bizarre or incredible.” *Id.* at 531.

The same goes for making visions appear. The God of the Old and New Testaments, as well as that of the Quran, frequently used apparitions as a way to convey messages to mortals. *See, e.g.*, Genesis 22:11-12 (angel informs Abraham that he does not need to sacrifice his son Isaac); Luke 1:26-38 (angel Gabriel informs Mary of the virgin birth to come); Quran 53:4-9 (angel Gabriel visits the Prophet Muhammad). Sending an apparition cannot constitute a punishable act of “witchcraft,” or else entire traditions of worship would be vulnerable to prosecution.

Additionally, although the Sisters may have “withered” and “wild” appearances (Act I, scene iii, line 40), those subjective aesthetic judgments do not render them guilty of the crime of regicide. Certainly, they cannot be prosecuted (or persecuted) for appearing insufficiently feminine; such “sex stereotyping” would run afoul of basic equal protection principles. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (disparate treatment of women by employers on the basis of sex stereotypes violates law prohibiting sex discrimination in the workplace). But precisely this sort of prejudice has been heaped upon the Sisters, who were slandered as “secret, black, and midnight hags” by Macbeth (Act IV, scene i, line 48), even as they sought to answer his questions. Act IV, scene i, lines 60-62; *see also* Act I, scene iii, lines 45-47 (Banquo: “[Y]ou should be women, / And yet your beards forbid me to interpret / That you are so.”).

And they have been caricatured here by the Crown, based on popular superstitions and fears that any gathering of more than two women must be a coven of witches.

Against all this, the Crown may argue that application of a “neutral, generally applicable” law does not violate the right to free exercise of religion, even if the effect of that law is to burden religious exercise. *See Smith*, 494 U.S. 872. But the Sisters do not contend that the right to practice their religion entitles them to solicit murders or help commit them. (An accommodation of one person’s faith, after all, should not “detrimentally affect others” who do not share that faith. *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).) Rather, the Sisters contend that the First Amendment demands close scrutiny of the Crown’s evidence before submission of such criminal charges to a jury. And where, as here, the evidence reveals nothing but peaceful protected religious expression, a judgment of acquittal must be granted.

II. THE CROWN FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE SISTERS SOLICITED OR AIDED AND ABETTED KING DUNCAN’S MURDER

Even were this Court to conclude the Crown’s case should have been submitted to the jury, the conviction must be reversed. For while the Crown’s case is “full of sound and fury” (Act V, scene v, line 27), it lacks proof beyond a reasonable doubt that the Sisters solicited or aided and abetted the murder of King Duncan.

In Scotland, which has adopted the model Medieval Penal Code (“MPC”), “[a] person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission [s]he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish [her] complicity in its commission or attempted commission.” MPC § 5.02(a). Similarly, a person is guilty of “aiding and abetting a crime if (and only if) [s]he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense’s commission.” *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014). And the Scottish Constitution requires the Crown to prove each and every element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

None of those elements is remotely satisfied here. The Third Sister’s prediction that Macbeth “shalt be king hereafter” is apparently the sole statement relied upon by the Crown for the proposition that the Sisters encouraged Macbeth to kill King Duncan. Act I, scene iii, line 50. But no reasonable juror could conclude that statement was an “encourage[ment] or request[.]” for Macbeth to murder the King or an “affirmative act in furtherance” of the murder.²

² That statement also was spoken by only one of the petitioners. For that reason, the Sisters ought perhaps to have had separate representation below (and in this Court).

The statement was merely a prophecy of things to come, not an exhortation to commit a crime—just as the Second Sister’s greeting of Macbeth as the Thane of Cawdor was a truthful prediction that did not invite or require Macbeth to murder the existing man who held that title. If Macbeth had simply let life unfold, he may well have become King, just as the Sisters had prophesized. Indeed, after hearing the Third Sister’s prediction, Macbeth acknowledged that it gave him no cause to murder King Duncan: “If chance will have me king, why chance may crown me, / Without my stir.” Act I, scene iii, lines 141-42. It was not until King Duncan named Malcolm as his heir, an event in which the Sisters had no role, that Macbeth decided to “catch the nearest way” (Act I, scene v, line 17) to the throne by murdering the King: “The Prince of Cumberland: that is a step / On which I must fall down, or else o’er-leap, / For in my way it lies. Stars, hide your fires, / Let not light see my black and deep desires. / The eye wink at the hand; yet let that be / Which the eye fears, when it is done, to see.” Act I, scene iv, lines 48-54.

Macbeth was, moreover, predisposed to violence and required no encouragement from the Sisters. Even before the Sisters encountered him, Macbeth had shown his vicious nature on the battlefield. There he had “unseamed” Macdonald “from the navel to th’ chops, / And fixed his head upon our battlements.” Act I, scene ii, lines 22-23. And after King Duncan’s death, Macbeth continued his killing spree, again without the encouragement or assistance of the Sisters. He slayed Duncan’s innocent grooms to cover up his own crime, solicited the murder of the honorable Banquo, and ordered

the murders of Macduff's wife, children, and servants. Far from being full of "th' milk of human kindness" (Act I, scene v, lines 15-17), Macbeth showed himself to be a bloodthirsty criminal who would make any excuse and take any measure to secure (and maintain) the Crown.

Nor can the Sisters be blamed for the alleged appearance of a floating dagger just before Macbeth committed his monstrous deed. *See* Act II, scene i, line 33-34 ("Is this a dagger which I see before me, / The handle toward my hand?"). There is no evidence that the Sisters caused the dagger to appear. Nor is there evidence that the apparition was even real. To the contrary, the evidence shows that it was "but / A dagger of [Macbeth's] mind, a false creation, / Proceeding from the heat-oppressed brain." Act II, scene i, lines 37-39. Or perhaps the vision was drug-induced. For might not Lady Macbeth, who "drugged [the] possets" of King Duncan's grooms, have done the same to her Lord's? Act II, scene ii, lines 6-7.

The true accomplice in King Duncan's murder was in fact the calculating Lady Macbeth, not the poor misunderstood Sisters. It was Lady Macbeth's taunts and challenges to Macbeth's (apparently fragile) masculinity that ultimately drove him to commit the murder. *See* Act I, scene vii, lines 49, 61-62 ("When you durst do it, then you were a man[.] * * * [S]crew your courage to the sticking place, / And we'll not fail."). It was Lady Macbeth who, "with wine and wassail," incapacitated the King's chamberlains to facilitate Macbeth's murder of the King. Act I, scene vii, line 65. It was again Lady Macbeth who left the chamberlain's daggers "ready" where Macbeth "could not miss 'em." Act II, scene ii,

lines 11-12. And it was Lady Macbeth who set up the chamberlains to appear guilty of the heinous crime by covering them in blood and placing the bloody daggers with them. Act II, scene ii, lines 52-57.

As explained above (*supra* Part I.B), the Sisters' conduct following the murder of King Duncan cannot save the Crown's case. It is elementary that actions after the completion of the crime cannot prove solicitation and aiding and abetting. *See West v. Commonwealth*, 156 Va. 975, 979 (1931).

Nor are the Sisters' actions probative of their intent or purpose to promote or facilitate King Duncan's murder. The Crown claimed that the Sisters' "unt[ying] [of] the winds" (Act IV, scene i, line 50) conjuring of apparitions, brewing of a stew (with admittedly adventurous ingredients), and lively dancing confirmed their evil intent. But those actions (in addition to being protected by the First Amendment, *supra* Part I), did not prove that the Sisters desired the murder of King Duncan. The Crown's introduction of such evidence was a flagrant attempt to inflame the prejudices of the jury. That evidence clearly should have been excluded on the grounds that "its probative value [was] substantially outweighed by a danger of * * * unfair prejudice." Scot. R. Evid. 403.

In short, the Crown submitted no evidence from which a rational jury could conclude beyond a reasonable doubt that the Sisters solicited or aided and abetted the murder of King Duncan. Like the good Macduff's wife, the Sisters "have done no

harm.” Act IV, scene ii, line 77. Let their plea not be similarly in vain.

CONCLUSION

The judgment should be reversed, and the Sisters should be allowed to practice their religion in peace. Long live King Malcolm (but hail Fleance, as Banquo’s “children shall be kings,” Act I, scene iii, line 86).

Respectfully submitted,

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