Neutral Citation Number: [2013] EWHC 773

Case No: 2013/01959B1

IN THE COURT OF APPEAL CRIMINAL DIVISION
ON APPEAL FROM NOTTINGHAM CROWN COURT
MRS JUSTICE THIRLWALL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2013

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE ROYCE
MR JUSTICE GLOBE

- -

Between :

ITN News and Others	**Appellants**
- and -	
R	**Defendant**

- -
- -

Ms H Rogers QC and Mr C McCarthy for the **Appellants**
Mr D Farrer QC and Mr J House for the **Crown**
Miss G Irving QC for the (**Intervener on behalf of Lisa Willis, the Mother)**
Mr Ian Wise QC for **Derby City Council (Intervener on behalf of the Children)**

Hearing dates: 1st May 2013

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Approved Judgment

The Lord Chief Justice of England and Wales:

1. This is an application under s.159 of the Criminal Justice Act 1988 (the 1988 Act), alternatively an application under s.46(10) of the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act) by a number of media organisations for leave to appeal against an order made by Thirlwall J at Nottingham Crown Court during the course of the notorious recent trial of Michael and Mairead Philpott and Paul Mosley.

2. Following the deaths of the six children of Michael and Mairead Philpott who were killed following a fire on 11 May 2012 in their home at 18 Victory Road, Derby, they were charged with manslaughter. In due course they were convicted by the jury.

3. One of the witnesses called by the prosecution was Lisa Willis (the mother). She had five children, four of them by Philpott. For several years she had lived at the same address, 18 Victoria Road, with Michael and Mairead Philpott. Several months before the fatal fire she had left that address. When she moved away from the area a dispute broke out between her and Philpott about the arrangements for the children. Philpott's involvement in the fatal fire stemmed from a determination to demonstrate that the mother was unfit to care for the children, and so, the night before the case was listed for a hearing, the fire was started. The intention was that she should be blamed for it. Thus she was a crucial witness at the trial.

4. Long before the tragic events of May 2012, the life style of Michael Philpott and the women in his life, and his very large number of children, had been the subject of extensive media coverage and public interest. Photographs and images of the mother and her children appeared on television and in newspapers. She herself had appeared in three television programmes speaking about her relationship with Michael Philpott and the family's living arrangements.

5. The first was the Jeremy Kyle show in 2006, entitled "Father to Fifteen … Wife and Girlfriend Pregnant Again". The mother appeared with Michael and Mairead Philpott, answering questions about her relationship and the living arrangements before a live studio audience.

6. The second was "Tales of the Unaccepted – the Philpotts". This programme was broadcast on ITV Central Television on 12 April 2007. The programme followed births of children to both Mairead Philpott and the mother of whom Michael Philpott was the father. The mother was filmed with her children. She spoke directly to the camera. The film showed the beginning of her labour at home and, after the birth of her baby in hospital, showed the baby handed to her immediately after the birth.

7. The third was "Ann Widdecombe vs the Benefit Culture", broadcast on ITV 1 on 22 August 2009. This was an hour long documentary in which Ann Widdecombe MP explored and challenged the attitudes of the Philpott family, and the arrangements by which they were all living in the context of claims for benefits. The mother was seen

from time to time throughout the documentary, and so were her children, and photographs of them all were widely published.

8. The events covered by the subsequent trial at Nottingham Crown Court attracted worldwide coverage and international interest. The coverage included images of the mother, which remain widely available on the internet, and on websites outside the jurisdiction.

9. Before the start of the trial, the Crown applied for and in accordance with s.23(1) of the 1999 Act was permitted the use of special measures. This took the form of protective screens when the mother gave evidence in court. The application was based on a statement from the mother herself, updated in oral submissions about her fearful state of mind. She was content to give her evidence, but had a number of concerns about the hearing. She was worried that her physical identity would be revealed at court. She had already taken measures to avoid any risk that anyone connected to Philpott should know of her whereabouts or know what she looked like. She was now living with her children in a house in an unknown location. She had changed their surnames and altered her appearance. If she gave open evidence she was scared "that someone will either see me and then make efforts to locate me and follow me to where I live with my children". She said that she would tell the court the whole truth about the case, and continued that it would "be a lot easier if I cannot see Mick Philpott and he and his family and friends cannot see me". She had been offered a number of "special measures", but she did not wish to give evidence or answer questions by video. She wished to give evidence in court personally, but she would feel "much more comfortable and be able to give my evidence more freely" if she could be behind screens. Hence the application, supported by the Crown.

10. On 12 February 2013 an order made by Thirlwall J under s.4(2) of the Contempt of Court Act 1981 prohibited the publications of photographs of the mother or any of her five children until 5 March 2013. At the end of the day, the judge was asked whether, in the light of her order, it was permissible for newspapers or broadcast media to publish photographs of the mother and her children that evening, and in any event before she gave evidence. The judge gave a short ruling underlining that her concern was the "integrity of the criminal trial". It was submitted to her by the Crown that any photographs appearing in the media just as she was about to give evidence would undermine the entire purpose of the order for special measures which had been made. Thirlwall J did not accept the entire breadth of the submission, but she recognised that the purpose of the order enabling the mother to give evidence behind a screen was that she would be able to give it away from the public gaze, and that public focus on her and her children would undermine her ability to give evidence. The judge noted that the publication of any such photographs would "torpedo her attempts not to be recognised, reinforcing her fears for herself and her children". She therefore made an order postponing publication of any photographs of Lisa Willis or her children, and further ordered that any photographs that had already been published during the course of the hearing should be withdrawn.

11. The judge considered the impact of the order on the entitlement of the press to report court proceedings fairly and accurately. She concluded that written and verbal reports were sufficient to represent the public interest, and she could see no public interest in the publication of a photograph or photographs or images of the mother or her children. In any event if photographs of the mother were published the children would be immediately identified.

12. On 13 February, after an opportunity to consider the relevant statutory provisions overnight, Thirlwall J concluded that the order under s.4(2) of the Contempt of Court Act was, as she described it, "a rather clumsy and possibly erroneous route to preserve the position". The proper route was via s.46 of the Youth Justice and Criminal Evidence Act 1999. She was satisfied that the witness was eligible for protection within the context of the Act, and that the quality of her evidence would be diminished by reason of fear at being identified as a witness in the proceedings. The order reflected the logical consequence of the attempts being made by the mother to rebuild her life and without it, all her efforts would come to nothing. The order should therefore be made in the interests of justice.

13. The order made on the previous day was revoked, and replaced by an order under s.46 of the Youth Justice and Criminal Evidence Act 1999. The order provided that:

> "(1) no photograph, pseudo photograph or other image of
>
> (a) Lisa Willis
> (b) Her children or any of them (with or without Lisa Willis)
>
> Shall be published in any way which connects them or any of them (whether through reports of these proceedings or otherwise howsoever) to the case of *R v Michael Philpott, Mairead Philpott and Paul Mosley*".

The press and media were given liberty to apply for amendment or revocation of the order on 24 hours notice.

14. Immediately after the order was made, the mother began her evidence. So as to avoid any disruption of the trial, the media postponed their application for the revocation of the order until the end of the evidence, after closing speeches were underway. The evidence of the mother was given in open court, and was widely reported throughout the media. No one has suggested that the media was unable to report her evidence in meticulous detail, or inhibited, let alone prevented from doing so, by Thirlwall J's order.

15. On 3 April the media application for revocation of the order was heard and dismissed. In her judgment next day Thirlwall J made clear that she could not, and that she did not believe that anyone listening to the case would, find it "easy to understand the purpose" of publication of photographs or film of the mother and her children. After considering submissions on behalf of the media and the Crown which in effect were repeated before us, she concluded that the jurisdiction to make the order prohibiting

publication of the photographs was based on or created by s.46 of the 1999 Act, and that notwithstanding that an internet search would produce images of the mother on websites outside the jurisdiction, the order should not be revoked. She reflected on the Article 8 rights of the witness and the Article 10 rights of the press, without regard to the Article 8 rights to the children. She concluded that there was not "the slightest doubt" that such publication would have "a very damaging effect" on the mother and her children.

Section 46 of the 1999 Act

16. Every court in England and Wales conducting criminal proceedings may make a reporting restriction order applicable to any adult who is a witness in the proceedings (other than a defendant). The protection of child witnesses is ensured by s.39 of the Children and Young Persons Act 1933.

17. Section 46(6) defines a reporting direction as:

> "A direction that no matter relating to the witness shall during the witness's life time be included in any publication if it is likely to lead members of the public to identify him as being a witness in the proceedings."

18. Publication of the name and address of the witness, any educational establishment attended by the witness, the identity of any place of work, and "…(e) any still or moving picture of the witness"

may be prevented.

19. The order may only be made in support of a witness eligible for statutory protection. The "eligibility" requires the court to be satisfied:

> "3(a) that the quality of evidence given by the witness, …
>
> is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings".

20. In deciding whether any particular witness qualifies for eligibility the court must:

> "(4) … take into account, in particular
>
> (a) the nature and alleged circumstances of the offence to which the proceedings relate;
>
> (b) the age of the witness;

> (c) such of the following matters as appear to the court to be relevant namely
>
> (i) the social and cultural background and ethnic origins of the witness
>
> (ii) the domestic and employment circumstances of the witness, and
>
> (iii) …
>
> (d) any behaviour towards the witness on the part of
>
> (i) the accused,
>
> (ii) members of the family or associates of the accused, or
>
> (iii)"

In addition to these specific matters, the court must also "consider any views expressed by the witness".

21. Provided the witness is eligible for protection and that it is appropriate for a reporting direction to be made, before making the order, the court must consider:

> "(8) …
>
> (a) whether it would be in the interest of justice to do so, and
>
> (b) the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings".

22. If the eligibility test is met, the court may also impose a reporting direction which is subject to "an excepting" directions, dispensing with restrictions which might otherwise be thought appropriate. Dealing with it broadly, the effect is that the court may limit the reporting direction, as it did here, to a photograph or film of the witness. In short the effect of any restriction should be limited to those which are reasonable bearing in mind the context of the public interest in the reporting of proceedings.

23. The reporting restriction may be revoked by the court of trial or an appellate court, that is "court dealing with an appeal … arising out of the proceedings …". (s.46(12)

The application

24. The first issue is to identify the basis on which Thirlwall J's decision may be considered by this court. When she refused to revoke the restriction decision, the

main submission was that the s.46 order was made without jurisdiction and that accordingly it should be revoked under s.46(10). There is no doubt that a reporting restriction may be revoked by the appellate court in any "proceedings" before this court. However, the present application, of course, is confined to the restriction order. The court is not otherwise concerned with any proceedings between any of the three defendants at trial and the Crown, or indeed any issue arising from it.

25. Section 159(1)(a) and (b) of the 1988 Act enable an applicant to apply to this court for leave against a reporting restriction order made in relation to a trial or indictment under s.4 or s.11 of the 1981 Act and s.58(7) and s.58(8) of the Criminal Procedure and Investigations Act 1996. Section 159 goes on to provide that the application may also extend to:

> "…
>
> (b) any order restricting the access of the public to the whole or any part of a trial on indictment or to any proceedings ancillary to such a trial; and
>
> (c) any order restricting the publication of any report of the whole or any part of the trial on indictment or any such ancillary proceedings …"

26. These provisions are designed to enable the media or any member of the public aggrieved by an order restricting access to a trial in the Crown Court to invite this court to interfere with, amend or revoke the order. Given the importance attached to the principle that criminal justice should, so far as possible, be exercised in public, it should therefore be given the widest possible construction. In our judgment a reporting restriction within s.46 of the 1999 Act falls within the ambit of S.159(1)(c) of the 1988 Act, and does so even when the restriction on reporting is confined, as this order was, to photographs or film. If the order should not have been made, and in particular if there was no jurisdiction enabling the order to be made, it should be revoked whether or not any other proceedings are before this court.

27. In the event of an appeal against conviction or sentence (or indeed a Reference by the Attorney General) then, in accordance with s.46(12) of the 1999 Act the jurisdiction of the Court of Appeal to revoke any restriction or "excepting" order would be immediately engaged without the need for further reference to s.159 of the 1988 Act. However where there is no such appeal, but the media remains aggrieved by the restriction order, s.159 provides the route to a remedy.

28. The issues raised on behalf of the media merit attention in this court, and accordingly leave to appeal under s.159(1)(c) is granted.

The decision

29. Stripped to essentials, the submission by Ms Heather Rogers QC is that the meaning given to reporting direction in s.46(6) did not extend to the order made by Thirlwall J, notwithstanding that the order itself was very limited in its scope, confined as it was to any photograph, pseudo photograph or other image of the mother and her children. Naturally enough, Ms Rogers began her submissions by underlining the importance of the principle of open justice. We agree, and need no anxious repetition of the many statements of principle to demonstrate the reasons why we do agree. Her next submission was that the Crown Court had no powers at common law to make any such order. The power to do so was contained in statute. We agree. She submitted that an order for special measures did not of itself justify the reporting direction, and that the reporting direction should not automatically follow any special measures order. Again, we agree. Section 46 provides a distinct power which may be exercised alongside a special measures direction, but also, separately from it. Eligibility for such a reporting restriction does not automatically follow from the need for special measures. It requires a distinct fact finding decision. Yet again, we agree. She suggested that the protection of the children of the adult witness did not arise in the context of s.46. These were issues better addressed, and more important, properly addressed, in family courts. Dealing with it generally, we immediately recognise the force of the submission that in relation to the identification of children (taken separately from that of their parent) the Family Division is normally the appropriate venue. Nevertheless the criminal courts must control their own processes, and the fact that the family court may protect the identity of the children, is not sufficient on its own to deprive the Crown Court of the jurisdiction under s.46. The eligibility conditions may be established as here, where publication of the photographs of her children would be likely to lead to the identification of the mother, and the risks would be likely to impact on the quality of the mother's evidence at trial. As Mr David Farrer QC for the Crown observed, the order offered "reassurance to a witness to preserve the integrity of his or her evidence". In our view reference in the order to the children was integral to the eligibility test as it applied to their mother.

30. The crucial difficulty is at the last stage of Ms Rogers' submission. She submitted that the mother has already been identified by previous publications, television programmes, and the internet. Indeed the name of Lisa Willis, and her identification as the mother of children of whom Philpott is the father is effectively common knowledge. She gave her evidence as Lisa Willis. In that sense she was and is fully identified as a witness.

31. The difficulty with this submission arises from the reality that in the overwhelming majority of cases the "identity" of every witness is known. If the jurisdiction to make an s.46 order were restricted in the way suggested, the "eligibility" test would be virtually confined to the rare case of the anonymous witness. Anonymity, however, is an entirely distinct and extreme form of special measure for which a separate statutory system is in place. Without repeating s.46(7) it seems clear that it extends beyond the bare naming, that is the identifying, of the witness. Thus a still or moving picture of the witness may be prohibited if the "eligibility" test is satisfied, whether or not the name and identity of the witness is otherwise known. This approach is reinforced by

analysis of the wide ranging "excepting" direction in s.46(9). This sub-section anticipates that the ambit of the reporting restriction may be much wider than the mere naming of the witness. It anticipates that the reporting restriction may impose substantial restrictions on reporting which, in the context of the public interest, are unreasonable. If Ms Rogers were right neither the provisions in s.46(7) nor those in s.46(9) would be necessary. As it is they demonstrate that the ambit of the reporting direction is much wider than she suggested, but s.46(9) also underlines that even when a reporting restriction is appropriate, it should be no wider than necessary to avoid any diminution in the quality of the evidence to be given by the witness.

32. In our judgment this order was appropriately made. The appeal is accordingly dismissed.