Case No: 2014/02393C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM MR JUSTICE NICOL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2014

Before:

LORD JUSTICE GROSS
MR JUSTICE SIMON
and
MR JUSTICE BURNETT

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Between :

GUARDIAN NEWS AND MEDIA LTD	**Appellants**
- and -	
AB CD	**Defendants**

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- -

Anthony Hudson and Ben Silverstone (instructed by **In-House Solicitor, Guardian News and Media Ltd**) for the **Appellants**
Henry Blaxland QC and Richard Thomas (instructed by **Birnberg Pierce and Partners**) for the **Defendant AB**
Naeem Mian (instructed by G T Stewart Solicitors) for the **Defendant CD**
R Whittam QC and Stuart Baker (instructed by **CPS**) for the **Prosecution**

Hearing date: 4 June 2014

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DECISION

LORD JUSTICE GROSS:

INTRODUCTION

1. Today, we give our Decision on the recent appeal of the media, accompanied by a brief overview. This is not our Judgment; our Judgments (plural, as will be explained presently) have been reserved and will be given in due course.

2. The Rule of Law is a priceless asset of our country and a foundation of our Constitution. One aspect of the Rule of Law – both a hallmark and a safeguard - is open justice, which includes criminal trials being held in public and the publication of the names of defendants. Open justice is both a fundamental principle of the common law and a means of ensuring public confidence in our legal system; exceptions are rare and must be justified on the facts. Any such exceptions must be necessary and proportionate. No more than the minimum departure from open justice will be countenanced.

3. These principles as to open justice were essentially not in dispute before us. However, it was also common ground that there are exceptions. For example, as rightly accepted by Mr. Hudson (for the media), the Court has a common law power to hear a trial (or part of a trial) in private ("*in camera*"). The Court does not require a party to destroy the right it is seeking to assert or protect as the price of its vindication. We detect no difference of substance in this connection between the common law and Art. 6 of the European Convention of Human Rights ("ECHR").

4. National security is itself a national interest of the first importance and the *raison d' etre* of the Security and Intelligence Agencies ("the Agencies"), who themselves operate within a framework of law and oversight. For the Agencies to operate effectively, at least much of their work is secret and must remain so as a matter of necessity. From time to time, tensions between the principle of open justice and the needs of national security will be inevitable.

5. As is well-established in our law, these tensions are resolved along the following lines:

    i) Considerations of national security will not *by themselves* justify a departure from the principle of open justice.

    ii) Open justice must, however, give way to the yet more fundamental principle that the paramount object of the Court is to *do* justice; accordingly, where there is a serious possibility that an insistence on open justice in the national security context would frustrate the administration of justice, for example, by deterring the Crown from prosecuting a case where it otherwise should do so, a departure from open justice may be justified.

iii) The question of whether to give effect to a Ministerial Certificate (asserting, for instance, the need for privacy) such as those relied upon by the Crown here is ultimately for the Court, not a Minister. However, in the field of national security, a Court will not lightly depart from the assessment made by a Minister.

PROCEDURAL HISTORY

6. The Defendants, for the moment AB and CD, face the following charges:

i) AB is charged with an offence contrary to s. 5, Terrorism Act 2006 ("TA 2006", preparation of terrorist acts) and an offence contrary to s.58, Terrorism Act 2000 ("TA 2000", collection of information).

ii) CD is charged with an offence contrary to s.58 TA 2000 (collection of information) and an offence contrary to s.4, Identity Documents Act 2010 ("IDA 2010", possession of false identity documents etc with improper intention).

7. By order dated 19th May, 2014 ("the order"), Nicol J ruled:

i) The entirety of the criminal trial of the Defendants should be in private (i.e., with the public and media excluded) and the publication of reports of the trial be prohibited.

ii) The names and identities of the Defendants should be withheld from the public and publication of their names/identities in connection with the proceedings be prohibited.

iii) The publication of reports of the hearing in open court on 19th May, 2014 and the open judgment handed down on that day be postponed until the conclusion of the trial or further order.

The order was made by Nicol J pursuant to his common law powers, together with those contained in s.11 and s.4(2) of the Contempt of Court Act 1981 ("the CCA 1981").

8. Pursuant to s.159, Criminal Justice Act 1988 ("the CJA 1988"), the Applicants (for convenience, "the media") sought leave to appeal from the order and contended that it be set aside. We treated the hearing as if it were the hearing of the substantive appeal and formally give leave. We make it plain that we have not treated the hearing as a review of the decision of Nicol J but have instead come to an independent conclusion on the material placed before us.

9. The matter is urgent as the criminal trial is due to commence on Monday 16th June at the Central Criminal Court. Accordingly, in the course of the hearing before us on the 4th June, we indicated that we would give our Decision as soon as possible, with fully reasoned Judgments to follow in due course. The present document contains our Decision.

10. So far as concerns the procedure followed, Nicol J was dealing with an application by the Crown that the trial should be held in private in its entirety

and that the Defendants should be anonymous. That application was supported by Certificates ("the Certificates"), setting out the reasons relied on in support, signed by the Secretary of State for the Home Department ("SSHD") and the Secretary of State for Foreign and Commonwealth Affairs ("SSFCA"). Further material was provided in Schedules to the Certificates ("the Schedules"). The Certificates but not the Schedules were provided to the Defendants and their legal representative and to the legal representatives of the media, on terms as to confidentiality.

11. The Judge heard part of the application in open court. He then heard part of the application in private, i.e., in the presence of the Defendants, their legal representatives and the media's legal representatives. All had access to secret material relied upon in support of the application. Finally, the Judge considered further material in the absence of all except the Prosecution ("the *ex parte* hearing").

12. We followed the same course – i.e., part of the hearing in open Court, part of the hearing in private and part (a very small part) *ex parte*. With regard to the last-mentioned (*ex parte*) part of the hearing, we rejected an argument advanced by Mr. Hudson that, unlike Nicol J, we were not entitled to have regard to such material. When we come to produce our full Judgments, there will be an Open Judgment, a Private Judgment and an *Ex Parte* Judgment.

THE PRINCIPAL ISSUES

13. We turn to our conclusions on the principal Issues, namely:

    i) Issue (I): Trial *in camera*;

    ii) Issue (II): Anonymisation of the Defendants;

    iii) Issue (III): S.4(2), CCA 1981.

ISSUE (I): TRIAL *IN CAMERA*

14. This case is exceptional. We are persuaded on the evidence before us that there is a significant risk – at the very least, a serious possibility – that the administration of justice would be frustrated were the trial to be conducted in open Court; for what appears to be good reason on the material we have seen, the Crown might be deterred from continuing with the prosecution. We are also of the clear view that in this case it is unreal to contemplate a split trial – with the core of the trial being split into open and *in camera* hearings. In our judgment, as a matter of necessity, the core of the trial must be heard *in camera.* Our reasons will be elaborated upon in our Judgments in due course.

15. It is important to underline that a defendant's rights are unchanged whether a criminal trial is heard in open court or in camera and whether or not the proceedings may be reported by the media.

16. As already underlined, no departure from the principle of open justice must be greater than necessary. While we are driven to conclude that the core of the

trial must be *in camera*, on the material before us, we are not persuaded that there would be a risk to the administration of justice were the following elements of the trial heard in open Court:

i) Swearing in of the jury.

ii) Reading the charges to the Jury.

iii) At least a part of the Judge's introductory remarks to the Jury.

iv) At least a part of the Prosecution opening.

v) The verdicts.

vi) If any convictions result, sentencing (subject to any further argument before the trial Judge as to the need for a confidential annexe).

Our Order should be drawn up accordingly.

17. There is, we underline, no dispute that a transcript of the proceedings will be kept, save in respect of a certain (few) discrete matters, thus far dealt with *ex parte*.

18. Further and importantly, we direct that the position as to publication is to be reviewed at the conclusion of the trial, thus permitting (if need be) a further application for leave to appeal under s.159, CJA 1988. For the avoidance of doubt, as trials are dynamic processes, our order does not preclude a review by the Crown and the Judge in the course of the trial, in the event of a substantial change of circumstances.

19. Still further, as we understand it, one issue canvassed before the Judge in open Court was whether a small number of "accredited journalists" might be invited to attend the bulk of the trial (subject to being excluded when a small number of matters are discussed in accordance with the Certificates and the Crown's submissions), on terms which compelled confidentiality until review at the conclusion of the trial and any further order. Notably, this issue was raised in the Certificates and supported by the SSHD and SSFCA. The Judge was not persuaded, essentially on grounds of practicality. We respectfully disagree. The arrangements can be agreed or can be dealt with in our Order, if need be, following further brief argument. Any breach would obviously carry the likelihood of severe sanctions and, as has been observed on previous occasions, reliance must be placed on the responsibility of the media. Further and in particular, any doubts with regard to policing are resolved by the fact that this is a proposal emanating from the SSHD and SSFCA and serving to minimise the extent of departure from the principle of open justice. While the terms may need refinement, for the assistance of the parties we indicate the following:

i) We have in mind a small number of accredited journalists ("the journalists") – drawn from the media parties to these proceedings.

ii) Notes can be made (if the journalists so choose, given the availability of a transcript - see below) but cannot be taken away at the end of the day's or session's proceedings; they will be securely stored until the end of the trial.

iii) A transcript of the proceedings (excluding the discrete *ex parte* areas) will be available for review at the conclusion of the proceedings in connection with any further consideration of publication.

iv) An order should be "tailor made" to deal with this unusual situation; we were not persuaded that the matter could be encompassed within any order made simply under s.4(2) or s.11, CCA 1981.

ISSUE (II): ANONYMISATION OF THE DEFENDANTS

20. This issue is to be approached on the footing that the core of the trial is to be conducted *in camera*, as set out above. On this footing, we are not persuaded, on the material before us, that there is a risk to the administration of justice warranting anonymisation of the Defendants; nor do we think that, properly understood, the Crown's material supported that outcome, provided the bulk of the trial was *in camera*. In this regard, we respectfully part company with the Judge and permit the Defendants to be named. We shall expand on these reasons in the Judgments to come. For completeness, we regard the preservation of flexibility until the conclusion of the trial as an inadequate foundation upon which to base this significant departure from the principle of open justice in the absence of a clear justification at this stage.

21. We add only this. We express grave concern as to the cumulative effects of (1) holding a criminal trial *in camera* and (2) anonymising the defendants. We find it difficult to conceive of a situation where both departures from open justice will be justified. Suffice to say, we are not persuaded of any such justification in the present case.

ISSUE (III): S.4(2), CCA 1981

22. *The hearing before us:* For the duration of the hearing before us, we "held the ring" by imposing an order until s.4(2), CCA 1981. At the conclusion of the hearing, we indicated that the order would not be continued in respect of hearing in open Court before us on the 4th June. We could not see any good reason to postpone publication of any open part of that hearing. The effect of our order is that the ordinary reporting restrictions applying to appeals from preparatory hearings (strictly so called) should not apply to the extent that anything said in the open hearing before us could be reported: see, s.37(4), Criminal Procedure and Investigations Act 1996 ("CPIA 1996").

23. *The hearing before Nicol J on the 19th May:* We are likewise not persuaded of the justification for a s.4(2) order in respect of that part of the 19th May hearing before Nicol J which took place in open Court and the open judgment given by the Judge on that day. That said, we underline that the hearing before Nicol J was a preparatory hearing and therefore subject to reporting restrictions contained in s.37, CPIA 1996. The media's success in this regard

may therefore be limited, at least so far as it relates to the open proceedings before Nicol J. However, our conclusion also means that the open judgment of the 19th May given by the Judge is no longer subject to any s.4(2) order because its material parts were referred to before us.

OVERALL CONCLUSION

24. Pulling the threads together:

i) To the limited extent indicated above, we vary the order made by Nicol J for the trial to be *in camera*.

ii) We allow the media's appeal from the order made by Nicol J for anonymisation of the Defendants.

iii) We allow the media's appeal from the s.4(2), CCA 1981 order imposed by Nicol J in respect of that part of the 19th May hearing held in open Court, together with his open judgment of that date.