Neutral Citation Number: [2012] EWCA Crim 2434

Case No: 2012/02657 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CAMBRIDGE CROWN COURT
His Honour Judge Hawksworth
T20117145

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2012

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE GROSS
and
MR JUSTICE MITTING

- -

Between :

R (Press Association)	**Appellant**
- v -	
Cambridge Crown Court	**Respondent**

- -
- -

Mr M Dodd on behalf of the **Press Association**
Ms C Matthews for the **Crown**
Mr L Mably (instructed by the Attorney General) as **Friend of the Court**

Hearing dates: 6th November 2012

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Approved Judgment

The Lord Chief Justice of England and Wales:

1. This is an appeal by the Press Association (PA) against orders made by His Honour Judge Hawksworth at Cambridge Crown Court on 16 April 2012.

2. On that date he made:

   i) an order (the initial order) under s.4(11) (plainly a typographical error for s.4(2)) of the Contempt of Court Act 1981 (the 1981 Act) imposing an indefinite prohibition on the publication of "anything relating to the name of the defendant which could lead to the identification of the complainant which could have serious consequences for the course of justice."

   This was followed shortly afterwards by:

   ii) an order superseding the initial order (the order) under s.1(2) of the Sexual Offences (Amendment) Act 1992 (the 1992 Act), again imposing a prohibition, unlimited in time, on the publication of "anything relating to the name of the defendant which could lead to the identification of the complainant which could have serious consequences for the course of justice."

3. A cursory glance at these orders underlines that the issue raised in the appeal is directed to the openness of the administration of criminal justice and the jurisdiction, if any, of the Crown Court to make an order restricting publication of the name of a defendant convicted of sexual offences for the purpose of protecting the interests of others, in particular the complainant.

4. We shall briefly summarise the essential facts.

5. On 14 February 2012 the defendant was found guilty of five counts of rape (counts 1-5) and four counts of breaching a restraining order (counts 6-9). The trial had taken place in open court and the case had been listed under the defendant's full name. On 16 April a sentence of imprisonment for public protection, with a minimum term of 8 years and 273 days, was imposed on him.

6. On that date counsel for the prosecution (Ms Matthews) and counsel for the defendant appeared before the judge. According to Ms Matthews she was not seeking an order which would prohibit the publication of the defendant's name; she merely wanted to draw to the judge's attention – and for him to alert the press – to the concerns which would arise if the defendant's name were published. In this way, the ambit of any proposed reporting of the case would be clear and the risk that the media would inadvertently undermine the complainant's anonymity by publishing the defendant's name would be avoided. Whatever her intention, the judge plainly thought that Ms

Matthews was seeking an order to impose a prohibition on the publication of the defendant's name. The judge made the initial order under s.4(2) of the 1981 Act. Thereafter, however, a representative of the local press persuaded the judge that s.4(2) of the 1981 Act did not apply. The judge remained concerned about the consequences for the complainant if the identification of the defendant led to her identification. He was concerned, both about the possible impact on her health and wellbeing and about other risks (upon which it is unnecessary to elaborate) should the complainant's family become aware of these offences and the defendant's responsibility for them. We understand the concerns of the judge, and readily acknowledge that he was proceeding with the best of intentions, namely the protection of a woman who had been the victim of grave crime committed by the defendant. Thus informed, the judge weighed up the freedom of the press on the one hand and the consequences for the complainant on the other. He underlined that the press was free to publish the facts of the offences and the sentence passed on the defendant; he did not see how the public interest would be "further bolstered by simply the publication of the man's name …". Accordingly, having carried out the balancing exercise he believed appropriate, the judge decided to continue the initial order, but using a different section for this purpose: hence the order under s.1(2) of the 1992 Act.

The applicable statutory provisions

7. Section 4(2) of the 1981 Act provides:

> "In any such proceedings (i.e. legal proceedings held in public) the court may, where it appears necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

8. Section 11 provides:

> "In any case where a court (having the power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld".

9. The 1992 Act, as its preamble makes clear, makes provision relating to anonymity in connection with allegations and criminal proceedings relating to certain sexual offences. Section 1 provides, inter alia:

> "(1) where an allegation has been made that an offence to which this Act applies has been committed against the person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead

> members of the public to identify that person as the person against whom the offence is alleged to have been committed.
>
> (2) where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed shall during the complainant's lifetime be included in any publication".

It is a criminal offence to contravene section 1 of the Act, whether by naming or enabling a "jigsaw" identification to be made. The ambit of the offence is not limited to the press. In short, it encompasses publication of prohibited material by anyone by whatever means publication occurs, and extends to bloggers and twitterers or any other commentators. However, we note that the sentence is confined to a financial penalty. Whether this is always a sufficient punishment for those who *deliberately* breach the anonymity of the victim of sexual crime appears to us to require urgent reconsideration.

The submissions

10. PA's ground of appeal, admirably addressed in writing (and developed briefly orally), by Mr Dodd, was that the judge had no power to make an order anonymising the defendant, whether under ss.4(2) or 11 of the 1981 Act or s.1(2) of the 1992 Act. So far as the 1992 Act was concerned, the responsibility for ensuring the lifelong anonymity granted to victims of certain offences under s.1, rested with the editors, and those reporting any trial, not with the court. The press was well aware that a breach of the anonymity provisions in the 1992 Act would give rise to a criminal offence and editors were reminded of their responsibilities by the Editors' Code of Practice. He contended that Parliament having considered and rejected the reintroduction of anonymity for defendants in cases involving sexual crime, it was not open to the court to achieve the same result by way of injunctive result; there was no inherent jurisdiction to restrain publication in this way. Mr Dodd underlined that the interest of the PA did not lie in the particular trial itself, but the issue was of major importance to the press, and he expressed considerable concern at the apparent willingness of some courts to make orders that were unnecessary or beyond their powers.

11. As we understand Ms Matthews for the Crown, she conceded that there was no power to make an order under the 1992 Act and that indeed the order in the present case was unnecessary. She submitted that the statute conferred automatic anonymity on complainants who were the victims of sexual crime. She likewise conceded that there had been no power to make the order under the 1981 Act, not least because there had been no reporting restrictions during the trial itself. All that accepted, she suggested that it was appropriate for the judge to give guidance and directions to the proper ambit of what could be reported. She added that the Crown Court was under a duty "to protect the anonymity" of a complainant which fell within the ambit of the

anonymity principles, although in argument she was unable to elaborate how this might be fulfilled.

12. Mr Mably, who was invited to make submissions as the Friend of the Court appointed by the Attorney General, submitted that the Crown Court is vested with power to order at the outset of proceedings that a defendant should not be named in two limited circumstances. First, that the interests of justice require it, and second, if the court is satisfied that there is a real and immediate risk to the life of the defendant. This can be achieved by ordering a trial in camera or withholding the name of the defendant. However, he agreed that the Crown Court lacks jurisdiction to make a free-standing order that the defendant is not to be named before, during or after the conclusion of proceedings simply because it appears to be desirable to do so.

The 1981 Act

13. As we have indicated, the judge relied on s.4(2) of the Act when making the initial order. These orders are intended to avoid "a substantial risk of prejudice" to the proceedings to which they are made, or to linked or related proceedings, such as a subsequent trial involving the same defendants or witnesses. Other examples of the use of the power in s.4(2) can be found in prohibitions against the publication of evidence or argument before the judge in the absence of the jury and, after a successful appeal against conviction, when a new trial is ordered and, to avoid prejudice to any retrial, an appropriate order is made. An order under s.4(2) should, however, only be made when it is necessary to do so and as a last resort. Suffice it to say that here, at the time of the making of the initial order, the defendant had been tried, convicted and sentenced in public, without any order restricting publication of his identity, and there were no pending proceedings which might be prejudiced by the publication of his name. Essentially too, s.4(2) as its wording suggests, is aimed at the postponement of publication rather than a permanent ban. An order prohibiting publication for an indefinite period carries with it the natural inference not merely that the publication has simply been postponed, but that a permanent ban had been imposed. Accordingly, s.4(2) was, as the judge swiftly recognised, inapt for the making of the initial order.

14. When making his ruling the judge made no reference to s.11 of the 1981 Act and, for completeness, it is plain that this section could not have been relied on as the foundation for the initial order. Section 11 does not arise for consideration unless the court, having the power to do so, withholds the name or other matter from the public in the proceedings before it (see *R v Arundel Justices ex parte Westminster Press Limited* [1985] 1 WLR 708 and in *Re Trinity Mirror plc* [2008] QB 770). It was therefore a pre-condition to the making of the order on the basis of s.11 that the name of the defendant should have been withheld throughout the proceedings.

The 1992 Act

15. We therefore turn to the provisions of the 1992 Act. Section 1 confers lifelong anonymity on complainants in cases which involve sexual offences to which the 1992 Act applies. What however cannot be found in the Act is the conferring of any express power on the court to make an order restricting publication of the defendant's name in order to protect or enforce a complainant's right to anonymity. There are, as it seems to us, a number of difficulties in reading any such power into the 1992 Act. First, the absence of an express power to make such an order is telling. All the more so, given that the only express power to make an order impacting on the complainant's right to anonymity under s.1 is conferred by s.3, which provides that the judge may give a direction which lifts the anonymity of the complainant in a number of carefully defined situations where the interests of justice so require. Second, on the face of it there is no need for any such power. The complainant enjoys the protection provided by s.1, and a contravention of the complainant's right to anonymity involves the commission of a criminal offence. Third, the absence of a judicial power to restrict publication provides a clear demarcation of responsibility. Decisions about what should or should not be published in a newspaper, or for that matter in the media generally, are left to editors and reporters. As we have explained, if section 1 is contravened, they face criminal prosecution.

16. It is clear from this legislative provision that the responsibility for decisions relating to publication is aligned with risk, and it is for those responsible for publication to ensure that the provisions which protect the public identification of a complainant in a sexual case are obeyed. They do so, however, not because they are enjoined to do so by judicial order, but because that is a statutory requirement. In the matter of *B* [2006] EWCA Crim. 2692, at paragraph 25, this court made plain that:

> "The responsibility for avoiding the publication of material which may prejudice the outcome of a trial rests fairly and squarely on those responsible for the publication. In our view, broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice. They have access to the best legal advice; they have their own personal judgments to make. The risk of being in contempt of court for damaging the interests of justice is not one which any responsible editor would wish to take. In itself that is an important safeguard, and it should not be overlooked simply because there are occasions when there is widespread and ill-judged publicity in some parts of the media".

Precisely the same approach should be taken to the risks and responsibilities involved in publication of material derived from the trial which may identify a complainant who is entitled to anonymity.

17. For these reasons we are wholly unpersuaded that any power which vests a judge with jurisdiction to make an order that a defendant should be given anonymity, even when the purpose of the order is to protect the anonymity of the complainant, can be read into the 1992 Act. Looking at the matter broadly, any such powers are not to be lightly inferred. There are very good reasons why defendants are not provided with anonymity, particularly after they have been convicted. For example, in *In re Trinity Mirror plc*. the defendant pleaded guilty to child pornography offences. In the Crown Court a judge granted an injunction to prohibit the identification of the defendant and his children in order to protect the children's ECHR rights. A five judge constitution of this court allowed an appeal by news media organisations. The decision turned on the jurisdiction of the Crown Court. However we underline these observations:

> "32. In our judgment it is impossible to over emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime… From time to time occasions will arise where restrictions on this principle are considered appropriate, but they depend on express legislation, and, where the court is vested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case".

Conclusion

18. We are not here concerned with the kind of extreme case where the identification of the defendant would imperil his life or safety or that of his family. As Lord Rodger explained in *In re Guardian News and Media Limited* [2010] 2 AC 697 at para 26:

> "… in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield: a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed. In such a situation the court may make an anonymity order to protect the individual".

Mr Dodd, rightly in our view, accepted that such a situation, or indeed a significant threat to the administration of justice, might lead to an anonymity order. This may arise at any time although we agree with him that the imposition of some anonymity on the identity of the defendant when his identity had not been concealed during the hearing would be extremely rare. More important, considerations like these did not form the basis for the anonymity direction in the present case.

19. Neither of the present orders, whether made under the 1981 Act or the 1992 Act, can be sustained. The court lacked the necessary jurisdiction. It was for the press to decide how appropriately to report the case so as to ensure the anonymity of the complainant: it was not for the court to instruct the press how to do so by making an order which in effect imposed a blanket prohibition against publication of the defendant's name.

20. Having emphasised what we believe to be the essential principles, we can deal briefly with two further submissions made on behalf of the PA about the 1992 Act. It was suggested by Mr Dodd that for the judge to give any guidance to the press risked usurpation of the editor's discretion about what and how to publish. There, we do not agree. The judge is entitled to express concerns as to the possible consequences of publication, and indeed to engage in a discussion with representatives of the press present in court about these issues, whether on his own initiative, or in a response to a request from them. The judge is in charge of the court, and if he thinks it appropriate to offer comment, we anticipate that a responsible editor would carefully consider it before deciding what should be published. The essential point is that whatever discussions may take place, the judicial observations cannot constitute an order binding on the editor or the reporter. It was also suggested that Rule 16.1 of the Criminal Procedure Rules is less clear and inappropriate because it suggests that the court had a "general open-ended power" to "vary" as well as to remove the protection conferred by s.1 of the 1992 Act. We do not agree. The rules are entirely clear, and we do not think that Rule 16.1 can be read as providing the court with a power which has not been conferred on it by primary legislation.

21. This appeal will be allowed.