

IN THE NEWCASTLE MAGISTRATE'S COURT

REGINA v BRIAN AITKEN

1. This judgement relates to an application made in the trial of Brian Aitken at Newcastle Magistrates' Court on 24<sup>th</sup> September 2014 before District Judge Earl. The trial relates to one count that on the 2<sup>nd</sup> May 2013, he was a person who published information in breach of a direction made by Mid and South East Magistrates' Court on the 30<sup>th</sup> April 2013, under section 39 Children and Young Persons Act 1933 (CYPA 33). The Defendant was at the relevant time the editor of the Journal Newspaper, which published the offending article. There is no dispute that the article published in the newspaper was in breach of the said direction. The publisher owner of the Journal newspaper is NCJ Media Limited who has already entered a guilty plea.

2. The applications are firstly one of no case to answer and in the alternative that the prosecution amounts to an abuse of process, in that it would be unfair to try the defendant (rather than that he would not be able to have a fair trial). I have read the bundles supplied by both parties and have considered both the skeleton arguments filed herein and the submissions thereon from Counsel for the Defence, Mr Baylin and for the Prosecution, Miss Michalos.

3. There are two sections of similar import in the CYPA 33, sections 39 (discretionary publication restrictions in non-youth court criminal matters) and section 49 (mandatory publication restrictions in youth court cases). Section 39 can be disapplied by the courts discretion for a number of good reasons but section 49 cannot.

4. Section 39 CYPA 33 as originally enacted stated:

*"39 Power to prohibit publication of certain matter in newspapers.*

*(1) In relation to any proceedings in any court which arise out of any offence against, or any conduct contrary to, decency or morality, **the court may direct that—***

*(a) **no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person against or in respect of whom the proceedings are taken, or as being a witness therein:***

*(b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.*

***(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding fifty pounds”***

The Highlight parts are relevant herein.

5. Section 49 of the CYPA 33 as originally enacted states the same test for the mandatory offence and section 49(2) is identical to section 39(2) above.

6. Section 39 has since originally passed been through three amendments in the Children and Young Persons Act 1963, the Criminal Justice Act 1982 and the Youth Justice and Criminal Evidence Act 1999. but remains substantially as originally passed in 1933. Section 39(2) remains the same although the penalty is now level 5 on the standard scale (currently £5000). However, what is important for this purpose is that Parliament has had three opportunities to amend section 39(2) and has only amended the penalty , thus far.

7. Section 49 has been substantially amended, in contrast by the Criminal Justice and Public Order Act 1994. In essence it has been re-written in a more modern way and in more detail. The

relevant part for this purpose is the amendments to the original section 49(2). It is now contained in section 49(1) which states:

***“49(1) If a report or picture is published or included in a programme service in contravention of subsection (1) above, the following persons, that is to say —***

***(a) in the case of publication of a written report or a picture as part of a newspaper, any proprietor, editor or publisher of the newspaper;***

***(b) in the case of the inclusion of a report or picture in a programme service, any body corporate which provides the service and any person having functions in relation to the programme corresponding to those of an editor of a newspaper,***

***shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.”***

8. So in section 49 it can be seen Parliament has amended the phrase “any persons” to specify the persons, who may be prosecuted for breaching the non-publication directive of the section. The defence in this case argued that this new wording widens the scope of the persons who may be prosecuted whereas the prosecution argue it restricts the earlier interpretation by virtue of specifying the persons. The prosecution also argue that if Parliament wished to amend the wording in section 39 similarly, it had opportunities to bring it back into line with section 49 but has not done so. The defence aver that if their interpretation is right, then there cannot be a case for their editor client, the defendant to answer. That is because if the old wording **was** more restrictive than the current in section 49, then the original wording in section 39 (2) must likewise have been too restrictive to include the editor in “any persons”.

9. In the Interpretation Act 1978 Section 5 and Schedule 1 the term “persons) is defined for any Act, unless the Act states differently. It defines person as :

***“includes a body of persons corporate or incorporate”***

My view is thus that “person” can be defined widely, more so than just a company. In this case, it has been argued that if such is the case it catches the journalist who wrote the piece, the editor **and** the publishing company.

Other statutes do have a similar construction to that of the amended section 49. However, although there may or may not be for good reasons or simple logic for that being the case. In many if not all of them, there is provision for due diligence defence that remains absent in section 39. That is of note but remains academic in this case since Parliament has not seen fit to bring forward legislation to amend section 39 in that direction. It may be relevant again that section 39 is discretionary whilst section 49 is essentially mandatory but that is not a matter for this court.

10. The defence also argue that Article 10 of the European Convention on Human Rights and Personal Freedoms is engaged guaranteeing the right to freedom of expression, to hold opinions and to impart them without interference. However, it contains a derogation in certain cases and states it may be *“subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...”*. Thus it is not an absolute right. This was considered in *Marie O’Riorden v DPP [2005] EWHC 1240 (Admin) at paras 26 and 27*. Although concerned with a different statute, namely sections 1 and 5 of the Sexual Offences (Amendment) Act 1992, the principles to be derived are the same, in my opinion. As Rose LJ stated therein,

*“In my judgement, this court is entitled to derive sustenance from it [the case of Brown v the United Kingdom EU number 44223/98 in 2002] to support the conclusion that the statutory offence, albeit of strict liability, was framed in terms properly to be regarded as proportionate and necessary in a democratic society for the protection of victims in rape cases. There can, in my judgement, be no different conclusion in relation to child victims of sexual offences”*.

11. I am satisfied that there is no substance to the submission of no case to answer in this case. Firstly, the Article 10 argument has no foundation in a just and democratic society where allegations

of sexual abuse of children are concerned as in this case. Secondly, that section 39 and section 49 had the same start point in 1933, does not mean that Parliament has remained of the same view since. That cannot just be because parliamentary language has changed though because, clearly, they have amended section 49 quite markedly but not section 39, despite having had the opportunities so to do. Was the original wording was more or less restrictive in section 49 as originally enacted? I do not agree with the defence submission on this point and I am with the prosecution that the amendment to section 49 (2) is more restrictive by naming those who may be prosecuted, rather than the term, "any persons". I believe the earlier term caught all of those in the later term AND others perhaps too. For example, the journalist would have been covered originally perhaps, but specifically not now.

12. It may be that Parliament did not intend to alter section 39 as it had with section 49 given that the latter was mandatory and the first discretionary. Applying a discretionary order to a wider body would seem to make more sense than for a mandatory order perhaps. However, I am also bolstered in my view by the Interpretation Act 1978 as cited and the basic rule that is to give effect to the natural usage of the statute. Whilst the defence did argue that only the publisher can publish, I am more attracted to the prosecution argument, that the word "publishes" in section 39(2) in the CYPA 33 refers to the person who publishes (the verb) rather than to the periodicals owner, the publisher (noun). I am also attracted to the prosecution argument that subsequent amendments to a section 49 does not, of itself, cast new meaning on the original section 39 in the Act. If Parliament intends to keep the meanings the same, it should do so.

13. Turning to the abuse of process argument, the defence rely upon the particular facts of the case. In short, the editor of a sister publication, the Chronicle, carried the same story and he is not being prosecuted. The CPS aver that his circumstances were a little different and applying the prosecutorial code, they took the view that such prosecution was not likely to succeed or was not in the public interest. The same argument was advanced in that the journalist was not prosecuted and

that he would be caught by the section if the editor was and he was the person at court who was aware of the mischief being caused directly. Whilst an interesting issue, I do not believe either take the case to an abuse of the process of the court. The fact the CPS take a view in relation to each cases circumstances does not, of itself lead to an abuse in the cases they do legitimately seek to pursue.

14. There is a public interest in seeing that the court's directions are followed in matters where they have exercised their appropriate discretion and other parties have had the opportunity to challenge then legitimately. To then flout the decision of the court must be dealt with, if not to protect the integrity of the court ruling, then at least to protect the individual youth for whom the protection was intended.

15. The argument as to whether the CPS should prosecute or not is part of the regulatory function of the High Court and is not an appropriate function of the Magistrates' Court. This is stipulated in the case of *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1993] 3WLR. Being satisfied that there are no matters affecting the ability to conduct a fair trial of the defendant, the "wider supervisory jurisdiction" is vested in the High Court per Lord Griffiths. Thus this court cannot entertain such a matter as is envisaged by the defence. As to the public interest issues and proportionality of the prosecution, whilst not also pursuing the editor of the sister publication and the journalist and given that he did not directly make a decision to publish in contravention of the section 39 direction, those are such High Court functions as envisaged.

16. The final aspects of this case raised by the defence that the prosecution should not proceed relate to the outcomes of the breach of the section 39 direction, such as whether the naming of the teacher the school and age of the victim constitute details likely to lead to the identification of the victim. Whilst such matters are important they go to sentencing, not to the question of whether or not this trial should proceed.

Stephen Earl

District Judge (Magistrates' Courts)

Northumbria

Decision Rendered Orally 27 October 2014