The Drax 29 and the Kingsnorth 6: Different Defences, Different Outcomes

By Mike Schwarz

In Autumn 2008 six Greenpeace campaigners were acquitted at Maidstone Crown Court for participating in an anti-coal action at Kingsnorth Power Station. Their defence centred on their concerns about climate change. In Summer 2009 twenty-nine other environmentalists were convicted at Leeds Crown Court following an action directed at DRAX power station, having sought to run a similar defence. Why the different outcomes?

Although both sets of defendants sought to stop CO2 emissions from coal fired power stations the charges they faced, the legal defence they ran and, as we know, the outcomes were different and bear further examination.

The Greenpeace campaigners painted the word 'Gordon' down the side of the chimney and were charged with criminal damage, s1 of the Criminal Damage Act 1971. The defendants relied on a defence unique to that Act (to be found in s5) that they had 'lawful excuse' for their actions because, through damaging some property (the chimney) they sought to protect other property in immediate need of protection; namely, property around the world currently at risk from the effects of climate change. The Crown Court judge allowed the defendants to put forward evidence supporting this defence, not only from their own mouths, but also from experts on climate change. Those experts established two things. First, that the defendants' fears of anthropomorphic climate change were reasonable and well founded. Second, that the conventional levers of power are flawed. UK democracy, Euro-politics and international diplomacy do not provide an effective or timely mechanism to address climate change. These views allow a jury, in rare circumstances such as those faced by the Greenpeace defendants, to acquit those who take 'direct action'.

The DRAX environmentalists, one dressed as a canary, stopped and unloaded a coal train on its way to DRAX. They were prosecuted for obstructing a train, contrary to s36 Malicious Damage Act 1861. There is no 'lawful excuse' defence to this offence. The defendants relied instead on a defence potentially available to defendants facing any criminal charge; that they were acting through 'necessity' (see R. v. Martin, 88 Cr App R 343, CA), that they were impelled to take action to protect others at risk of death or serious injury from the impacts of climate change. Again, the defendants proposed to give evidence themselves and call expert evidence. However, at a pre-trial hearing (under s29 Criminal Procedure and Investigation Act 1996) the Crown Court judge ruled, on the basis of the defendants' 'defence case statement' and expert evidence, that they had as a matter of law no defence, that there was insufficient evidence for a reasonable jury properly directed about the law to acquit. In the light of this ruling, those defendants who pleaded not guilty were unable to present the evidence they had sought to rely on and were found guilty.

What then explains the difference in the outcome? The defendants in the two cases faced different charges and relied on different defences. Significantly perhaps the 'lawful excuse' defence relies more heavily than the 'necessity' defence on the subjective beliefs of the defendants, rather than the view of an objective observer as to what is 'reasonable'. It is normally the function of a jury to find the facts and decide what is reasonable. This feature perhaps emboldened the DRAX judge to rule that no evidence which the jury might hear could make the defendants' actions reasonable. Authorities are divided as to when and whether a judge has the power to withdraw defences from the jury before the evidence is even put before the court (see for example Attorney-General for Northern Ireland's Reference (No.1 of 1975) [1976] 2 All ER 937 and R v Jones (Margaret) and others (2007) 1 A.C. 136). Judicial politics may also have been at play. The judiciary cannot have failed to notice that the acquittals of the Greenpeace defendants led to front page headlines not only about climate change, but also the legitimacy or otherwise of 'direct action'. It is submitted that in future cases judges should at least allow the evidence be put before the court (the jury) and for the judge then to consider, when summing up, whether the jury should be allowed to consider a climate change defence when retiring to consider their verdict.

And where do climate change campaigners, seeking to argue that their beliefs and actions were reasonable, stand? Despite 'Climategate', public consciousness of anthropomorphic climate change is, like CO2 levels in the atmosphere, rising. So too, perhaps as a result of Copenhagen, is the public's awareness of the need to take action, not only to reduce personal CO2 emissions, but also to influence decision-makers. It was, after all, none other than the Secretary of State for Energy and Climate Change who said 'When you think about all the big historic movements, from the suffragettes, to anti-apartheid, to sexual equality in the 1960s, all the big political movements had popular mobilization. Maybe it's an odd thing for someone in government to say, but I just think there's a real opportunity and a need here'.

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