

Tuesday, 22nd January 2002

B e f o r e:

MR JUSTICE MAURICE KAY

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DPP

-v-

WOODS

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(Official Shorthand Writers to the Court)

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MR D BRADSHAW (instructed by CPS, King William House, Market Place, Hull, HU1 1RS) appeared on behalf of the  
appellant

The respondent did not appear and was not represented

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J U D G M E N T

(As approved by the Court)

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1.MR JUSTICE MAURICE KAY: This is a prosecutor's appeal by case stated. On 6th August 2001 Craig Leslie Woods appeared before the Kingston upon Hull Justices for trial. The charge he faced was that "on 27/04/01 at the City of Kingston upon Hull assaulted Sunny Efosa Ogbevoen by beating him and the offence was racially aggravated contrary to S29 of the Crime and Disorder Act 1998".

2.The respondent had previously pleaded guilty to an offence of common assault based on the same facts, absent the elements which the prosecution contended made the offence a racially aggravated one. The case stated lists a number of undisputed facts that arose from the evidence. They were as follows:

"(a) Mr Ogbevoen was on duty as a door supervisor at the Circus Circus On-licensed premises, Kingston upon Hull on the night of 27th April 2001.

(b) At approximately 10.30 pm the Respondent and two other young men approached the entrance door to the premises.

(c) The Respondent and his companions had consumed alcohol during the course of the evening.

(d) Upon Mr Ogbevoen refusing to allow one of the Respondent's companions entry into the premises an altercation took place. Shortly thereafter, Mr Ogbevoen was assaulted.

(e) The respondent assaulted Mr Ogbevoen by punching him to the head.

(f) Mr Ogbevoen restrained the Respondent who was detained at the scene until the police arrived.

(g) The Respondent admitted the assault during interview and subsequently pleaded guilty to a charge of common assault.”

3. What was disputed by the respondent was that he had ever uttered the words “you black bastard” immediately prior to the assault and that he had demonstrated hostility towards Mr Ogbevoen based upon his membership of a racial group.

4. In evidence Mr Ogbevoen described the use of the words “you black bastard” but said that he was not bothered by such comments which were often made in that type of situation “... so long as they don't touch me.” The respondent gave evidence in the course of which he denied the use of the disputed words.

5. The Justices found that the respondent had assaulted Mr Ogbevoen and had uttered the words “you black bastard” a few moments before the assault. In retirement the justices sought the advice of their clerk and were advised by reference to the decision of the Divisional Court in Director of Public Prosecutions v Pal 3rd February 2000. It seems that the advice they received from the clerk was that whilst the use of racially abusive insults would ordinarily be found sufficient for the purposes of the section, it was possible that such words could be spoken and yet the offence be not proved.

6. The conclusions of the Justices are set out in these paragraphs from the case stated:

“16. We took into account how the victim assaulted perceived the comments. In his evidence Mr Ogbevoen made no play (at any stage) of the words being racially offensive and said he was not bothered by such comments “... so long as they don't touch me”.

17. We found the Respondent's hostility to be borne out of his frustration and annoyance as a result of his companion being denied entry to the premises, and whilst he may have intended to cause offence by the words, this was not 'hostility based on the victim's membership (or presumed membership) of a racial group'. We believed that the Respondent's frame of mind was such that he would have abused any person standing in Mr Ogbevoen's shoes by reference to an obvious physical characteristic had that individual happened to possess one.”

7. The case stated poses the single question: “Did we err in law in concluding that, in all the circumstances of this case, the words “you black bastard” uttered a few moments before the assault were not such to prove that the Respondent had demonstrated hostility towards the victim based upon his membership of a racial group?”

8. Section 28 of the Crime and Disorder Act 1998 provides as follows:

“(1) An offence is racially aggravated for the purposes of sections 29 to 32 below if -

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.”

9. The terms in which this case was contested in the magistrates' court concentrated on section 28(1)(a). A common assault which is racially aggravated is an offence under section 29(1)(c) of the Act.

10. In the course of his submissions, Mr Bradshaw has taken a number of points. First, he submits that the Justices were wrong to take into account the victim's perception of the words. I agree with this submission. The fact that the person to whom the words were directed may have had a personality which enables him to take a resilient or broad shouldered view of the situation is irrelevant to the question which arises under section 28(1)(a), namely whether the offender “demonstrates towards the victim ... hostility based on the victim's membership of a racial group”.

11. Secondly, Mr Bradshaw submits that it is immaterial that the respondent had or may have had an additional reason for uttering the words; that is to say, a reason unrelated to race. The Justices attached significance to their finding that the respondent's hostility was “borne out of his frustration and annoyance as a result of his companion being denied entry into the premises.” However, the case stated does not show that the Justices had regard to section 28(3)(b). Section 28(3) provides that:

“It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender's hostility is also based, to any extent, on ...

(b) any other factor not mentioned in that paragraph.”

12. In my judgment, if the Justices had had regard to that provision, it is inevitable that a conviction would have followed. Section 28(1)(a) was not intended to apply only to those cases in which the offender is motivated solely, or even mainly, by racial malevolence. It is designed to extend to cases which may have a racially neutral gravamen but in the course of which there is demonstrated towards the victim hostility based on the victim's membership of a racial group. Any contrary construction would emasculate section 28(1)(a).

13. Thirdly, it is submitted that the fact that the respondent's frame of mind was such that he would have abused any person standing in the complainant's shoes by reference to an obvious physical character is irrelevant. In my judgment, this submission is well-founded. If the respondent would have assaulted another person and called him, say, "a fat bastard", that would not be an aggravated offence because Parliament has not found it necessary to provide additional protection to the overweight by the creation of an aggravated form of the offence by reference to that characteristic. Racial abuse, however, is the subject of an aggravated offence, and therefore the evidence in this case fell to be considered by reference to that category rather than to circumstances which would have obtained if the abuse had referred to characteristics which have not received the attention of Parliament.
14. Finally, Mr Bradshaw referred to the authority of Pal. At the time of the drafting of his skeleton argument he was minded to submit, in the alternative, that Pal was not correctly decided. Wisely, he no longer seeks to make good that submission. The facts of Pal were more complex than those in the present case. In Pal the prosecutor's appeal was dismissed. However, in dismissing it Simon Brown LJ, with whom Klevan J agreed, did consider circumstances less complex than those that were before the court. In paragraphs 14 and 15 of the judgment the learned Lord Justice said:
- "... I would wish to make it perfectly plain that I will reject also an argument put before us by the Respondent, to the effect that section 28(1)(a) has no application to:
- "... street arguments when insults may be thrown without thought being given to whether the same are racially abusive, which conduct is already covered by other offences..."
15. Were it otherwise, this argument runs:
- "... as soon as one racial word is uttered - whatever the motivation - then there is no defence to the charge."
- That, of course, is not so. It will always be necessary for the prosecution to prove the demonstration of racial hostility, although the use of racially abusive insults will ordinarily, no doubt, be found sufficient for that purpose."
15. In my judgment, the conclusions that I have reached in this case are entirely consistent with the judgment of Simon Brown LJ in Pal.
16. Accordingly, to the question posed in the case stated, I answer with the single word, "Yes". I shall remit the matter to the Justices with a direction to convict.
17. Thank you very much, Mr Bradshaw.

SMITH BERNAL