Neutral Citation Number: [2005] EWCA Crim 1983

Case No: 2005/01768 C5

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT, TEESIDE
(THE RECORDER OF MIDDLESBOROUGH)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 26 July 2005

Before :

LORD JUSTICE MAURICE KAY
MR JUSTICE FIELD
and
SIR JOHN ALLIOTT
(Sitting as a Judge of the Court of Appeal Criminal Division)

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Between :

REGINA
- and -
TEESIDE CROWN COURT– ex parte GAZETTE MEDIA COMPANY LTD AND OTHERS **Appellant**

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- -

Mr Anthony Hudson for the **Appellant**
Mr Philip Havers QC on behalf of the **Attorney General**

Hearing date: 7 and 15 July 2005

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Judgment

Lord Justice Maurice Kay :

1. This case concerns an order made under section 39 of the Children and Young Persons Act 1933. The order relates to proceedings in the Crown Court at Teeside in which two men, S and L, were being prosecuted for offences contrary to section 1 of the Protection of Children Act 1978 and for conspiracy to rape. The police had seized two computers belonging to S. It was established that he was in contact with L whom he had never met and who lives at the other end of the country. S and L shared an interest in indecent photographs of children. S took such photographs of his 11 year-old daughter and transferred them electronically to L. As a result of further e-mails between S and L it was agreed that L would have sexual intercourse with S's daughter with S as an observer. S and L discussed administering a substance to the daughter to facilitate the sexual intercourse. S and L also corresponded about the photographic recording of the act.

2. When S and L appeared in the Crown Court, S was charged with offences of making or distributing indecent photographs of his daughter and with the offence of conspiracy to rape. L was charged with the conspiracy to rape and also with offences of making and distributing indecent photographs of a child.

3. On 12 October 2004 the Recorder of Middlesborough made an order under section 39 of the Children and Young Persons Act 1933. The relevant parts provided as follows:

> "No reporting of any proceedings in respect of R v S and L. No identification of the defendant S by name or otherwise the nature of the case against him the identification of the alleged victim [S's daughter] her age place of abode or any circumstances that may lead to her identification in connection with these proceedings."

4. In due course S pleaded guilty to nine Counts relating to offences contrary to section 1 of the Protection of Children Act 1978. He pleaded not guilty to the conspiracy but was convicted of it on 18 February 2005. He was sentenced to a total of 14 years' imprisonment on that day but on 4 March 2005 the Recorder reviewed the sentence and reduced it to one of 10 years. L pleaded guilty to eight Counts relating to offences contrary to section 1 of the Protection of Children Act. He too pleaded not guilty to conspiracy to rape but was convicted of it on 18 February 2005. He was initially sentenced to 12 years' imprisonment but the sentence was reduced on review to eight years' imprisonment.

5. Solicitors acting for media interests wrote to the Recorder complaining about the wording of the order under section 39. A member of the court staff replied stating that the Recorder was unwilling to reopen the matter or to engage in any correspondence about it. On 30 March 2005 the present application was made on behalf of three media companies pursuant to section 159 of the Criminal Justice Act 1988. That section permits a person aggrieved to appeal to the Court of Appeal against "any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings". Such an application requires

the leave of the Court of Appeal and section 159 provides that "the decision of the Court of Appeal shall be final".

6. By the Criminal Appeal Rules 1968, Rule 16A an application for leave to appeal under section 159 is to be made within 14 days after the date on which the order was made. It follows that the application in this case was substantially out of time. The application first came before us on 7 July 2005. On that occasion we extended time and granted leave but we adjourned the hearing of the appeal because we considered it desirable that someone should make submissions reflecting the interests of S's daughter. At the time, S and his wife had indicated an interest in appearing as respondents but each was experiencing funding difficulties. Accordingly we ordered that either one of them or the Official Solicitor might be represented at the adjourned hearing. In the event, neither S, his wife nor the Official Solicitor participated in the adjourned hearing but the Attorney General instructed counsel who has assisted the court and communicated the views of the Official Solicitor.

7. The first point of the appeal can be resolved without difficulty. It is common ground that the wording of the order went beyond that which is permissible under section 39. The leading authority is *ex parte Godwin* [1992] 1 QB 190. There the order included a provision that "the names and addresses of the defendants shall … not be revealed or published". Giving the judgment of this court, Glidewell LJ said (at pages 196H – 197B):

> "We are persuaded that the arguments for the appellants are correct. In our view section 39 as a matter of law does not empower a court to order in terms that the names of defendants be not published. It may be that on occasions judges who are concerned with making an order of this kind will think that it will be helpful to have some discussion about the identification of particular details and may give advice. Our combined experience is that judges in the Crown Court not infrequently give advice which representatives of the media invariably respect. But we are here concerned with the formality of what may be contained in an order under section 39. In our view, the order itself must be restricted to the terms of section 39(1), either specifically using those terms or using words to the like effect and no more."

8. The terms of section 39(1) are as follows:

> "In relation to any proceedings in any court … 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 [by or against] or in respect of whom the proceedings are taken, or as being a witness therein;

> (b) no picture shall be published in any newspapers 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."

9. Thus, an order which expressly uses the terms of section 39(1) is not specific as to the "particulars calculated to lead to the identification". It is clear beyond doubt that the order made by the Recorder in the present case flew in the face of what *Godwin* had decided. It is common ground that the embargo on reporting of the proceedings as expressed in the first sentence of the order could not lawfully be included in the order. It is also common ground that, if *Godwin* survives as an unqualified statement of the law, the embargo on the identification of S cannot stand.

10. It is at this point that Mr Havers QC, on behalf of the Attorney General, seeks to limit the effect of *Godwin*. He submits that, whilst a total embargo on the reporting of the proceedings remains unlawful, since the coming into force of the Human Rights Act 1998 the prohibition of the naming of a defendant so as to protect the interests of a child may be possible. The argument is as follows: (1) Section 3 of the Human Rights Act requires primary legislation to be read and given effect in a way which is compatible with Convention rights. (2) S's daughter has a right to respect for her private life under Article 8 of the Convention. (3) It is necessary to include in the terms of the order under section 39 that S should not be identified in order to protect his daughter's Article 8 right.

11. If Article 8 stood alone, this reasoning would have greater force. However, it co-exists with Article 10 and the right to freedom of expression. The relationship between these two Articles was considered by the House of Lords in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1AC 593; [2004] UKHL 47. Part of the headnote reads as follows:

> "Where the right to private and family life under Article 8 … was in conflict with another's right to freedom of expression under Article 10 … , neither Article as such had precedence over the other, the correct approach being to focus on the comparative importance of the specific rights claimed in the individual case, with the justifications for interfering or restricting each right being taken into account and the proportionality test applied to each; … Although the ordinary rule was that the press could report everything that took place in a criminal court, it was the duty of the court to examine with care each application for a departure from the rule by reason of Article 8, but in so doing the court was not, given the number of statutory exceptions to open court reporting, to create further exceptions by a process of analogy save in the most compelling circumstances; … On an application of those principles, the interference with the child's Article 8 rights, albeit distressing, was indirect and not of the same order when compared with cases of juveniles directly involved in criminal trials; … By contrast, the Article 10 rights at issue concern the freedom of

> the press, subject to statutory restrictions, to report proceedings at criminal trials, which was a valuable check on the criminal process and promoted public confidence in the administration of justice."

12. The latter part of the headnote is a reflection of the speech of Lord Steyn at paragraph 20 where he said:

> "Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice."

13. Whilst *S* was not directly concerned with the scope of section 39, it illustrates the difficulty which is faced when an attempt is made to invoke Article 8 in circumstances such as these. In effect, the balance is struck by the primary legislation. We do not consider that, in this case, there is scope for extending the restrictions on freedom of expression beyond what is provided by statute as construed in *Godwin*. In an alternative submission, Mr Havers suggests that, quite apart from the Human Rights Act, we should not consider ourselves bound by *Godwin* because he has advanced a construction argument which was not before the Court in *Godwin*. The argument is that because the final words of section 39(1) permit the wording of an order to exclude things which would otherwise fall within the restriction, it must follow that the order may add specifics over and above the words of the section. We do not accept this submission. It seems to us that it was considered and rejected in *Godwin* (see p.196A-C). Accordingly we decline the invitation to depart from *Godwin*. We do not consider that this is the sort of case in which such a departure could be justified by reference to the recent authority of a five judge Court in *Simpson* [2004] QB118, [2003] EWCA Crim 1499.

14. In these circumstances we are unable to accept the submission of Mr Havers that we should simply delete the first sentence of the order made by the Recorder. It is also necessary to delete the express restriction on the identification of S. Similarly, the restriction in relation to "the nature of the case against him" cannot survive.

15. On behalf of the media interests, Mr Hudson submits that the appropriate course is to quash the order in its entirety and not to replace it by an appropriately worded section 39 order. He does not question the need to protect the identity of S's daughter but he contends that this will be achieved by the automatic operation of section 1 of the Sexual Offences (Amendment) Act 1992. By section 1(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 committed ("the complainant") shall during the complainant's lifetime –
>
> (a) be published in England and Wales in a written publication available to the public; or

> (b) be included in a relevant programme for reception in England and Wales."

16. Mr Hudson observes that the protection under the 1992 Act is, in effect, more extensive than that under section 39. It begins at an earlier stage, in that section 1(1) applies from the making of the allegation, and it continues throughout the complainant's lifetime. In these circumstances, an order under section 39 is superfluous. Moreover, the current trend is in the direction of automatic statutory restrictions rather than resort to court order. This is apparent not only from section 1 of the 1992 Act. It is also discernible in provisions relating to youth courts: see section 49 of the 1933 Act and section 44 of the Youth Justice and Criminal Evidence Act 1999 (which has not yet been brought into force).

17. The enthusiasm of Mr Hudson and his clients for this approach knows no limits. It is taken to be a virtue that initial decisions in relation to restriction pass from trial judges to the media. This is how it is put. Reference is made to paragraph 7 of the Press Complaints Commission Code of Practice, headed "Children in Sex Cases". It provides:

> "1.The press must not, even if legally free to do so, identify children under sixteen who are victims or witnesses in cases involving sex offences.
>
> 2.In any press report of a case involving a sexual offence against a child –
>
> (i) The child must not be identified.
>
> (ii) The adult may be identified.
>
> (iii) The word "incest" must not be used where a child victim might be identified.
>
> (iv) Care must be taken that nothing in the report implies the relationship between the accused and the child."

18. Our task is to consider whether this deference to automatic restriction via section 1(2) of the 1992 Act provides a sufficient protection in the present case. As Mr Hudson was eventually constrained to concede, quite clearly it does not. The reason is that, whilst conspiracy to rape is an offence to which section 1 of the 1992 Act applies, offences under the Protection of Children Act do not fall within section 1 of the 1992 Act. (Since the hearing, Mr Hudson has suggested by way of written submission that his concession was inappropriate but we do not agree.) In our judgment, that in itself necessitates the making of a section 39 order in the present case. What we shall do is to quash the original order in its entirety and substitute a new order in conventional *Godwin* terms. S's daughter will therefore be protected, to the extent that this is possible, by the section 39 order and by the provisions of section 1 of the 1992 Act.

19. We feel it appropriate to add these comments. They should be seen as the equivalent of the advice which Glidewell LJ considered it appropriate for trial judges to give when making section 39 orders. It is at least implicit in Mr Hudson's submissions

that, in the face of a proper section 39 order and the protection provided section 1 of the 1992 Act, there is no restriction on the reporting of S's name. As it happens, because they considered that the original section 39 order was flawed, newspapers have reported S's name and referred to the victim as "an 11 year-old schoolgirl". We do not consider it to be axiomatic that reporting of that kind would comply with a proper section 39 order or avoid a breach of section 1 of the 1992 Act. Offences of the kind established in this case of S and L are frequently committed by fathers and stepfathers. The history of photography and the planning of further offences are indicative of a close relationship between the offender and the victim. If the offender is named and the victim is described as "an 11 year-old schoolgirl", in circumstances in which the offender has an 11 year-old daughter, it is at least arguable that the composite picture presented embraces "particulars calculated to lead to the identification" of the victim. We record that, on behalf of the Attorney General, Mr Havers supports this view. We make no secret of the fact that, if it were not for *Godwin*, we would have construed section 39 as enabling an express restriction of the naming of S and we would have included such an express restriction in the order. However, and notwithstanding the attempt of Mr Havers to persuade us to the contrary, we do not feel able to depart from the *Godwin* approach. We regret that, to an extent, it is creative of uncertainty which, for their own reasons, media interests prefer. It seems to us that it makes prosecution for offences under section 39 more difficult and, in some cases, it invites a submission that the order is unenforceable for reasons of uncertainty: see *Briffett v Crown Prosecution Service* [2002] EMLR 12. All this disposes us to the view that we regret the limitation which *Godwin* places on the drafting of orders and we further regret the forthcoming statutory abandonment of orders in criminal trials wholly in favour of so-called automatic restriction. We cannot believe that essential child protection is being enhanced by these developments.

20. For the record, we allow this appeal, quash the order made by the Recorder and substitute a new section 39 order in conventional terms.