Racism, impartiality and juries

Peter Herbert seeks urgent reform

There is now a fundamental contradiction in English law as to the conflicting philosophies which govern the question of the impartiality of juries in the criminal justice system.

The established view is stated by Lord Denning[1] which was adopted by the Court of Appeal in *R v Ford*:[2]

> "We believe that 12 persons selected at random are likely to be a cross section of the people as a whole and thus represent the views of the common man ... the parties must take them as they come."

The new awareness of the judiciary to the potential damage which racism can cause is illustrated by the comments of the Lord Chief Justice:

> "Race issues go to the heart of our system of justice, which demands that all are treated as equals before the law. It is a matter of the gravest concern if members of the ethnic minorities feel they are discriminated against by the criminal justice system: more so if their fears were to be borne out in reality."[3]

The question which is now being asked with some urgency is whether the present system of jury selection, oath taking and race awareness of the average juror is a sufficient safeguard to ensure an impartial hearing for a black defendant.

In January 1989 the defence right to the use of up to three peremptory challenges was abolished on the pretext that the pooled exercise was making the jury "too defence oriented.[4] The decision of the Court of Appeal in *R v Ford*[5] completed the process, for black defendants, of limiting the right of trial by a jury of one's peers. The Court went on to hold that a judge has no power to influence the composition of the jury panel, as that power was the sole preserve of the Lord Chancellor under s 5 of the Juries Act 1974.[6]

The decision in *Ford* forces one to rely instead on the principles of "random selection" and the "common man" to guarantee impartiality. There is a clear reluctance on the part of the Lord Chief Justice to see any advantage in providing for a multi-racial jury. In a speech to the Leeds Race Issues Advisory Council,[7] the Lord Chief Justice said that multi-racial juries represented the "thin edge of a particularly insidious wedge ... we must on no account introduce measures which allow the State to start nibbling away at the principle of random selection."

However, Professor J Gobert[8] found that:

> "Studies consistently show an under-representation of ethnic minorities, young persons and women on jury panels."

Similarly, a survey (initiated by the Society of Black Lawyers and conducted by the Lord Chancellor's Department in 1990) of 15 court centres in Coventry and Birmingham, found that 7.5 per cent and 9.3 per cent respectively of all excusals were of Asians on the basis that English was not their first language.

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The "randomness" principle is already distorted by cases involving black defendants being moved from inner city courts out to Maidstone, Aylesbury and Kingston, areas with a low ethnic minority population.

For example, the "Cardiff Three"[9] were tried by an all white Swansea jury trying three black men from a community in Cardiff of which they had no concept. This resulted in a conviction later overturned by the Court of Appeal.

Further distortions have occurred, not as a result of State intervention, but due to the exercise of judicial discretion. In many cases involving allegations against the police or the prison service or fraud against a company, jurors linked to those institutions ha[ve] been excluded by the trial judge. I[n] these cases the principle of the jur[y] having the appearance of impartiali[ty] overrides the issue of random selectio[n].

Professor J Gobert commented:

> "A randomly selected jury is not an end in itself; it is only a means to an end. The end is the empanelling of an impartia[l] jury."[10]

The United States Supreme Cour[t] now known for its liberal views in re[cent] years, acknowledged the proble[m] when it commented:[11]

> "Securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial."

The abolition of the right of perem[p]tory challenge enabled judges prior [to] *Ford* to exercise their discretion to obtain a multi-racial jury. The process [of] challenge was completely unscientif[ic] as it was simply done by the outwar[d] appearance of the jurors. The defendan[ts] (and the public) were rewarded with [a] jury over which they had been able [to] exercise some choice. The advantage[s] of this are still recognised in the Frenc[h] penal code which allows five jurors [to] be challenged, both by the prosecutio[n] and the defence out of an eventual jur[y] of nine. In Sweden there is a simila[r] right of peremptory challenge of up [to] four jurors from the final total of nine.

The Lord Chief Justice stated tha[t] peremptory challenge was a device tha[t] enabled defence lawyers to, "try to ri[g] juries to bring in a particular verdict" though no evidence has ever been pro[duced] to substantiate that assertion. This view is not widely supported at th[e] Criminal Bar or by Professor Gober[t] who argued that, "the peremptory chal[lenge] has been made the illegitimat[e] scapegoat for the Government's concer[n] about the deterioration in law an[d]

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[1] R v Sheffield Crown Court, ex parte Brownlow *(1980) QB 530, 541.*

[2] *(1989)* The Times *July 31.*

[3] *Foreward to the Criminal Justice consultative Council on "Race and the Criminal Justice System" (1994).*

[4] *"Peremptory Challenge – An Obituary", Professor James J Gobert, (1989) Crim LR p 529.*

[5] *See note 2.*

[6] *"their enlargement or amendment, and all other matters relating to the contents an[d] form of the panels shall be such as the Lo[rd] Chancellor may form time to time direct"*

[7] The Times, *July 1, 1995.*

[8] *"The Peremptory Challenge – An Obituar[y]" Crim LR (1989) p 528.*

[9] R v Parris *(1989) 89 CR App R 173*

[10] *See note 8.*

[11] Georgia v McCullom, *112S. CT 2348, 23[?] (1992).*

order".

It could be argued that the "right of silence", the "hearsay rule" and a variety of other safeguards are being sacrificed on this same altar.

The reliability of the "common man" must seriously be in question if one considers the extent of racism in Britain. There are an estimated 130,000 incidents of racial harassment per year;[12] 95,751 black people were stopped and searched by the Metropolitan Police in 1993/4 with only 12.6 per cent arrested;[13] 8 per cent of children excluded from school are African or Caribbean whilst they represent only two per cent of the school population;[14] the unemployment rate for young black men in London between 16-24 is 61 per cent, three times that of young white men.

In response to Sir Paul Condon's recent, unsubstantiated assertion that 80 per cent of muggers in London are Black,[15] a TV debate[16] registered 92 per cent of over 70,000 callers saying that he was correct in what he said.

The African-Caribbean and Asian communities feel under siege in every walk of British life, from the court room to the cricket pitch. This is not some idle or over sensitive perception but the hard reality based upon overwhelming evidence.[17] The "common man" on the jury is more likely than not to hold to this "common prejudice" which, when combined with the power to decide the facts of a case in the jury room, is likely to result in a racially biased outcome.

This reality was recognised by the Royal Commission on Criminal Justice in July 1993 when it accepted a number of recommendations from the Commission for Racial Equality and from the Society of Black Lawyers. It recommended a number of strategies to ensure impartiality amongst juries. One of the recommendations included a simple safeguard adopted by Mr Justice Otton in *R v Simon Thomas*[18] whereby a judge would be required to, "warn the jury that they should not be prejudiced in cases where there is a black defendant or other racial dimension".[19]

The Royal Commission recommended the empanelling of a multi-racial jury, comprising at least three members of the ethnic minorities on an application to the trial judge, "where a defendant reasonably believed that he could not get a fair trial from an all white jury because of the unusual and special features of the case".

The growing awareness of the effects of racism at every level of the criminal justice system has been reflected in the passing of s 95 of the Criminal Justice Act 1991 which reminds all agencies working within the system of their duty not to discriminate on, "grounds of race, gender or any other unlawful ground". This section, although still not to be found in any practitioner's legal textbook, was given a boost by the formation of the Judicial Studies Board Ethnic Minorities Advisory Committee[20] (EMAC). The Lord Chancellor attended a "Top Peoples Seminar" in November 1993 which provided the springboard for the current session of training programmes for circuit judges, recorders and assistant recorders, due to be completed in spring 1996.

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Early indications are that the day and a half course, which includes an element of self analysis, education and interaction with black people has been well received. Time and monitoring will tell whether this has led to a sea of change not just in attitudes but in judges behaviour and sensitivity.

Unfortunately this expenditure in time and resources is in danger of going to waste if it is assumed impartiality can be guaranteed by a more racially aware judiciary, directing all white, but racially prejudiced juries.

The case of *California v Powell*[21] illustrated in stark terms the depth of injustice which can occur when an all white jury accepted a defence based on racial stereotypes of the "violent black" man. The subsequent uprising in Los Angeles was fuelled not by the initial televising of the video itself but by the all white jury who, in effect, decided that a black man in Simi Valley was not entitled to equal treatment as a human being. The lesson in inferiority from America was understood by the black community here, but not it seems by those in authority, who adopted the complacent approach that such a thing could never happen in Britain.

The pressure for change has, however, come from an increasingly relevant guardian of civil liberties—the European Court of Human Rights. The first Black defendant to expose the racism which exists amongst juries won the first stage of his case before the European Commission of Human Rights in Strasbourg in April this year.[22]

Mr David Gregory was convicted on November 28, 1991 at Manchester Crown Court of robbery and sentenced to six years imprisonment by a majority of ten jurors to two.

When the jury retired, a note was submitted to the judge by one of the jurors reading "jury showing racial overtones, one member to be excused". The judge brought the jury back, and making no enquiry of the jurors directed them that, "any thoughts of prejudice of one form or another, for or against anybody, must be put out of your minds" together with a reminder of their oath. The Court of Appeal said that the judge dealt with a "novel and delicate situation ... with tact and sensitivity" although they accepted that Gregory was "a black man and therefore anxious about his position"[23] and that it would have been entirely inappropriate for the judge to have conducted an enquiry.

Neither the trial judge nor the Court of Appeal considered s 95 of the Criminal Justice Act 1991, which specifically reminds judges and others of their duty to avoid discrimination on grounds of race. There is no similar provision for juries.

A judge faced with a potentially bi-

[12] *Home Affairs Select Committee on Racial Harassment (1994).*
[13] Policing of London, *December 2 1994, 1468.*
[14] Outcast England—How School Exclude Black Children, *Institute of Race Relations (1994).*
[15] The Daily Telegraph, *July 7, 1995.*
[16] *BBC1 "You Decide" July 11, 1995.*
[17] *Commission for Racial Equality. Annual Report, (1994).*
[18] *(1989) 88 Cr App R.*
[19] *Royal Commission on Criminal Justice Cm 2263, para 63, p 133.*
[20] *July 1991.*
[21] *Serranno and Wilkinson, "All Four in King Beating Acquitted"*—Los Angeles Times, *April 30, 1992.*
[22] Gregory v The United Kingdom, *Eur Comm No 22299/93, April 5, 1995.*
[23] *Mr Justice Ward, Court of Appeal, January 19, 1993 (unreported).*

ased jury has three options: (a) to give further directions to the jury; (b) to discharge up to three jurors from the 12 and to allow the trial to continue with the remainder;[24] (c) to discharge the entire jury and order a re-trial before a fresh panel.

It was argued before the European Commission that the judges failure to enquire into what occurred or to discharge the jury was a breach of Art 6 (the right to a fair hearing by an independent and impartial tribunal) and Art 14 (that the enjoyment of rights under the Convention should be secured without discrimination on any grounds such as race).

Once the jury had retired, the Government in *R v Gregory* attempted to argue, that s 8 of the Contempt of Court Act (1981) prohibited any enquiry into what occurred in the jury room. The logical position must be that for a judge to know which option to adopt an enquiry should be made of the whole panel. If that is decided to be too dangerous an option, then on evidence of racial bias the jury should be discharged. This is the only safeguard to ensure a fair and impartial hearing.

The Commission has heard several cases which have considered the composition of the jury as it relates to potential bias. In *Holm v Sweden*[25] the test was whether on an objective basis the appellant's fears as to the independence and impartiality of the District Court could be objectively justified. In *Holm*, the appellant had brought a private prosecution which was tried by a jury that included several members who had a close political connection to the defendants, who then together with three judges dismissed the appellants claim for criminal libel.

The European Court has recognised the threat posed to impartiality by the potential for bias from a judge. In *Piersack v Belgium*[26] Mr Piersack was convicted of murder in a trial presided over by a judge who had originally been the senior deputy prosecutor in his case. It was noted that, "any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society".

The European Commission has, however, adopted a fuller recognition of the effects of racism than the Court of Appeal when it considered the actual behaviour of the jury itself. In *Said Andre Remli v France*[27] an Algerian national being tried for murder in the Rhone Assize Court after an abortive prison escape was tried by a jury, one of whose members was overheard to state prior to being sworn, "In addition I am a racist". The Court of Cassation (Appeal Court) refused to address the failure to investigate. The Commission held that doubt could legitimately be cast on the impartiality of the Assize Court.

The English courts have been competent enough to recognise bias in a variety of situations adopting the test in *R v Gough*:[28]

> "I would prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias."

There are several examples of the Court of Appeal being willing to protect the principle of impartiality as occurred in *R v Boyes*, where a trial judge failed to enquire if a jury in a rape case overheard the alleged victim's mother refer to the "other five girls he has attacked".

Similarly, in *R v Stephen Young*[29] jurors who consulted an ouija board during their retirement were held by the Court of Appeal to constitute a real danger of prejudice to the applicant.

The danger of racial bias should be one which the English courts can understand as Lord Goff commented in *R v Gough*,[30] "bias is such an insiduous thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias".[31]

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The question of racism amongst juries arose on the Northern Circuit recently requiring a judge to discharge a juror who referred to black people as "those darkies". In ***R v JS Baath and others***,[32] three Asian defendants experienced a juror who in the words of the trial judge, "expressed disquiet at the behaviour of fellow jurors who seemed not to be taking their duties seriously and to be making racist jokes and remarks".

The judge sent them away to reflect overnight to see whether they felt "unable to honour" their oath. Not surprisingly, having been exposed the jury returned the next day as converts to impartiality and confessed that they "utterly refuted" the allegation and assured the court that they would make a decision, "based solely according to the evidence and without racial bias".

Two out of the three Asian defendants were convicted and are currently appealing their convictions. It remains to be seen whether the Court of Appeal will recall s 95 and the words of Lord Hewart CJ when he stated in *R v Sussex Justices ex parte* McCarthy,[33] that it is:

> "Of fundamental importance that justice should not only be done, but manifestly and undoubtedly be seen to be done."

It is highly unlikely that black defendants and victims will be reassured by the flawed concepts of "random selection" and the "common man" given the present "colour blind" approach to racism amongst juries.

Conclusion

Reforms to the jury process are urgently required to ensure that it keeps pace with the rest of the Criminal Justice System. A positive approach is required to ensure that the race training of judges is not dissipated by racist juries and to guarantee impartiality for all, regardless of colour or ethnic origin. If implemented, this would ensure compliance with the European Convention for Human Rights. Above all else, we as a society should learn the lessons of history and avoid the catastrophe which engulfed Los Angeles which was exacerbated by prejudice and intolerance in the jury room and on the bench. o

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[24] *Juries Act 1974, s 16(1).*
[25] *Eur Court HR Vol 279, November 25, 1993.*
[26] *Eur Court HR October 1, 1982, Series A No 53.*
[27] *Eur Comm No 16839/90, November 30, 1994.*
[28] *(1993) 2 All ER p 673.*
[29] *(1991) Crim LR 717.*
[30] The Times, *December 30, 1994.*
[31] *See note 29.*
[32] *Birmingham Crown Court, March 1995 (unreported).*
[33] *(1924) 1 KB 256.*