Neutral Citation Number: [2022] EWHC 1466 (Admin)

Case No: CO/2047/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 June 2022

Before:

LORD JUSTICE HOLROYDE

MR JUSTICE CHAMBERLAIN

- -

Between:

MARQUETTE CAIN	**Appellant**
- and -	
CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

Elena Papamichael (instructed by **GT Stewart Solicitors**) for the **Appellant**
Tom Worden (instructed by **CPS Appeals Unit**) for the **Respondent**
Hearing dates: 14 June 2022

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Approved Judgment

Lord Justice Holroyde:

1. On 11 December 2020, following a trial in the Croydon Magistrates' Court, this Appellant was convicted of racially aggravated use of threatening, abusive or insulting words or behaviour, contrary to section 4A(1) of the Public Order Act 1988 and section 31(1)(b) of the Crime and Disorder Act 1988. His appeal against that conviction to the Crown Court at Inner London was dismissed on 9 April 2021 by HH Judge Pawlak, sitting with two justices. He now appeals by way of Case Stated against the decision of the Crown Court.

The facts:

2. The charge arose out of events on 12 May 2020 on a housing estate in London, when the Appellant used threatening, abusive or insulting words or behaviour towards a police officer, PC Yansen, who was detaining a teenage boy. In the Case Stated, the Crown Court records the following findings of fact:

> "PC Yansen is of mixed race or heritage. He received information from the mother of a black 14 year old child whom he knew in his capacity as a local community officer, that her child had gone missing and was thought to be in possession of drugs and a knife. He was searching for him on the estate and found him. The boy, who was physically large in size, tried to run away and the officer handcuffed him on the ground. He was in possession of drugs and the bike he had been riding had been stolen. The boy's phone fell to one side and he was making a lot of noise, as a result of which a small group of bystanders gathered to watch among whom was the [Appellant]. The entire episode was filmed on the officer's body camera. The officer was on his own and the entirely lawful arrest and detention of the boy was being deliberately hampered by the threatening, abusive or insulting behaviour of the [Appellant]. There was no mistreatment of the boy. The [Appellant's] interventions were totally unjustified, unreasonable and hostile, his clear intention being to cause harassment, alarm or distress and he did in fact cause PC Yansen harassment, alarm or distress. The boy was not being restrained in a way which did or could have prevented him from breathing. The words used were a calculated racial insult and referred to the officer being a member of a racial group. The fact that the [Appellant] was black was irrelevant. The evidence is contained in the film from the body-worn camera of PC Yansen, which among other things made clear beyond doubt the [Appellant's] intention to cause harassment, alarm or distress."

3. The parties have helpfully agreed a transcript of the words spoken by the Appellant and recorded by PC Yansen's body-worn camera. They include the Appellant demanding to know why PC Yansen was "harassing" the boy and shouting comments to the effect that PC Yansen was acting without justification and contrary to proper procedures. He ignored PC Yansen's requests to walk away.

4. Most relevant to the issues in this appeal are words spoken in an exchange towards the end of the recording, after the Appellant had demanded to know why the boy was still on the ground:

> "Appellant: You see this nigger, looking for fucking acceptance, violating his own kind.
>
> PC Yansen: Did you just call me a nigger?
>
> Appellant: Why you fucking …
>
> PC Yansen: Do you want to get arrested?
>
> Appellant: (inaudible shouting)
>
> PC Yansen: You need to walk away right now, I'm serious, walk away.
>
> Appellant: (inaudible) … what you doing, you're violating … (inaudible)
>
> PC Yansen: … or I'm going to arrest you for racially aggravated public order.
>
> Appellant: (inaudible) … for acceptance
>
> PC Yansen: Walk away, when I've finished with him I'm going to arrest you, do you understand?
>
> Appellant: (inaudible shouting) … violating …
>
> PC Yansen: Walk away, walk away. I don't take that kind of language from anyone. I don't take that from anyone."

The question raised for this court:

5. Before the Crown Court, the Appellant raised a number of issues which are no longer pursued, including as to whether his conduct had amounted to the offence of using threatening, abusive or insulting words of behaviour. It is, however, unnecessary to say more about those issues, because the focus in this appeal is on the element of racial aggravation of the offence. It had been submitted on behalf of the Appellant that the words used did not demonstrate hostility based on PC Yansen's membership of a racial group. The Crown Court ruled against that submission. The sole question which the Crown Court asks this court to answer is -

> "whether the offence committed by the Appellant of using threatening, abusive or insulting words or behaviour, thereby causing PC Yansen harassment, alarm or distress with intent, was racially aggravated by the words used and directed at PC Yansen, who is of mixed race or heritage, in that they demonstrated hostility towards PC Yansen based on his

> membership of that racial group, the words being 'look at that nigger violating his own kind just for fucking acceptance'. "

The legal framework:

6. Before considering the submissions of counsel it is convenient to set out the terms of the relevant statutory provisions, so far as is material for present purposes, and to refer to some of the case law which has been cited.

7. By section 4A of the Public Order Act 1986:

> "**4A. Intentional harassment, alarm or distress.**
>
> (1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he –
>
> (a) uses threatening, abusive or insulting words of behaviour, or disorderly behaviour …
>
> thereby causing that or another person harassment, alarm or distress."

8. Part II of the Crime and Disorder Act 1988 contains provisions relating to racially or religiously aggravated offences. By section 31 of that Act:

> "**31. Racially or religiously aggravated public order offences.**
>
> (1) A person is guilty of an offence under this section if he commits …
>
> (b) an offence under section 4A of [the Public Order Act 1986] (intentional harassment, alarm or distress) … which is racially … aggravated for the purposes of this section."

9. Section 28 of the same Act contains the following definition:

> "**28. Meaning of 'racially … aggravated'.**
>
> (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.

> (2) In subsection (1)(a) above – 'membership', in relation to a racial … group, includes association with members of that group; 'presumed' means presumed by the offender.
>
> (3) 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 any other factor not mentioned in that paragraph.
>
> (4) In this section 'racial group' means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins."

10. I shall refer to provisions of the 1988 Act simply by reference to their section numbers.

11. It is common ground between counsel, and I agree, that the Crown Court convicted the Appellant pursuant to section 28(1)(a) and not section 21(1)(b).

12. I turn to the case law. In doing so, it is unfortunately necessary to refer to language which by modern standards would on any view be regarded as intolerably offensive.

13. In July 1999, less than a year after the relevant provisions had come into force, magistrates in Bedfordshire acquitted a defendant of an offence of racially aggravated common assault contrary to section 29. The prosecution appealed to the High Court by way of Case Stated. The appeal was dismissed: see *Director of Public Prosecutions v Pal* [2000] EWHC 1575 (QB) ("*Pal*").

14. The facts, in brief, were that a caretaker at a community centre, described as "a man in his 60s and of Asian appearance", asked four youths to leave the premises. Two of the youths were white, the other two were of Asian appearance. Three did leave, but the respondent – one of the Asian youths –assaulted the caretaker, called him a "white man's arse licker" and a "brown Englishman", and assaulted him again. At the trial in the magistrates' court, the prosecution relied on section 28(1)(b), arguing that the abuse was directed towards white men rather than Asians. The magistrates found that the relevant words had been spoken, but did not find that they were motivated by racial hostility. Rather, they were used in anger as part of the limited vocabulary of the respondent, who was "neither an articulate nor a well-educated youth".

15. On appeal, the prosecution relied also on section 28(1)(a), submitting that the clear inference from the words used was that the respondent was accusing the caretaker of betraying his own racial group by doing the bidding of white men. Simon Brown LJ, with whom Klevan J agreed, rejected that submission. He said at [11] that although the respondent's words would have had no meaning if the caretaker had not been Asian, the respondent's hostility was not in any material sense based on the caretaker's membership of the Asian race:

> "What he was demonstrating was not hostility before Asians, but hostility towards [the caretaker's] conduct that night. Not racism, but resentment."

16. Simon Brown LJ went on to reject an alternative submission based on section 28(2) to the effect that the respondent's words demonstrated antipathy not towards Asians but towards the white race, and hostility towards the caretaker on the basis of his association with that race. On the facts of the case, he said, that was "an impossibly far-fetched submission to make".

17. He also rejected, however, a submission by the respondent to the effect that section 28(1)(a) did not apply to insults thrown during an argument without thought being given to whether they were racially abusive. Otherwise, it had been argued, the uttering of a racial word, whatever its motivation, would mean there was no defence to the charge. At [16], Simon Brown LJ said of that argument:

> "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."

18. In *R v Anthony Delroy White* [2001] EWCA Crim 216 ("*White*") the Court of Appeal (Criminal Division) dismissed an appeal against conviction for an offence contrary to section 31, where the facts were that the appellant had called a bus conductress a "stupid African bitch". The court, rejecting a submission that the word "African" did not impute membership of a racial group, held at [17] and [18] that the language of the statute was intended to be comprehensive and should be given "a broad, non-technical meaning".

19. The court also rejected a submission based on the fact that the appellant was himself African. Pill LJ, giving the judgment of the court, referred at [20] to *Pal* and said:

> "while it may be unusual, as Simon Brown LJ commented, for a person to show hostility to another based on the other's membership of a racial group where the offender comes from the same racial group, we see no basis for holding that such hostility cannot in law be shown. It may be more difficult in such cases to establish that the hostility is of racial, national or ethnic origin as the case may be. However, a person may show hostility to his own kind whether racial, ethnic or national."

20. In *Director of Public Prosecutions v McFarlane* [2002] EWHC 485 (Admin) ("*McFarlane*") a magistrates' court had acquitted the respondent of an offence contrary to section 31. The facts were that in the course of an altercation over a parking space, the respondent – who was white – had called the victim – who was black - a "jungle bunny", "black bastard" and "wog". The lower court had regarded itself as bound by the decision in *Pal* to find that the respondent's hostility was towards the victim's conduct rather than based on the victim's membership of a racial group.

21. The prosecution appealed successfully to the High Court by way of Case Stated. Forbes J, with whom Rose LJ agreed, said at [13] that the decision in *Pal* –

> "…is heavily dependant on its own particular facts and, accordingly, has little or no real application to the factual circumstances of this case."

22. Forbes J went on to hold, at [16], that the lower court had fallen into clear error and that a finding that the respondent had demonstrated hostility based on the victim's membership of a racial group was "inescapable". He added, at [17], that the lower court had overlooked section 28(3), which rendered it immaterial that the respondent may have had an additional reason for using the words he did, for example because he was angry over the victim's conduct in parking where he did.

23. In *Johnson v Director of Public Prosecutions* [2008] EWHC A509 (Admin) the High Court again made clear, at [12], that it did not matter whether an offender's hostility was partly racial and partly for another reason:

> "The effect of section 28(3) of the 1998 Act is that it is sufficient if the hostility is based in part on the victim's membership or presumed membership of a racial group."

24. In *Jones v Bedford and Mid-Bedfordshire Magistrates' Court* [2010] EWHC 523 (Admin) Ouseley J at [18] noted the distinction between the two limbs of section 28:

> "Even though the facts of a particular case may satisfy both limbs simultaneously, limb (a) involves no examination of subjective intent or motivation behind the demonstration of racial hostility for the victim. It merely requires the demonstration of racial hostility. It contains an objective test of whether the defendant demonstrated racial hostility to the victim. That makes particular sense where a victim is present towards whom such racial hostility is demonstrated. The offence is concerned with the objective view of whether racial hostility has been demonstrated, in part because of its effect upon the victim, rather than being concerned with a subjective motivation of the defendant. By contrast, limb (b) is examining the defendant's subjective motivation whether an individual victim is present or not."

25. I mention finally the decision of the House of Lords in *R v Rogers* [2007] UKHL 8, [2007] 2AC 62 ("*Rogers*"), in which the defendant had been convicted of an offence contrary to section 31(1)(a) of the 1996 Act and section 28(1)(a) of the 1998 Act. The House of Lords upheld the decision of the Court of Appeal that the word "foreigners" did constitute a racial group within the meaning of section 28(4). Baroness Hale, with whom the other Lords agreed, confirmed at [11] that the statute intended "a broad, non-technical approach, rather than a construction which invited nice distinctions." She referred in this regard to the decision in *White*.

26. At [15] Baroness Hale referred to *Pal*, which she said "might be thought to go the other way". She noted that it had been held in that case that the offending language did not demonstrate hostility towards Asians, and continued –

> "But it is difficult to understand why it did not demonstrate hostility based on the victim's presumed association with whites (within the meaning of section 28(2)). That would undoubtedly cover, for example, a white woman who is targeted because she is married to a black man. It may well be that this way of looking

> at the matter did not feature in the case presented to the Divisional Court."

The grounds of appeal:

27. On behalf of the Appellant, Ms Papamichael puts forward three grounds of appeal against the conviction. She submits first that there was no evidence to support the finding that the words used by the Appellant were a calculated racial insult, and no reasonable court could have found that the words demonstrated hostility towards PC Yansen based on his membership or presumed membership of a racial group. Secondly, that the finding that the words did refer to PC Yansen being a member of a racial group was insufficient to found the conviction of a racially aggravated offence. Thirdly, that the Crown Court erred in law in determining that the Appellant's race was irrelevant to the issue of whether he had demonstrated hostility based on race.

Summary of the submissions:

28. In developing these grounds, Ms Papamichael accepts that the word "nigger" is capable of demonstrating racial hostility, but submits that there was no evidence in this case that it did so. She emphasises that the Appellant is himself black and points out that within a black community the word can be used "as a neutral descriptor or even as a term of endearment". The words used by the Appellant, she submits, can only be understood as meaning that PC Yansen was a black or mixed race man violating another black person in order to gain acceptance. That, she argues, was an encouragement of better treatment of black people and wholly inconsistent with the Appellant demonstrating hostility towards black people.

29. Ms Papamichael also emphasises the need to examine the context within which the offending words were used. She relies on the words of Simon Brown LJ at [11] in *Pal* and submits that the Crown Court should have concluded that the Appellant was demonstrating hostility towards PC Yansen's based on his conduct, not his race. The Crown Court was accordingly wrong in law to treat the fact that the Appellant is black as irrelevant. Had the Crown Court taken into account that fact, it should inevitably have concluded that the words spoken were critical of conduct but not hostile on the basis of race. She suggests that the Appellant was doing no more than holding PC Yansen to a higher standard than his white colleagues, which could not be regarded as hostility on the basis of race.

30. Mr Worden accepts on behalf of the Respondent that the mere use of the word "nigger" is not without more sufficient to sustain the conviction of a racially aggravated offence, and that the surrounding circumstances must be considered. But that, he submits, is what the Crown Court was invited by the Respondent to do, and did do. The circumstances, he argues, were that the Appellant used a racial slur in a hostile manner whilst criticising PC Yansen's actions as a black man. He submits that in those circumstances, the word "nigger" clearly was not being used in the benevolent way which Ms Papamichael suggests. PC Yansen immediately, and correctly, recognised the words spoken as intentional racist abuse. By reason of section 28(3), it did not matter whether the Appellant was also angry with PC Yansen because of his conduct. He submits that it was therefore plainly open to the Crown Court to find that the Appellant displayed hostility towards PC Yansen based on his membership or presumed membership of a racial group.

31. Mr Worden submits in the alternative that it was also open to the Crown Court to find that the Appellant displayed hostility based on PC Yansen's presumed association with white people. So far as the rejection of a similar argument in *Pal* is concerned, Mr Worden points to the fact that in *Rogers* Baroness Hale doubted the reasoning of this part of the judgment in *Pal*. In any event, he submits, the decision in *Pal* was heavily dependent on its specific facts.

Analysis:

32. I am grateful to both counsel for their written and oral submissions.

33. The following principles can be derived from the case law I have mentioned:

    i) It is essential, when considering an allegation that an offence was racially aggravated, to have regard not only to the words used but also to the circumstances and context in which they were used.

    ii) The mere fact that the defendant uttered a word or term which is capable of being racially abusive is not, therefore, necessarily decisive.

    iii) The fact that the defendant belongs to the same racial group as his victim is an important part of the circumstances and context, but it is not necessarily a bar to the offence being proved.

34. As is rightly conceded on the Appellant's behalf, use of the word "nigger" is clearly capable of demonstrating hostility based on membership of a racial group. The issue for this court is whether it was properly open to the Crown Court to find that the defendant did in fact demonstrate such hostility.

35. With respect to Ms Papamichael, there is in my view a flaw in her argument. Section 28(1)(a) requires consideration of whether, objectively, the offender demonstrated hostility based on the victim's membership or presumed membership of a racial group. That may be proved without the offender necessarily being shown to be generally hostile towards that group, or being shown to be motivated by general hostility towards the group. Thus in *White*, it could not be said that the appellant, who regarded himself as African, was hostile towards all Africans as a race. He had nonetheless demonstrated hostility towards the bus conductress based on her membership of that racial group. Accordingly, whilst I agree with Ms Papamichael that the Appellant did not demonstrate hostility towards black people generally, I cannot accept her submission that the prosecution must for that reason fail.

36. In the circumstances of the present case, and viewing the word "nigger" in the context in which it was used, it was in my judgment plainly open to the Crown Court to conclude that the Appellant demonstrated hostility towards PC Yansen on the basis of his membership of the black racial group. It was open to the court to find that the words used by the Appellant were not simply a criticism of PC Yansen's conduct, and demonstrated such hostility. Giving the Appellant's words the necessary broad and non-technical meaning, they were intended as, and were clearly understood by PC Yansen to be, a criticism of him as a black officer conducting himself in a manner which the Appellant wrongly thought was aimed at currying favour with white colleagues. The words demonstrated hostility based on the officer's race because they were a

criticism of him as a black man for acting in a way which the Appellant regarded it as unacceptable for a black man to behave. If PC Yansen had been white, the Appellant would no doubt have been angered by his arrest of the boy; but it is unrealistic to think that he would have criticised the officer for "looking for acceptance, violating his own kind".

37. The circumstances are therefore materially the same as those in the example of the white woman targeted for marrying a black man which was given by Baroness Hale at the end of the passage which I have cited from her speech in *Rogers* at [15]. In my view, it is unnecessary in such a situation to try to separate out the hostility towards the white woman based on her membership of the white racial group, and hostility based on her association with a member or members of the black racial group. The hostility is surely based on the victim's being a member of the white racial group and conducting herself towards a black man in a way which the speaker regards as unacceptable for a white woman.

38. The Crown Court's reference to the fact that the Appellant is black was irrelevant must also be viewed in its context. It cannot be interpreted as a general statement that the race of the defendant will always be irrelevant on a charge of a racially aggravated offence. Rather, it is to be understood in the circumstances of this case as a statement, correct in law, that the Appellant's own race was not a bar to his words being "a calculated racial insult".

39. It is important to remember that section 28(3) makes it immaterial that the hostility, if based on the victim's membership of a racial group, may also be based on some other factor. With that subsection in mind, I am not persuaded by the reliance which the Appellant places on the decision in *Pal*. With the greatest of respect to the court in that case, the reasoning from it on which Ms Papamichael relies seems to overlook the combined effect of section 28(1)(a) and section 28(3). It was criticised in cogent terms by Baroness Hale in *Rogers*, and the actual decision was said in *McFarlane* to be heavily dependent on its own facts. I respectfully agree with those observations. I think it important also to bear in mind that *Pal* was decided in the early days of the relevant legislation and, as Mr Worden rightly submitted, there is now a far greater ability to identify racial abuse and to understand the corrosive effects which make the racially aggravated offence so much more serious than the basic public order offence. Whilst the decision in *Pal* may be explained by the specific findings of fact which had been made in the lower court in that case, it should in my view be confined to its precise facts and circumstances. It is distinguishable from the present case and, with respect, is unlikely to provide assistance in other cases.

40. I do not think it necessary to express a concluded view on the alternative submission advanced by Mr Worden. There seems to me to be considerable force in the argument that it was also open to the Crown Court to find that the Appellant demonstrated hostility towards PC Yansen based on his presumed association with white persons, so that his conduct was caught by section 28(2). It is not, however, clear to me whether that argument was specifically advanced before the Crown Court, and it is not addressed at all in the certified question. I therefore prefer to base my decision solely on the primary argument of the Respondent, which I accept.

Conclusion:

41. I would slightly amend the wording of the certified question to make clear that the issue for this court is whether it was properly open to the Crown Court to find that the offence was racially aggravated by the words used and directed at PC Yansen. I have no doubt that it was open to the court so to find. I would therefore answer the amended question "Yes", and dismiss this appeal.

Mr Justice Chamberlain:

42. I agree.