

Neutral Citation Number: [2017] EWHC 1845 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 17 May 2017

BEFORE:

THE HONOURABLE SIR MICHAEL TUGENDHAT

BETWEEN:

BILAL AHMED

Claimant

- and -

EXPRESS NEWSPAPERS
ASSOCIATED NEWSPAPERS LIMITED

Defendant

MR S AHMED (MYM Solicitors) appeared on behalf of the Claimant
MS C MICHALOS (instructed by Express Newspapers) appeared on behalf of the Defendant
MS C EVANS, QC (instructed by ACK MEDIA LAW LLP) appeared on behalf of the Defendant

JUDGMENT
(As Approved)

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8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.dtiglobal.com Email: courttranscripts@dtiglobal.eu
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If this transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

1. THE HONOURABLE MR JUSTICE MICHAEL TUGENDHAT: A report published by the BBC on 4 June 2014 is headed, "Three Guilty in Oxford Teen Sex Attack Case". It is illustrated with a picture of the Claimant together with the two other convicted defendants. It includes the following, "Two men sexually assaulted a pregnant teenage girl before a third threatened to shoot her". It continues:

"The girl, who was 17 at the time, was attacked after a night out in Cowley Road, Oxford in December 2011. Zeeshan Ahmed was sentenced to 18 months for perverting the course of justice and his cousin Bilal Ahmed, 27 [that is the Claimant], was jailed for three and a half years for serious sexual assault."

2. The BBC also reports the words of the Chief Crown Prosecutor, commenting on the conviction, who said, "The men who have been convicted are nothing less than vicious sexual predators". There are other contemporary reports in a similar vein.
3. The words complained of in the present case, against Associated Newspapers Ltd, include the following, which were published on 29 to 30 January 2016:

"The three Somali men who gang-raped a white 16-year-old girl in the bathroom of a hotel where they went to celebrate Eid have been jailed for 30 years.

Muhyadeen Osman, Bilal Ahmed and Mowled Yussef, all now 20, were just teenagers when they attacked the girl in the Victoria Park hotel in Manchester regarding her as, 'easy prey', the court heard.

The group, who were then all aged 17, had spent the previous night in the hotel with a number of other men as part of Eid celebrations when one of their friends who had met the girl on BlackBerry messenger, who had brought her round, saying she should, 'meet his boys'.

In the run up to the assault, the group moved from room to room looking for unlocked doors to hide from a porter. They eventually got into her bedroom where Yussef was first to force the girl to perform a sex act on him in the bathroom.

Despite her repeatedly telling the group she didn't want to have intercourse, she was forced to perform a sex act on Ahmed before he raped her.

Osman then joined in after he he'd been hanging around outside the door. He then moved her to the bed and raped her himself.

Their victim, now a university student, was left alone as the gang dispersed only to realise that her mobile phone and cash had been taken from her handbag.

She initially only reported the theft the day after the attack but in 2013 she revealed the extent of her ordeal. DNA matching the offenders was recovered from the scene and she later picked the men out in identity parades.

In a victim impact statement read to the court the teenager said she no longer felt confident to go out of the house and her education had suffered.

At Manchester Crown Court, Yussef, who was convicted of rape, oral rape and assault by penetration following a trial, was jailed for 10 years.

Ahmed, who was convicted of oral rape, was locked up for 9 years whilst Osman got 12 years after being convicted of an unrelated

robbery in which he mugged an innocent man on the street for his rings and mobile phone was also taken into account.

In dramatic scenes outside the courtroom around 60 members of Manchester's Somalian community protested against the verdicts suggested the three men were being, 'victimised' because of their race while the victim was a white Brit.

They managed to pile into the public gallery and gasp as the sentences were handed down while Yussef flicked a little finger at the mother of their victim who was present.

The court heard the girl was on her summer holidays between school and beginning A levels when she began talking to a friend of the gang Ibrahim Jama on BlackBerry messenger.

They exchanged messages and agreed to meet - but as Jama met her at a bus stop shortly before 11.00 am, he soon convinced her to perform a sex act on him in an alleyway.

Prosecuting, Henry Blackshaw said, 'He then made references to 'his boys' that were at the Victoria Park hotel so she accompanied him. Once in the hotel, she was then involved in what was talked about as a game of going to hotel rooms with the group and hiding away from the porter'.

CCTV then captured the group and the girl disappearing into one hotel room for around 30 minutes while the attacks took place.

The court heard that all three men continued to protest their innocence and other men who had a sexual encounter with the victim on the same day have not been arrested.

On behalf of Osman, Michael Goldwater said, 'What these defendants did wrong is allowing themselves to believe themselves this young lady was willing to perform virtually any sex act on all of them and failing to make an enquiry about her willingness or indeed to care very much one way or the other. These were young immature men who got carried away'.

But jailing the men, Judge David Hernandez said, 'This was a large group of young men in a hotel and the inference is you all saw her as easy prey. She didn't really understand what was on your mind and that is probably because she was a naive and sexually inexperienced and vulnerable girl. When you were running around the hotel she probably saw this as innocent childish fun but it all turned sinister when you put her into the bathroom. She found herself in a situation she was totally unable to control. She found herself confronted with demands for sexual activity she did not wish to engage in and did not willingly consent. She had no choice and no opportunity to refuse'.

Jama was cleared of conspiracy to commit rape during the trial."

4. Those are the end of the words of the article complained of. They include erroneously, of course, a photograph of the Claimant.
5. The meaning pleaded on behalf of the Claimant against Associated Newspapers is as follows:

"The publications in their natural and ordinary meaning meant and were understood to mean that the Claimant was guilty of, 'gang rape' of a 16-year-old naive white girl who was described as being of another race, namely Somali. It was meant that the Claimant was a sexual predator preying on naive young white girls. A

photograph of the claimant, which formed part of the news article, was clearly printed and plainly identified. The Claimant will aver that his photograph, which was included in the news article, resulted in the Claimant being identified by those who knew him and made him visible to those who had not previously known of the claimant."

6. The words complained of as against, Express Newspapers, the publishers of the Sun newspaper, the First Defendant, are shorter but not materially different. It is not necessary to read them out. The meaning complained of as against them is pleaded in identical terms to the meaning pleaded against Associated Newspapers Ltd.

7. The Defamation Act 2013, section 1, provides as follows:

"(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant..."

8. The meaning of that section of the 2013 Act has been considered in a number of cases of which the most significant, for present purposes, is *Lachaux v Independent Print Limited* [2015] EWHC 2242 (QB) [2016] QB 402. Again, for present purposes, it is sufficient if I take from the headnote of the law report the effect, as explained by Warby J in that case:

"Section 1(1) of the Defamation Act 2013 did not substitute a new definition of the term “defamatory” but, rather, added to the common law definition of the term by providing that the “serious harm” requirement be met; that in order to satisfy the “serious harm” requirement in [section 1\(1\)](#) of the 2013 Act it was insufficient for a claimant to show that the words complained of had a tendency to cause serious harm to his reputation; that, rather, a claimant had to prove that serious harm to his reputation had

already been caused by, or was likely to result in future from, the publication complained of; that, when determining the question of serious harm, the court was not confined to considering only the defamatory meaning and harmful tendency of the words complained of but could have regard to all the relevant circumstances, including evidence of what had actually happened after publication; ..."

That decision is the subject of an appeal to the Court of Appeal. Judgment was reserved and is, at present, awaited.

9. In the present case neither of the Defendants ask the court to make a ruling on meaning for the purposes of their applications, namely for summary judgment, or to strike out the claim. It is obvious that the words complained of, together with the photograph of the Claimant, carry a seriously defamatory meaning. For present purposes, the court can safely proceed assuming (without deciding) that the meaning is the meaning to be attributed to the publication by the claimant.
10. Ms Evans reminds the court of the proper approach to a summary judgment application under the Civil Procedure Rules, Part 24. The approach was summarised by Lewison J, as he then was, in *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339, paragraph 15:

"(1) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success. [I omit the citations.]

(2) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

(3) In reaching its conclusion, the court must not conduct a 'mini-trial'.

(4) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

(5) However, in reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence that can reasonably be expected to be available at trial.

(6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(7) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will, in truth, have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although the material in the

former documents or oral evidence that would put the documents in another light that is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a variant on the question of construction."

11. There is no dispute in this case about the extent of publication. There is detailed uncontested evidence put before the court by each of the Defendants. I do not need to refer to it because, even though the material complained of was accessible online only for a short period, the numbers of those accessing the websites in question were in thousands. On any view, this is a substantial publication in terms of the number of publishees.
12. The real issue in this case is as to the effect of the conviction in Oxford in 2014. The Defendants submit that it is evidence in relation to section 1 of the 2013 Act. This submission is one that is well-established under the previous law in a different context. They submit that a criminal conviction is in the relevant sector of the claimant's life, if it is not spent, and that it is admissible in mitigation of damage as evidence that the claimant has a general bad reputation.
13. Before the 2013 Act, evidence of convictions had been held sufficient to justify the striking out of a claim as an abuse of process before the trial of an action. Ms Evans cites *Williams v MGN* [2009] EWHC 3150 and *King v Grundon* [2012] EWHC 2719, QB. That was a case decided by Sharp J, as she then was, who included the following in her judgment:

"(32) For present purposes, it is also relevant to observe that a long-established foundation of the law of defamation is that it 'Will not permit a man to recover damages in respect of an injury to a

character which he does not or ought not to possess': *M'Pherson v Daniels* [1829] 10 B & C 263 and 272.

(33) In this context, regard has to be had to the effect of previous convictions on a person's reputation. Previous convictions within the relevant sphere of a claimant's reputation are admissible as evidence of general bad reputation. They are the raw material upon which bad reputation is established and are, 'the best guide to [a Claimant's] reputation and standing: see the observations of Lord Denning, Master of the Rolls, in *Goody v Odams Press Limited* [1966] 1QB 333 at 340G and 341C."

14. Sharp J continued:

"(36) First, in my view, it is fanciful to suppose, in the light of the facts to which I have referred, that the Claimant's conviction in New Zealand, his subsequent disbarment in the reports that those gave rise to, that the Claimant has a reputation in the relevant sector of his life which is capable of being vindicated by these proceedings.

(37) In my judgment, the reality is he has none which is capable of being vindicated in these proceedings. I regard this case in this respect as on all fours in the decision in *Williams* approved by implication by the Court of Appeal in *Lait [v Evening Standard* [2011] EWCA Civ 859, [2011] 1WLR 2973]. In this context, it is important to note two things. First, the conviction is not only entirely directed to the relevant sector of the Claimant's reputation which the words complained of put in issue, but is also an essential part of the words complained of. Second, none of the Claimant's convictions are spent convictions under the Rehabilitation of

Offenders Act 1974 ... because of the seriousness of the offences and his seven-year jail sentence."

Sharp J had earlier stated that in that case the claimant's conviction, his sentence and expulsion from the English Bar had been widely reported in this jurisdiction.

15. Ms Evans also notes that an analogous principle has emerged in the jurisprudence of the European Court of Human Rights in *Axel Springer AG v Germany* [2012] 55 EHRR 6, paragraph 83. In my judgment, nothing is added by reference to that jurisprudence.
16. Accordingly, in the light of the law, Ms Evans submits that at the time of the publication complained of, namely overnight on 29 to 30 January 2016, the Claimant's reputation was that of a convicted serious sex offender who had committed a horrible and depraved sexual assault on a vulnerable and pregnant 17-year-old girl for which he had received a three and a half-year prison sentence. That, she submits, remains his reputation today. , As is usual in the modern age, the reports of his conviction and sentence in 2014 are available to anyone who uses an Internet search engine. She stresses that the conviction was less than two years before the publication complained of, and must have been within a relatively short time of his release on licence from prison for that offence, whenever that release took place.
17. It is clear from the Claimant's own witness statement that he was still in touch with the probation services at the time. The conviction in Oxford in 2014 is not one which was, or could be, spent. It is not in dispute that, in terms of seriousness for the purposes of sentencing, the offence for which the claimant was convicted in 2014 is of the same order of gravity as the offence of which he was not convicted, but wrongly accused, in 2016.
18. The particulars of serious harm are set out both in Particulars of Claim against the two defendants and in a witness statement. In the Particulars of Claim it is pleaded:

"(a) The publication has identified the Claimant from his photograph,

(b) The publication has been read by hundreds and thousands, including members of the community and his family, namely his parents, siblings, aunts, uncles and cousins which are false, defamatory and the Claimant suffered considerable hurt, distress and embarrassment. Many, as a result of the publication/article sought to disassociate themselves from the Claimant.

(c) The Claimant's friends who have children broke off ties and contact with him fearing that the Claimant possessed a sexual predator disposition against young girls.

(d) The Claimant was approached by members of the local mosque who told the claimant that he was not welcomed in the mosque.

(e) The Claimant received calls and threats from persons who did not identify themselves. The claimant and his family were informed by the police that they were subject to danger. The nature of the threats were directly linked to the publication, the Claimant being called a pervert, a paedophile, and it was said to him that he would be sorted out. Many silent calls which were intimidating and harassing in nature caused serious harm to the Claimant and resulted in the conflict with his immediate family,

(f) As a result of the publication, the Claimant would aver that he was excluded from local community. His gym and friends and members of his family also disassociated themselves from the claimant."

19. The claimant's witness statement was made on 14 February 2017, some three months ago. In it he states that the article is still circulating online with a thumbnail of his photograph. The defendants have informed me that they are unable to identify what he is referring to and he, himself, has not exhibited any evidence of that thumbnail photograph. In these circumstances, I am paying no regard to that for the present purposes.
20. The Claimant describes what he says are the relevant matters in the following paragraphs:

"(4) Emotionally, life has been very challenging for me because this incident has affected my relationships with my family, friends, my social life and the community as a whole. A distance has emerged between me and my family members. My friends do not wish to associate with me. My daily life routines have been affected.

(5) My cousin, who is from High Wycombe, called me in the morning of the published article. I had just woken up and didn't believe it at first. Firstly, I thought it was a nightmare and then I thought it was a joke.

(6) I then went online and checked whether it was true. I saw the article and felt sick and dizzy. I called my cousin who told me that some friends of his had told him after they had seen the news in the Daily Mail.

(7) The phone call made me feel vulnerable and stressed out. I started crying and called the police, as I didn't know what to do to stop the nightmare. I was scared to go out and to answer the phone. The abuse and constant name-calling was happening nearly on a daily basis and this was becoming unbearable. I was afraid to

leave the house. I was scared to face my immediate family, dreading that they might not believe me. My sister, Samray Ahmed, found out about the article from her friend. My sister and her friend both emailed, wrote letters and called the papers to try and stop everything, as I was unable to face any of it. My sister and her friend also contacted the picture provider ...

(8) When the newspapers denied making an error by publishing the wrong picture and details of me I felt as if the papers didn't care and were not taking the matter seriously. I thought that I would have to work twice as hard now for people to believe me that I had changed. I still had a lot of work to do to prove to people that I was a changed person, had put my past behind me and had started feeling better in the recent months. I felt that a very dark past was behind me. I had fought so much against everything to be able to move on with my life and I finally felt as if I was succeeding. I had turned to my religion more and people were putting the first experience down to a genuine mistake rather than to me being a repetitive criminal. I felt as if I had gradually accepted and was being given a chance, a new lease of life. My friends and family knew that it was a one-off thing and they knew me and how much I had been through. They understood that I was sorry and they genuinely felt for me, I think. I meant everything that I had done and said to gain their trust back."

21. He then continues at paragraph (15):

"I feel that my father is very paranoid and avoids going out most of the time. My father has heard people, when they walk past, making nasty comments and that sometimes it turns into verbal abuse. My family were sitting in the front room one of the very few nights where I decided to join the family in the front room and

my father received a call from a withheld number and the person on the line called him a, 'scumbag' and various other swear words. My frail father got very angry and was clearly very hurt. He went red in the face and got up from the sofa and started walking around. I believe the gestures my father was doing were from the frustration he was feeling. All I could do was try and avoid eye contact with my father and, after a few minutes, I left the front room. For a few moments afterwards, I didn't join my family at night to watch TV, et cetera. I called the probation officer regarding the phone calls but no other action was taken. Me and mine kept receiving abusive phone calls, so we had no choice but to change our phone numbers. After the article was published, and I was feeling down, I was advised to start eating well. I decided to follow the advice in the hope that I would start feeling a bit better although I very much doubted it. I started going to the gym and used to play cricket but it all came to an end. I would walk in the street. From when I left the house to the gym, I was constantly abused. Maidenhead is a very small community and everyone knows each other's business and I was the talk of the town. I would walk in the street and people would shout from the car window, 'Where is your Somalian gang?'. I'd feel so embarrassed and wished that the ground would swallow me up."

22. At paragraph (18) he wrote:

"Prior to the article being published, I had started to have a positive outlook towards life and was a very sociable person. I feel that my mental state has been very much affected because before I was outgoing and very social and now all I want to do is be on [my] own. I have visited [my] GP and my doctor and has suggested counselling but I refused it as I felt that he had to re-live everything

I had been through. I was trying to forget but how could I when I was being reminded of it every day."

23. He then describes some medical treatment and concludes the witness statement at paragraph 22 saying:

"I, therefore, ask the court to consider this statement which has been prepared under considerable time constraints and proceed with the matter to be adjudicated at trial, and I invite the court to dismiss the defendant's application."

24. It is right to say that the Defendants did not accept that they ever denied that they had made a mistake, and the prompt timing of the taking down of the picture makes it difficult to follow what the Claimant is referring to by such denial. Although he states that he was under time constraint in preparing the witness statement on 14 February, he has not taken the opportunity in the intervening three months to make a further witness statement.

25. He has produced a letter from his probation officer dated 8 February 2017. The letter is addressed to him and includes the following:

"This letter is to confirm the information that I recorded during the supervision session on 3 February 2016 following your picture being incorrectly printed in the newspaper. Bilal was very distressed in this session and said that his photo had been printed in the national newspapers linking him to a sexual offence that he did not commit (previously discussed in phone contact). He said that his picture came out in a paper on Friday and it has been on social media sites since. He said that it has also shared on EDL and Britain First website. Bilal said he does not feel safe and he usually goes to the gym to take out any frustrations but he cannot

do this at present for fear of being confronted at the gym. Bilal says he is very low at present and is not sure what he should do."

26. Ms Evans submitted that if that witness statement was intended to rely on damage to the Claimant's reputation amongst a particular community(whether defined by religion or family, or some other class, less than the community of publishees as a whole) then that would be an error of law, because what is relevant for the purpose of defamation is a person's reputation among right-thinking persons generally and not amongst any particular group or class of people. Mr Ahmed, appearing for the Claimant, accepted that is correct as a proposition of law, which it undoubtedly is. He relies on damage to the reputation amongst right-thinking people generally who were publishees of the picture and article complained of, and not damage in the eyes of any particular section of the community.
27. Ms Evans is critical of the vagueness of the witness statement. In particular, she notes the emphasis on friends and family, who would have known that he had not been convicted of the Manchester offence, as would anybody who knew that he was not Somali and who knew of his age. Ms Evans refers to his vague claims about being unsuccessful in finding employment. They are vague because he gives no dates or particulars to link the matters he claims he has suffered to the effects of the article complained of in the present case, as opposed to the consequences that might have been expected to follow from his conviction in 2014. She submits that whatever the release date, the conviction in 2014 must have been fresh in the minds of people that knew him, and that that conviction, heavily reported as it was, would have provided material to explain why people would have shunned him or not wished to employ him. She submits that it is simply fanciful that the Claimant could ever overcome the problem represented by that conviction.
28. In addition to adopting the submissions of Ms Evans, Ms Michalos repeated in court the apology which her clients had published on 24 December 2016. In summary, like Ms Evans, she submits that the sting of the liable is a conviction for a serious sexual assault on a teenage girl. That is true. The publication itself is obviously inaccurate

and wrong, as the defendants have accepted. She too submits that the claim has no prospect of success. Both Ms Evans and Ms Michalos advanced, in the alternative, arguments under the *Jameel* abuse of process jurisdiction. I do not consider those in detail, because it seems to me that they add nothing to the primary argument, which is that the claimant has no prospect of establishing serious harm within the meaning of section 1.

29. Mr Ahmed emphasises, rightly, that the court is not engaged in a mini trial and that the test of no real prospect of success is a high one. He submits, as is the case, that there is no connection between the conviction in 2014 and the conviction wrongly attributed to the Claimant in 2016. Mr Ahmed submits that the Claimant has integrated himself back into his community after his release from prison, or at least that he has a real prospect of success in persuading the court at a trial that that is so. The additional consequences of the publication in 2016, he submits, are a matter to be investigated at trial. The Claimant's witness statement may be vague but the burden is on the Defendants. He accepts that the two offences are of a similar nature, but he submits that the meaning that the Claimant is a predator is a meaning that would be derived from there being two convictions, namely 2014 and 2016, and would not arise out of a conviction solely in 2014.
30. Mr Ahmed has said everything that could be said for the Claimant, but he has failed to persuade me. I appreciate that this case is a novel one in the application of section 1. However, it has to be recalled that what is in question here, under section 1, is damage to reputation, and not injury to feelings. A claimant in a libel action who establishes the necessary damage to his reputation, and who also establishes injury to feelings, may be awarded more damages by reason of the injury to feelings than he would have been awarded simply from the harm to the reputation.
31. But the central question, under section 1, relates to reputation, not to injury to feelings. The Claimant's evidence is such that I see no prospect at all of him establishing that he has suffered serious harm to the reputation which he actually had in January 2016 by

reason of the publications of the convictions in 2014. In those circumstances, I shall grant summary judgment in favour of the Defendants.

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165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: courttranscripts@DTIGlobal.eu