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Racially aggravated offences: when does section 145 of the Criminal Justice Act 2003 apply?

The development of hate crime legislation in England and Wales over the past 15 years has been fragmented. The lack of uniformity with regards to what offences are covered by legislation, which characteristics are protected, and how identity-based hostility is proved in court has led to a number of conceptual and procedural problems for the operationalisation of hate crime offences.¹ One issue that has caused some confusion is the relationship between the racially and religiously aggravated offences as proscribed under the Crime and Disorder Act 1998 and the penalty enhancement provisions that are set out under ss.145 and 146 of the Criminal Justice Act 2003. In particular, the question as to whether penalty enhancers can be applied at sentencing when a racially or religiously aggravated offence could have been, but was not, charged has been left unclear.² It is this question that was recently faced by the Court of Appeal in the case of *O'Leary*.³

The facts of the case were as follows: Mr O'Leary pleaded guilty to one count of assault with intent to rob, and two counts of unlawful wounding contrary to s.20 of the Offences Against the Person Act 1861. He was also tried and acquitted of attempted murder and wounding with intent. Mr O'Leary's first two offences were committed when he entered a store brandishing a knife and demanded that the till be opened. The victim, Mr Ahmed, grabbed hold of the knife in an attempt to disarm O'Leary. This led to a struggle between the appellant and Mr Ahmed, which resulted in a superficial laceration and abrasions to Mr Ahmed's head. The appellant fled the scene and returned to his home where he collected two more knives. He then proceeded to a second convenience store where Mr Islam was working. Brandishing one of the knives, the appellant told Mr Islam that he wanted to kill a Muslim. Mr Islam grabbed hold of the knife causing a deep wound to his hand. A second struggle ensued, this time causing Mr Islam to fall to the floor, whereupon Mr O'Leary repeatedly punched his head. The next day the police arrested O'Leary. At the police station, whilst being booked in, the appellant said that he did not want to be processed by a Muslim. Thereafter, the appellant made no further comments, other than providing a short statement in which he denied the accusation that he had stated that he wanted to kill a Muslim. The appellant's criminal antecedents disclosed that he has been convicted of a number of other violent offences, including racially threatening behaviour.

During sentencing, the trial judge indicated that there were a number of aggravating factors in relation to the appellant's offences. These included that the victims were in vulnerable positions, that the offences had been planned, and that the crimes had caused both physical injury as well as significant and lasting psychological harm, which was directly linked to the racial nature of the threat to Mr Islam. O'Leary was sentenced to a total of 8 years' imprisonment, comprising 5 years for assault with intent to rob, 3 years concurrent for one count of unlawful wounding, and 3 years consecutive for the second count of unlawful wounding.

¹ See A. Owusu-Bempah, "Prosecuting Hate Crime: Procedural Issues and the Future of the Aggravated Offences" (2015) 35 *Legal Studies* 443; M.A. Walters, "Conceptualizing 'Hostility' for Hate Crime Law: Minding 'the Minutiae' when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998" (2014) 34 *O.J.L.S.* 47

² C. Bakalis, "Legislating Against Hatred: the Law Commission's Report on Hate Crime" [2015] *Crim.L.R.* 192, 203; Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, chs.2-3; R. Taylor "The Role of the Aggravated Offences in Combating Hate Crime 15 Years After the Crime and Disorder Act 1998: Time for a Change?" (2014) 13 *Contemporary Issues in Law* 76.

³ *O'Leary* [2015] *EWCA Crim* 1306.

The appellant appealed against sentence based on the complaint that the judge was not entitled to treat racial motivation as a factor at sentencing which increased the seriousness of the unlawful wounding offence, absent the appellant having been convicted of an offence of racially aggravated unlawful wounding, contrary to s.29(1)(a) of the Crime and Disorder Act 1998.

The court dismissed this ground of appeal holding that:

In the present case... the appellant had neither been acquitted of an offence contrary to section 29 of the Crime and Disorder Act 1998, nor had the indictment been amended so as to delete a count charging such an offence.... [T]here was in the present case clear evidence upon which the trial judge had been entitled to conclude to the criminal standard that the assault was racially aggravated. In these circumstances we are satisfied that the judge was entitled to treat this matter as a factor which increased the seriousness of the offence, and we dismiss this ground of appeal.⁴

Implications for hate crime law

Section 145 of the Criminal Justice Act 2003 requires racial and religious hostility to be treated as an aggravating factor at sentencing. The provision “applies where a court is considering the seriousness of an offence *other than* one under sections 29 to 32 of the Crime and Disorder Act 1998” (emphasis added). The wording of the provision has created uncertainty as to its application. In the earlier cases of *McGillivray*⁵ and *Kentsch*,⁶ the sentencing judge had not been entitled to increase the sentence for a basic offence on the ground that a racially aggravated offence had been charged but was not proved at trial or had subsequently been deleted from the indictment. In *O’Callaghan*,⁷ the sentencing judge had not been entitled to enhance the sentence for a basic offence because there had been no evidence at trial of racial aggravation and no *Newton* type hearing had taken place to prove racial hostility. However, these cases left it unclear as to whether, and in what circumstances, s.145 could be used to increase the sentence for a “basic offence”, where the offence could have been, but was not, charged as an aggravated offence under the 1998 Act.

One might consider that a common sense approach would prevail in such a case. Surely a racially or religiously aggravated offence that falls within ss.29-32 of the 1998 Act should be charged under the Act. Where the CPS fails to do this, it would be contrary to the purpose of the Act to later rely on sentencing provisions in order to rectify the prosecution’s failure to pursue the correct charge. This is the approach taken by the Magistrates’ Court Sentencing Guidelines (MCSG), which states that “[t]he court should not normally treat an offence as racially or religiously aggravated if a racially or religiously aggravated form of the offence was available but was not charged.”⁸

However, in *O’Leary*, the court took a literal approach to s.145, finding that, while it excludes the racially and religiously aggravated offences, it does not necessarily exclude the basic offences. On the face of it, this decision is contrary to the principle that an offender should not be sentenced for a more serious offence than the offence of which he has been convicted. This principle has been

⁴ *O’Leary* [2015] EWCA Crim 1306 at [17].

⁵ *McGillivray* [2005] EWCA Crim 604.

⁶ *Kentsch* [2005] EWCA Crim 2851.

⁷ *O’Callaghan* [2005] EWCA Crim 317.

⁸ *Sentencing Council, Magistrates’ Sentencing Court Guidelines*, p. 178 at https://www.sentencingcouncil.org.uk/wp-content/uploads/MCSG_web_-_October_2014.pdf.

recognised, and applied, in a number of cases, including *Lawrence*,⁹ *Canavan*,¹⁰ and *O'Prey*.¹¹ In accordance with this principle, if there is evidence of racial or religious hostility, then the aggravated offence should be charged. If it is not charged, then the more serious nature of the offending behaviour should not be reflected in the sentence. However, the court was not troubled by the principle, finding that the situation in *O'Leary* was akin to the case of *Khan*.¹² In *Khan*, the trial judge had been entitled to treat verbal threats to kill as an aggravating factor following a conviction for perverting the course of justice, despite the fact that Khan had not been convicted for an offence of making threats to kill. The court took the view that, as in *Khan*, there had been an opportunity for the defence to test and challenge the aggravating factor during the course of a trial, and to take it into account was not inconsistent with the trial verdict.¹³

Yet, there is a significant difference between the offences in question in *O'Leary* and *Khan*. In respect to *Khan*, the threats may have been treated as forming part of the course of conduct amounting to an act tending to pervert the course of justice.¹⁴ Making threats to kill does not elevate liability to a more serious form of perverting the course of justice, and sentencing Khan for perverting the course of justice, in the light of the threats to kill, was not equivalent to passing a sentence for an offence of making threats to kill. Conversely, to increase a sentence for wounding on the basis that the offence was racially aggravated is equivalent to passing a sentence for racially aggravated wounding. Racially aggravated wounding requires liability for the basic offence of wounding, and s.145 adopts the same meaning of "racially or religiously aggravated" as s.28 of the Crime and Disorder Act 1998.

In a passage from *Khan*, which is quoted in *O'Leary*, it is stated that:

"Clearly treating someone as having an intention to supply drugs is inconsistent with a conviction for simple possession or treating someone as intending to cause really serious bodily harm is inconsistent with a verdict for inflicting the same."¹⁵

In the two sets of offences referred to above, the aggravating factor is included in the definition of the more serious offence. The same is true of wounding and racially aggravated wounding. Thus, contrary to the court's finding, treating someone as having been racially motivated to wound is, arguably, inconsistent with a verdict for simple wounding.

In finding that the circumstances of the case in *O'Leary* were akin to those considered in *Khan*, the court sought to distinguish it from *McGillivray*, *Kentsch*, and *O'Callaghan*. They did so on the basis that the appellant had not been charged and acquitted of the aggravated offence, as in *McGillivray*; that a count charging the aggravated offence had not been included and then deleted from the indictment, as in *Kentsch*; and that there had been clear evidence of racial aggravation, unlike in *O'Callaghan* and the more recent case of *Docherty*.¹⁶ Moreover, unlike in *Lawrence* and *O'Prey*, the appellant was dealt with following a trial in which there had been an opportunity for the defence to test and challenge the evidence of racial aggravation. Yet, arguably, the judge's decision to take account of racial aggravation remains contrary to principle and the position taken in *Canavan*, that a

⁹ *Lawrence* (1983) 5 Cr App R (S) 220.

¹⁰ *Canavan* [1998] 1 WLR 604.

¹¹ *O'Prey* (1999) 2 Cr App R (S) 83.

¹² *Khan* [2009] EWCA Crim 389.

¹³ *O'Leary* [2015] EWCA Crim 1306 at [16]-[17].

¹⁴ See D.A. Thomas, "R. v Imran Mohammed Khan: sentencing - factual basis for sentence - misconduct related to offence treated as aggravating factor of offence" [2009] Crim.L.R 744, 746.

¹⁵ *Khan* [2009] EWCA Crim 389 at [12], per Hedley J.

¹⁶ *Docherty* [2014] EWCA Crim 1404.

defendant “may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence”.¹⁷ O’Leary had neither admitted racial aggravation, nor had racial aggravation formed part of a jury verdict.

This is not to suggest that the defendant’s conduct is in fact more serious when it forms part of an offence definition than when it is taken into account at sentencing. Where, for example, a defendant’s conduct was aggravated by hostility towards the victim on the basis of sexual orientation, transgender identity or disability, it can only be taken into account at sentencing, applying s.146 of the Criminal Justice Act 2003. Conduct which is aggravated by hostility towards these characteristics should not be considered any less serious than equivalent conduct which is aggravated by racial or religious hostility. Moreover, while the maximum sentence that could be imposed for a basic offence, applying s.145, is lesser than that available for an aggravated offence, the sentences imposed for the aggravated offences tend to fall well below the maximum available for the basic offences.¹⁸ Nonetheless, since there are specific offences, which include racial or religious hostility as an essential ingredient, to take that factor into account at sentencing for a basic offence is seemingly at odds with the general principle set out in previous cases.

Implications for the prosecution of hate crimes

The issue of principle aside, the decision in *O’Leary* could have significant implications for the prosecution of hate crimes. In consequence of the court’s decision and reasoning, where an aggravated offence could have been, but was not, charged, racial or religious aggravation can be dealt with at sentencing, provided that: the indictment at no point included an aggravated form of the offence in question; the defence had an opportunity to challenge the issue at a trial; the judge concludes to the criminal standard that the offence was racially or religiously aggravated; and the judge’s finding is not inconsistent with a jury verdict. In fact, the mandatory wording of s.145 suggests that the provision “must” be applied in these circumstances. It remains unclear whether, and in what circumstances, s.145 can be applied where there was no trial because the defendant pleaded guilty to a basic offence, and there was no trial for a further offence at which the issue of racial or religious aggravation could be raised. The court in *O’Leary* placed reliance on the fact that the aggravating factor had been scrutinised at trial, as it had been in *Khan*, but it did not explicitly rule out the application of s.145 to a basic offence following a guilty plea, and in the absence of a trial.

Having settled at least some of the uncertainty as to the application of s.145, the CPS might prefer to charge only the basic offence, raise the issue of racial or religious aggravation at trial, but wait until sentencing to take account of racial or religious aggravation. Prosecutors may find it easier to satisfy a judge of aggravation than to satisfy a jury at a contested trial.¹⁹ However, if prosecutors take this approach, they will be undermining the existence and aims of the aggravated offences. The aggravated offences are intended to attack the mischiefs of racism and xenophobia.²⁰ To have

¹⁷ *Canavan* [1998] 1 WLR 604, per Lord Bingham.

¹⁸ See Law Commission *Hate Crime: The Case for Extending the Existing Offences Appendix C - Impact Assessment* (Consultation Paper No 213, 2013) para C.61.

¹⁹ Several responses to the Law Commission’s consultation on the aggravated offences indicate that, in practice, juries can be reluctant to convict defendants for aggravated offences. See Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, para 4.175.

²⁰ See *Rogers* [2007] UKHL 8.

specific hate crime offences which are not prosecuted where there is clear evidence of racial or religious aggravation could create the impression that hate crime, as well as racism and xenophobia more generally, is not taken seriously, or at least not as seriously as it should be. For prosecutors to charge only the basic offence is also contrary to the CPS's Guidance on Racist and Religious Crime, which states that consideration should "be given in all cases to putting alternative charges covering both the basic and the racially or religiously aggravated offences."²¹

The court in *O'Leary* pre-empted the possibility of the prosecution by-passing the aggravated offences by stating that:

"Our conclusion upon this issue should not be taken as any endorsement for the view that the prosecution are thereby relieved of their duty to consider the indictment with care. On the contrary, in the majority of cases where the evidence supports an aggravated form of assault, then it should be placed upon the indictment."²²

Whether the terms of this statement are strong enough to influence charging decisions will remain to be seen.

The court went on to explain that:

"However we can understand in the particular circumstances of the present case, where another set of alternative offences had already been placed on the indictment for the jury to consider, adding further alternatives under section 29 of the Crime and Disorder Act 1998 would have had the effect of overloading the indictment and overly complicating the jury's task."²³

The prosecution face difficult decisions whenever numerous charges and alternative verdicts are available. Where the alleged criminal conduct at issue is covered by s.18 of the Offences Against the Person Act 1861, s.20 of the Offences Against the Person Act 1861, and s.29 of the Crime and Disorder Act 1998, the court's statement could be taken to imply that it is preferable to pursue liability for intent rather than for racial or religious aggravation. At a minimum, the statement has provided grounds for a decision not to charge an aggravated offence alongside the basic offence where other alternative charges are available.

The need for a full-scale review

While the decision in *O'Leary* has resolved some of the uncertainty as to the application of s.145, it has left much to be desired in relation to the prosecution of hate crimes. Cases such as *O'Leary* expose the practical problems which arise from a combined system of aggravated offences to deal with certain types of offending and a more general sentencing power to deal with all other types of offending. These problems include not only confusion as to when the sentencing provisions can apply, but also difficult charging decisions for prosecutors who must avoid charge bargaining as well as overloading the indictment.²⁴ Where there are alternative offences on the indictment, there arises the potential for confusion amongst jurors as to what must be proven in relation to each

²¹ *Racist and Religious Crime - CPS Guidance* at http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/

²² *O'Leary* [2015] EWCA Crim 1306 at [18].

²³ *O'Leary* [2015] EWCA Crim 1306 at [18].

²⁴ See *Racist and Religious Crime – CPS Prosecution Policy* at <http://www.cps.gov.uk/publications/prosecution/rrpbcbook.html#a30>

count, and each alternative. This could lead to undesirable outcomes, including inconsistent verdicts where a defendant is charged with two or more aggravated offences arising out of one incident.²⁵

The Law Commission discussed the practical problems arising from the combined system of hate crime legislation in its report, *Hate Crime: Should the Current Offences be Extended?*²⁶ As part of a project on hate crime, the Commission examined the case for extending the racially and religiously aggravated offences in the 1998 Act, so that they also cover disability, sexual orientation and transgender identity. While the report acknowledges that there are a number of compelling theoretical and socio-legal grounds for extending the legislation,²⁷ it also found serious concern amongst practitioners and consultees as to the complexity of the existing hate crime legislation; including the complex and unclear inter-relationship between the aggravated offences and s.145.²⁸

In its report, the Commission asserted that, '[i]f the current offences are flawed in their structure or operation, there will be little benefit for future victims of hate crime for the offences to be extended in their current form.'²⁹ The Commission recommended that, in the first instance, a wider review of the operation of the existing aggravated offences and the sentencing provisions be carried out, before a decision is taken as to whether the offences should be extended.³⁰ In accordance with this recommendation:

“Such a review should examine all the available data to establish whether aggravated offences and sentencing provisions should be retained, amended, extended or repealed, what characteristics need to be protected, and the basis on which characteristics should be treated as protected.”³¹

A wider review could thus determine the most effective approach to prosecuting and sentencing hate crimes, including clear guidance on the relationship between criminal offences and sentencing provisions. The Law Commission also recommended new guidance from the Sentencing Council on the approach to sentencing hostility-based offending.³² The precise form and content of any guidance would be a matter for the Sentencing Council. Such guidance could clarify the circumstances in which s.145 can currently be applied to an offence which could have been, but was not, charged as an aggravated offence. Guidance would also be welcomed on the relevant principles, already laid down in case law, regarding the requirement that notice be given to the defence that s.145 may be applied at sentencing;³³ thereby giving the defence an opportunity to rebut any

²⁵ For a detailed examination of the procedural and practical problems arising from the hate crime legislation, see A. Owusu-Bempah, “Prosecuting Hate Crime: Procedural Issues and the Future of the Aggravated Offences” (2015) 35 *Legal Studies* 443.

²⁶ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348.

²⁷ Including the importance of fair labelling (paras 4.139-4.144), the symbolic denunciation of criminal proscription (paras 4.65-4.70 & 4.77-4.81) and the need to create equality of protection across victim groups (paras 4.14-4.17).

²⁸ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, paras 2.65-2.70, 3.42, 4.168-4.173, 5.17.

²⁹ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, para 5.83.

³⁰ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, para 5.102.

³¹ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, para 5.102.

³² Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, paras 3.49-3.51.

³³ *O’Callaghan* [2005] EWCA Crim 317.

evidence during a *Newton* hearing.³⁴ This could encourage more effective use of ss.145 and 146 by ensuring that more care and thought is given to putting evidence of identity-based hostility (and counter evidence) before the court during sentencing.³⁵

At the time of writing, the Government is yet to respond to the Law Commission's recommendation for a full-scale review of the existing hate crime legislation, despite the report being published over 18 months ago. With budget cuts being made to the Ministry of Justice, it seems unlikely that funds will be made available for such a large research project. In an attempt to respond to the issues raised by the Law Commission's report, the authors of this article have begun to undertake a 24 month study on the legal process for hate crime in England and Wales. Funded by the Directorate-General for Justice and Consumers at the European Commission, we³⁶ are collating quantitative data on hate crime prosecutions and conducting qualitative interviews with prosecutors, defence lawyers, magistrates, judges, victims and defendants in order to examine more fully the operational realities of hate crime laws in England and Wales. The aim of the study is to identify good practices as well as the limitations in the application of both the racially and religiously aggravated offences and the sentencing provisions under ss.145 and 146. The final report will be published in 2017.

In the meantime, prosecutors must continue to use the current framework of hate crime law in the most effective way possible. In this regard, we assert that wherever there is sufficient evidence that a basic offence was racially or religiously aggravated, the aggravated version of the offence should be charged and prosecuted, rather than relying on s.145 at sentencing. To do otherwise is arguably contrary to principle and will ultimately undermine the main purpose of the racially and religiously aggravated offences in the Crime and Disorder Act 1998.

³⁴ Law Commission, *Hate Crime: Should the Current Offences be Extended?* (HMSO, 2014), Law Com. No.348, para 3.43.

³⁵ The failure to use properly *Newton* hearings in hate crime cases can result in the "hostility" element of an offence being lost. See, U. Morris, "Lessons to Be Learned from *Sheard v. R*" (2013) 177 *Criminal Law and Justice Weekly* 540.

³⁶ Along with four other partner countries.