Neutral Citation Number: [2022] EWHC 2213 (Admin)

Case No: CO/1725/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 August 2022

Before :

LORD JUSTICE DINGEMANS, VICE-PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE JOHNSON

- -

Between :

HSK	**Appellant**
- and -	
Crown Prosecution Service	**Respondent**

- -
- -

Gerard Pitt (instructed by **Just for Kids Law**) for the **Appellant**
Paul Jarvis (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 28 July 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 26 August 2022 at 10:30 am.

Lord Justice Dingemans:

Introduction

1. This is the hearing of (1) an application for an extension of time to file an appellant's notice in relation to an appeal by way of case stated; and, if the extension is granted (2) an appeal by way of case stated from the Justices of the North and Central London Youth Panel sitting at Highbury Corner Youth Court. The appellant was born in January 2005. The appellant has the benefit of anonymity pursuant to the provisions of section 49 of the Children and Young Persons Act 1933.

2. It is common ground that on 24 February 2020 at Oxford Street, London W1, the appellant unlawfully and maliciously wounded Jonathan Mok Hin Kyong, contrary to section 20 of the Offences against the Person Act 1861 ("OAPA"). The appellant pleaded guilty to that offence on 10 August 2020 in the Highbury Corner Youth Court.

3. On 19 August 2020 the prosecution was granted permission, despite objections on behalf of the appellant, to bring a further charge on the basis that the appellant had unlawfully and maliciously inflicted grievous bodily harm on Mr Kyong and that the offence was racially aggravated within the terms of section 28 of the Crime and Disorder Act 1998 ("the 1998 Act"). It is not apparent why the first offence alleged wounding and the second offence alleged grievous bodily harm, but nothing has turned on that issue.

4. A trial took place on 14 December 2020 in respect of the racially aggravated offence and on 4 January 2021 the appellant was convicted of that offence. On 27 January 2021 the appellant was sentenced to a Youth Rehabilitation Order ("YRO") with additional requirements. Mr Pitt made it clear that if the appeal was allowed he would not be asking for the appellant to be resentenced. This is because the appellant had been sentenced to a YRO for both the section 20 offence and the racially aggravated section 20 offence. Although further requirements had been added to the overall sentence to reflect the aggravating factor of the conviction for the racially aggravated offence, the appellant had complied with those requirements. Further, the appellant is to be sentenced for a further matter later this summer, as appears from paragraph 11 below.

5. The question from the Youth Court is "were we entitled to convict the appellant of the racially aggravated section 20 offence on the basis that he was part of a group which we were satisfied had attacked Mr Mok Hin Kyong and that the attack was motivated by Mr Mok Hin Kyong's assumed racial origin, even though we could not be sure who in the group had said the words in question?".

The relevant facts from the case stated

6. It is established that this Court is bound by the facts set out in the stated case. This is relevant because it is apparent that the prosecution and defence have interpreted the case stated in different ways. I have therefore set out below the relevant parts of the case.

7. The relevant parts of the stated case were:

> "It was not in dispute that Mr Mok Hin Kyong was walking down Oxford Street with his companion Ms Lynn when a group of white males approached from the opposite direction. One of the group bumped into him. There was an altercation. During the altercation Mr Mok Hin Kyong was assaulted by more than one male. The appellant punched him in the face and Mr Mok Hin Kyong stated that he thought he heard the appellant say "I don't want your coronavirus in my country" but he accepted when he was cross-examined that he could not be 100% sure if it was the appellant who said this as he was looking down after he was punched. The other witnesses gave similar accounts. Ms Lynsey Hamilton gave evidence that the scene was chaotic, but she heard the words "we don't want your disease in our country". Ms Katy Hamilton gave evidence that she heard "you are diseased don't come near me". Finally, Ms Higgs gave evidence that she heard "get your disease away from us". Ms Lynn gave evidence but could not assist with what was said. The appellant gave evidence where he accepted, he had punched the complainant, but he did not say anything or hear anything about coronavirus or disease directed towards Mr Mok Hin Kyong."

8. In the case stated the Justices recorded that the prosecution had opened their case on the basis that the appellant had demonstrated hostility towards Mr Mok Hin Kyong based on his presumed membership of a racial group. The Justices also noted that in closing the prosecution had relied on joint enterprise.

9. Further relevant findings are set out below.

The extension of time

10. It is apparent from all the information before this Court that the appellant was advised to bring an appeal against his conviction, and gave instructions for such an appeal to be brought. An application to state a case was made within time to the Youth Court on 17 February 2021. There was some delay in the drafting of the case, and the Justices served the stated case on the appellant's legal representatives on 1 June 2021. This meant that an appellant's notice had to be filed within 10 days pursuant to paragraph 2.2 of Practice Direction 52E, by 11 June 2010.

11. In the intervening period the solicitor handling the case lost his employment at the firm of solicitors who had been instructed, and delays occurred in the hand over of legal aid and the pursuit of the appeal. It was because the appellant had needed further legal representation in relation to an additional and separate offence of wounding with intent contrary to section 18 of the OAPA (to which he has pleaded guilty and for which he is to be sentenced in the Crown Court at Wood Green later this summer) that the appellant came across different solicitors who assisted the appellant to progress this appeal by way of case stated. The appellant's notice was filed more than 11 months out of time.

12. An extension of time may be granted in such a case pursuant to CPR 52.15 and 3.1. The guidance given in *Denton v TH White* [2014] EWCA Civ 906; [2014] 1 WLR

3926 is relevant to applications for relief in respect of failures to comply with time limits set out in the rules for appeals by way of case stated, see *Halcrow v Crown Prosecution Service* [2021] EWHC 483 (Admin); [2021] 2 Cr App R 1. There was reference in the submissions to *Greece v O'Connor* [2022] UKSC 4; [2022] 1 WLR 903 in which the Supreme Court considered the circumstances in which it would be right to visit the failures of a legal representative on an appellant seeking permission to appeal against an order for extradition.

13. In my judgment in this case there was: (1) a serious breach of the rules to file the appellant's notice on time because there was a delay of 11 months; (2) there was no good reason for this serious breach. This is because a change of employment by the solicitor is not a good reason for delaying filing an appellant's notice. It is, however, necessary to: (3) evaluate all of the circumstances of the case. In this respect it is relevant to note that the appellant is young, the evidence shows that he was at material times a Child in Need for the purposes of social services support, and he was dependent on the solicitor to lodge the appellant's notice. The case is a criminal one so that it is appropriate to have some regard to the distinction between legal representatives and defendant so far as fault is concerned. The appellant had been attempting to appeal from the moment of his conviction, and the formal notice for stating a case had been served in time. Further it is apparent, from the matters set out below, that there is apparent merit in the appeal.

14. On the other hand there are the interests of Mr Kyong to consider, who as Mr Jarvis pointed out, had understood that the appellant had been convicted of the racially aggravated offence against him. Further, if it had been necessary to revert to the Justices for further findings or information about the stated case (given the rival interpretations of the case stated by the parties), this would also have militated against granting an extension of time.

15. It is, however, in my judgment not necessary to revert to the Justices to resolve this appeal, for the reasons set out below when dealing with the merits of the appeal. Taking all the circumstances into account, and in particular the absence of personal fault on the part of the appellant, it is appropriate to extend time so that this Court can deal with this appeal justly.

Relevant provisions of law

16. s.28 (1) of the Crime and Disorder Act 1998 provides that:

> "An offence is racially or religiously aggravated if:
>
> (a) at the time of committing the offence, or immediately before or after doing so, the offender <u>demonstrates towards the victim of the offence hostility</u> based on the victim's membership (or presumed membership) of a racial or religious group; or
>
> (b) the offence <u>is motivated (wholly or partly) by hostility</u> towards members of a racial or religious group based on their membership of that group." (underlining added)

17. It is apparent that it is necessary to show either that the offender demonstrates hostility (based on the victim's membership or presumed membership of a racial or religious group) or is motivated by such hostility. The demonstration of hostility is an objective test, but motivation requires findings about the offender's motivation for the offence.

18. In *G v DPP* [2004] EWHC 183 (Admin); (2004) 168 JP 313, the Divisional Court considered a joint appeal against a conviction of two defendants in the Youth Court for their part in a course of racially aggravated harassment, racially aggravated common assault and an affray. The issue was whether the judge was entitled to find that one defendant had been 'motivated by racial hostility' based on participation in a series of group activities which the judge found each included evidence of racial hostility demonstrated by one or more of the group. May LJ stated at paragraph 13 that "…an offender may demonstrate racial hostility by joining in the activities of a group of people where a sufficient number of members of the group are themselves demonstrating racial hostility, and where the defendant's adherence to the group is such as to go beyond mere presence within the group, but so as to associate himself or herself with the demonstration of racial hostility which the group as a whole is displaying." May LJ also recorded that: "the prosecution may well be able and entitled in any particular case to rely on both limbs of section 28(1) of the 1998 Act. It is not necessary, nor necessarily the case, that a racially aggravated element of an offence has to be packed into one or other of the subsections (a) or (b) to the exclusion of the other". The Court also noted that there would be circumstances where the prosecution might need to make clear the basis on which they were proceeding.

19. In *R v Steven Cooke* [2015] EWCA Crim 1414 the Court of Appeal considered an appeal against sentence arising from significant public disorder arising from an English Defence League protest in Birmingham. The defendant was sentenced on the basis his part in the offending was aggravated by religious hostility toward Muslims. The appellant appealed against the finding that the offending was so aggravated. The Court noted some interesting academic commentaries on the increase in sentences where the offence was not specifically designated as a racially aggravated offence and where one, but not another, of the group acting on the joint enterprise had been motivated by racial hatred. In that case the Court found that the judge was entitled to infer from all the facts that the appellant had been motivated by racial hatred and did not address the matters raised by some of the commentaries.

20. It was common ground in the submissions to the Court that in the vast majority of cases of racially aggravated offending the tribunal of fact would be looking at the offender's own demonstration of hostility or the offender's own motivation. It was also common ground that there might be cases where issues of joint enterprise in respect of a racially aggravated offence arise, but that in this case and appeal such issues did not arise. For these reasons I do not propose to consider the circumstances in which there might be a joint enterprise in respect of the racially aggravated offence.

No finding that the appellant either demonstrated or was motivated by hostility

21. It is necessary to set out the findings of fact made by the Justices as recorded in the case stated. Under "Findings of facts" the Justice recorded their findings as follows:

> "9. i) We could not be satisfied so that we were sure as to who said what.
>
> ii) We were satisfied that one of the group of white males had said words to the effect that they did not want "your coronavirus in my country" or that they didn't want "your disease" or that Mr Mok Hin Kyong was diseased. We could not be satisfied of the precise words used as the witnesses gave slightly different accounts which was perhaps not surprising given the nature of the incident. However, we were satisfied so that we were sure that something was said referring to coronavirus and that it was Mr Mok Hin Kyong's disease. We were satisfied so that we were sure that this was a reference to covid 19 having originated in China and whoever uttered those words was assuming that Mr Mok Hin Kyong was of Chinese heritage because of his appearance.
>
> iii) We did not believe that the appellant did not hear anything. We were satisfied so that we were sure that this was a group attack by more than one male. It was unprovoked and more than one of the white males punched Mr Mok Hin Kyong.
>
> iv) Whilst we could not be sure who said the words in question we were satisfied that the words were said by at least one of the group, that Mr Mok Hin Kyong was attacked because they assumed that he was of Chinese origin and that that some or all of the group were motivated to do so because coronavirus had originated in China." (underlining added).

22. Under a further section of the case headed "Our Findings" it was recorded:

> "10. We were of the opinion that the appellant was part of a group that attacked Mr Mok Hin Kyong. He did not dispute that he punched him causing him serious injury. We were further satisfied that at the time of the assault words were uttered about coronavirus and reference made, in essence, to it coming from a country in East Asia and there was an assumption that Mr Mok Hin Kyong came from that country. We found that it was an unprovoked assault motivated by racial hostility and that some or all of the group had the necessary intention to commit the offence. We therefore convicted the appellant of the racially aggravated offence." (underlining added).

23. As is apparent from the findings set out in the case stated the assault happened in February 2020 at a time when the worldwide spread of COVID-19 was becoming more known.

24. Mr Pitt, on behalf of the appellant, submitted that on the findings made by the Justices they were sure that some or all of the group was motivated by racial hostility, but they could not be sure that this included the appellant. In these circumstances the appellant should have been acquitted.

25. Mr Jarvis, on behalf of the prosecution, submitted that the Justices must have been sure that the appellant was motivated by racial hostility because they referred to some or all of the group, and had convicted the appellant. Further in paragraph 10 they had found "that it was an unprovoked assault motivated by racial hostility" and it was the appellant who had carried out the assault. The added words "and that some or all of the group had the necessary intention to commit the offence" were not necessary.

26. I am very grateful to Mr Pitt and Mr Jarvis for their excellent, succinct and helpful submissions.

27. It is apparent that the Justices were sure that there was a group attack on Mr Kyong and that someone said something to the effect that COVID-19 had originated in China and that the person saying that had assumed that Mr Kyong had come from China. The Justices were sure that the appellant had heard that, and did not believe his denial that he did not hear it.

28. The Justices made it clear that they could not be sure that it was the appellant who had said the relevant words, and this appears in part from the terms of the question for the court. If the Justices had been sure of that fact it would have been a proper foundation for finding that he both demonstrated hostility on a racial ground (to paraphrase the statutory test) and was motivated by hostility on a racial ground.

29. The Justices did make it clear that they were sure that it was an unprovoked assault motivated by racial hostility but they also made it clear that they could not say that the appellant himself was motivated by that racial hostility because they said "and that some or all of the group had the necessary intention to commit the offence", suggesting that some of the group, which might have included the appellant, did not have the necessary motivation. The Justices did not find either that all of the group had the necessary motivation, or that the appellant had that motivation. In these circumstances it is not possible to infer that the Justices were sure that the attack by the appellant had been motivated by a racial ground.

30. Therefore although the appellant was properly convicted (on his own plea) of the section 20 offence, he could not be properly convicted, on the findings made by the Justices, of the racially aggravated offence.

31. This means that the answer to the question: "were we entitled to convict the appellant of the racially aggravated section 20 offence on the basis that he was part of a group which we were satisfied had attacked Mr Mok Hin Kyong and that the attack was motivated by Mr Mok Hin Kyong's assumed racial origin, even though we could not be sure who in the group had said the words in question?" is no. In this case the Justices could have convicted the appellant if they had found that the appellant's attack was motivated by Mr Mok Hin Kyong's assumed racial origin either because all of the group had that motivation or because they found that the appellant had had that motivation. As is apparent from the findings of fact made by the Justices, they did not make either of those findings.

Conclusion

32. For the detailed reasons set out above the appellant's appeal against his conviction for the racially aggravated offence is allowed and a conviction for the section 20 offence

is substituted.

Mr Justice Johnson:

33. I agree.