HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 8

on appeal from: [2005] EWCA Crim 2863

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R
v.
Rogers (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Mance

Counsel

Appellants:
Alastair Malcolm QC
Mark Florida-James
(Instructed by Churchers)

Respondents:
David Perry QC
Louis Mably
(Instructed by Crown Prosecution Service)

Hearing date:
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ON
WEDNESDAY 28 FEBRUARY 2007

HOUSE OF LORDS

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R *v.* Rogers (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

[2007] UKHL 8

LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reason she gives with which I agree, I too would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

3. I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. For the reasons set out in her opinion, with which I agree, I would dismiss the appeal and answer the certified question as she proposes.

BARONESS HALE OF RICHMOND

My Lords,

4. The issue in this appeal is whether using the words "bloody foreigners" and "get back to your own country" can transform the offence of using abusive words and behaviour with intent to cause fear or provoke violence, contrary to section 4 of the Public Order Act 1986, into the racially aggravated form of that offence, contrary to section 31(1)(a) of the Crime and Disorder Act 1998.

5. Sections 29 to 32 of the 1998 Act create racially or religiously aggravated versions of some frequently encountered offences which vary greatly in their intrinsic seriousness: assaults falling short of grievous bodily harm with intent (section 29), criminal damage (section 30), certain public order offences (section 31) and harassment (section 32). If racially or religiously aggravated, the maximum penalties are higher. The justification for treating such conduct more severely than the basic versions of these crimes is helpfully summarised by Ivan Hare ("Legislating Against Hate – The Legal Response to Bias Crimes" (1997) 17 OJLS 415, 416-7):

> "The case of principle for an explicit response to the phenomenon rests fundamentally on the realization that crimes motivated by hatred for the group to which the victim belongs are in some sense of a qualitatively distinct order of gravity. This perception arises from intuitive feelings of retribution and from awareness of the impact such offences have on the immediate victims and on society as a whole. In addition to being the target of an act of violence the victim is likely to feel a sense of injustice at having been discriminated against on the basis of his membership of, or association with, a particular group. The more general strain of the argument is that hate crimes entail a threat to public welfare which makes it appropriate to punish them more severely."

6. The court must first be satisfied that the basic offence has been committed and then that it is racially or religiously aggravated within the meaning of section 28 of the 1998 Act. Subsection (1) provides that

the offence is racially or religiously aggravated if either of two different circumstances exists:

> "(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim hostility based on the victim's membership (or presumed membership) of a racial or religious group; or
>
> (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group."

One limb is therefore concerned with the outward manifestation of racial or religious hostility, the other with the inner motivation of the offender. Here we are concerned with the former but the point at issue arises in relation to both. Hostility, demonstrated or meant, is required for both, but hostility to what?

7. The point at issue is the meaning of "racial group". This is defined in section 28(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."

The victims in this particular case were three young Spanish women who were walking back to the home of one of them after celebrating the birthday of another in a local restaurant. The appellant, who is incapacitated by arthritis, was riding a mobility scooter along the pavement on his way home from a public house. An altercation took place as he tried to get past them on the pavement. He then pursued them in an aggressive manner into a local kebab house where they had taken refuge. The jury must have been sure that he had used threatening, abusive or insulting words or behaviour intending them to fear immediate unlawful violence or to provoke it. The only question was whether calling them "bloody foreigners" and telling them to "go back to your own country" demonstrated hostility based on their membership of a racial group as defined in the 1998 Act.

8. It is accepted on his behalf that had he called them "bloody Spaniards" or any other pejorative word associated with natives of the Iberian peninsular, he would have been guilty. But it is argued that the hostility must be shown towards a particular group, rather than to foreigners as a whole. Mere xenophobia, it is said, does not fall within the ordinary person's perception of hostility to a racial group.

9. This may be true, but the definition of a racial group clearly goes beyond groups defined by their colour, race or ethnic origin. It encompasses both nationality (including citizenship) and national origins. This was quite deliberate. In *Ealing London Borough Council v Race Relations Board* [1972] AC 342, a majority of this House declined to interpret "national origins" in the list of prohibited grounds of discrimination under the Race Relations Act 1968 so as to include "nationality": discriminating against the non-British was allowed. Following this decision, the list of prohibited grounds was deliberately expanded in the Race Relations Act 1976 so as to include nationality. The list of grounds contained in the 1976 Act was adopted for the purposes of defining racial groups in the 1998 Act. An obvious advantage is that it helps to reduce argument about whether particular terms of abuse which are generally considered racist are or are not covered: does "Paki", for example, demonstrate hostility towards everyone who might hail from the Indian subcontinent or only towards citizens of Pakistan?

10. Nevertheless, it is argued for the appellant that the Act requires that the group be defined by what it is rather than by what it is not. Hence it is argued that Spaniards are covered but foreigners, that is the non-British, are not. The same argument would presumably be made about a person who showed hostility towards all non-whites, irrespective of the particular racial group to which they belonged. This cannot be right as a matter of language. Whether the group is defined exclusively by reference to what its members are not or inclusively by reference to what they are, the criterion by which the group is defined – nationality or colour – is the same.

11. There are, as Mr David Perry QC for the respondent has pointed out, other indications that the statute intended a broad non-technical approach, rather than a construction which invited nice distinctions. Hostility may be demonstrated at the time, or immediately before or after, the offence is committed (section 28(1)(a)). The victim may be presumed by the offender to be a member of the hated group even if she is not (section 28(1)(a)). Membership of a group includes association

with members of that group (section 28(2)). And the fact that the offender's hostility is based on other factors as well racism or xenophobia is immaterial (section 28(3)).

12. This flexible, non-technical approach makes sense, not only as a matter of language, but also in policy terms. The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as "other". This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about. This is just as true if the group is defined exclusively as it is if it is defined inclusively.

13. The offences do not require particular words to be used: the necessary hostility could be demonstrated in other ways, such as the wearing of swastikas or the singing of certain songs. But it will normally be proved by the use of some well known terms of abuse. Fine distinctions depending upon the particular words used would bring the law into disrepute. This case shows that only too well but it is easy to think of other examples. "Wogs begin at Calais" demonstrates hostility to all foreigners, whereas "bloody wogs" might well be thought to have specific racial connotations. "Tinted persons" could in certain circumstances demonstrate hostility to all non-Caucasians, while "blacks" might refer to a particular racial group. But "black" might equally refer to several different racial groups whose members may have very black skin. All are defined by reference to their race, colour, nationality, or ethic or national origins, whether there are many, several, or only one such group encompassed by the words used.

14. It therefore comes as no surprise that the Divisional Court and Court of Appeal have generally taken the same view, as did the Court of Appeal in this case. In *Director of Public Prosecutions v M* [2004] EWCA 1453 (Admin), [2004] 1 WLR 2758 the Divisional Court held that "bloody foreigners" could, depending on the context, demonstrate hostility to a racial group. In *Attorney General's Reference No 4 of 2004* [2005] EWCA Crim 889, [2005] 1 WLR 2810 the Court of Appeal held that "someone who is an immigrant to this country and therefore non-British" could be a member of a racial group for this purpose. In *R v White (Anthony)* [2001] EWCA Crim 216; [2001] 1 WLR 1352, it was held that "African" could demonstrate hostility to a racial group, because it would generally be taken to mean black African. However, it

was doubted whether the same would apply to "South American". It is not easy to imagine a scene in which hostility to South Americans as such is demonstrated, but as with "African", it is quite easy to imagine a scene in which hostility is demonstrated to racial, national or ethnic groups within that continent. The context will illuminate what the conduct shows.

15. A case which might be thought to go the other way is *Director of Public Prosecutions v Pal* [2000] Crim LR 756. There the Divisional Court dismissed the prosecution's appeal when magistrates acquitted the defendant, of Asian origin, who had assaulted the victim, also of Asian origin, and called him a "white man's arse-licker" and a "brown Englishman". It was held that this did not demonstrate hostility towards Asians. 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.

16. The late Sir John Smith, commenting on *Pal*, was critical of what he saw as a further complication of our already over-complex law of offences against the person in order to meet a problem which could equally well be met by sentencing guidelines. But as Mr Perry has pointed out, there is an advantage for the accused in differentiating between the basic and the aggravated offence. The fact finders, whether a jury or magistrates, have then to decide whether the offence was indeed racially or religiously aggravated. If they decide that it was not, then the offender should be sentenced on that basis. If the offence is not covered by these provisions, it is for the sentencer to decide whether it was racially aggravated and, if it was, to treat this as an aggravating factor in sentencing (Criminal Justice Act 2003, section 145).

17. The Court of Appeal in this case [2005] EWCA Crim 2863, [2006] 1 WLR 962, para 24, expressed some concern that

> "[t]he very width of the meaning of racial group for the purposes of section 28(4) gives rise to a danger that charges of aggravated offences may be brought where vulgar abuse has included racial epithets that did not, when all the relevant circumstances are considered, indicate hostility to the race in question."

If that is what the evidence suggests, of course, the normal criteria for bringing proceedings would not be met. There is no reason for the Crown Prosecution Service to be any more hesitant about charging these offences, if they are properly supported by the available evidence, than about any other.

18. The question certified by the Court of Appeal was: "Do those who are not of British origin constitute a racial group within section 28(4) of the Crime and Disorder Act 1998?" The answer is "yes", as would it be to the question whether "foreigners" constitute such a group. Whether the evidence in any particular case, taken as a whole, proves that the offender's conduct demonstrated hostility to such a group, or was motivated by such hostility, is a question of fact for the decision-makers in the case.

19. It follows that this appeal must be dismissed.

LORD MANCE

My Lords,

20. I have had the benefit of reading in draft the opinion prepared by my noble and learned friend, Baroness Hale of Richmond. I am in full agreement with it, and with the answer which she proposes to the certified question.