**Neutral Citation Number [2017] EWCA 1012 (Crim)**
2017/02543/C3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 9th June 2017

B e f o r e:

LADY JUSTICE SHARP DBE

MR JUSTICE POPPLEWELL

and

MR JUSTICE WARBY

**R E G I N A**

**- v -**

**JEMMA BEALE**

**IN THE MATTER OF AN APPEAL BY NEWS GROUP NEWSPAPERS LIMITED UNDER s 159 CRIMINAL JUSTICE ACT 1988**

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(Official Shorthand Writers to the Court)

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**Mr A Wolanski and Mr G De Wilde** appeared on behalf of the Applicant
**Mr C Henley QC** appeared on behalf of the Respondent Offender
**Mr J Price QC** appeared on behalf of the Crown

**J U D G M E N T**
**(Approved)**

Friday 9th June 2017

**LADY JUSTICE SHARP:**

1. This application for leave to appeal by News Group Newspapers Limited is made pursuant to section 159 of the Criminal Justice Act 1988. It raises a short but important point of construction in relation to the provisions of section 1 of the Sexual Offences (Amendment) Act 1992 ("the 1992 Act"), which confers anonymity on the victims of sexual offences. The Court Office was notified of the application last night, and it has been brought on at very short notice this morning. This judgment is accordingly briefer than it otherwise might have been.

2. The application is made in relation to an order made by His Honour Judge Loraine-Smith QC sitting in the Crown Court at Southwark on 5th June 2017, under section 4(2) of the Contempt of Court Act 1981 ("the 1981 Act"). Judge Loraine-Smith is currently conducting the trial of Miss Jemma Beale for perjury and attempting to pervert the course of justice. The trial is now in week two, and it is due to last for a further three weeks.

3. We can take the brief facts from the judge's ruling.

4. In December 2011 [Miss Beale] gave evidence in a trial at Isleworth of a man called [MC], who was indicted with raping her. The jury failed to agree and she gave evidence again the next month in a retrial. [MC] was convicted and sentenced to seven years' imprisonment.

5. Subsequent enquiries were to reveal that Miss Beale had made other allegations which the prosecution in her current trial say are untrue. The defence were informed of these matters and leave to appeal against conviction was granted to MC. His appeal was unopposed and was successful: see *R v C* [2015] EWCA Crim 1335.

6. Miss Beale is a 25 year old vulnerable defendant who has been diagnosed as suffering with an emotionally unstable personality disorder of borderline type. She has been granted special measures in the trial. An intermediary will assist her if she gives evidence. The current trial consists of four allegations of perjury arising from those two trials, and four allegations of doing an act or acts tending or intended to pervert the course of justice, which cover some, but not all of the other allegations Miss Beale has made in the past.

6. On 1st June 2017, on the day the Crown opened the case to the jury, the issue of Miss Beale's anonymity was raised before the judge. The issue debated at that stage was whether section 1 of the 1992 Act afforded her anonymity in reports of the trial. The judge deferred consideration of the matter until the next day. On 2nd June 2017, at a hearing also attended by counsel for News Group Newspapers, counsel for Miss Beale made an application for an order under section 4(2) of the 1981 Act. The judge reserved his decision and handed it down on 5th June 2017.

7. In his ruling he acknowledged that he had no power to make an order anonymising Miss Beale under section 1 of the 1992 Act, since that Act provides for automatic anonymity for victims of sexual offences, rather than conferring a power to make orders. However, he acceded to an application for an order under section 4(2), which he made in these terms:

> "It appearing to the court to be necessary to do so for avoiding a substantial risk of prejudice to the administration of justice in other proceedings pending or imminent, it is hereby ordered that the publication of any report of the said proceedings should not, until further order, include any reference to the following matters:
>
> i. The identity of the defendant in these proceedings.
>
> ii. Any matter of fact or law that could lead to her being identified as the defendant in these proceedings."

8. The judge's decision was based, in essence, on two points. First, he concluded that Miss Beale was entitled to anonymity under the provisions of section 1 of the 1992 Act. He said that he found section 1(4) of the 1992 Act difficult to construe, but he did not consider that it deprived her of her right to anonymity in the circumstances that applied here.

9. However, he said that it was appropriate to make a section 4(2) order on the ground that the publication of anything that would lead to Miss Beale's identification would give rise to a substantial risk of prejudice to the administration of justice "in the effect it would have on future complainants". By that he meant that her identification would be capable of persuading other complainants that their anonymity is not guaranteed and they therefore might choose not to report something to the police or other authorities.

10. In our view, neither point is sustainable.

**The first point**

11. Section 1 of the 1992 Act provides as follows:

> "1. (1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, neither the name nor address, and no still or moving picture, of that person shall during that person'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,
>
> 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 ('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.
>
> (3) Subsections (1) and (2) are subject to any direction given under section 3.
>
> (4) Nothing in this section prohibits the publication or inclusion in a relevant programme of matter consisting only of a report of criminal proceeding other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence."

12. Section 1(1) affords lifetime anonymity to those who complain of rape and various other sexual offences. There is no provision for the court to make any order to give effect to this right. There is no need. The right is enshrined in statute. A duty to preserve anonymity is cast on others, breach of which is an offence. In this respect the judge was correct. We have no doubt that this provision was enacted so that complainants in sexual cases should not be discouraged by the prospect of publicity if they came forward to report an offence.

13. However, the right to anonymity, and the duty to preserve it, are clearly qualified by section 1(4). The plain and obvious meaning of the language in section 1(4) is that section 1(1) does not operate to prohibit a report of any criminal proceedings other than those in which a person is accused of the sexual offence in question, or proceedings on appeal from such proceedings. Criminal proceedings in which a rape complainant is accused of perjury are "other proceedings" for that purpose. No other conclusion is possible. It follows that in enacting section 1, Parliament has legislated to exempt the reporting of proceedings such as those Miss Beale is

facing, from the ambit of the right to anonymity conferred by section 1(1).

14. In this connection, the current guidance given by the Judicial College on Reporting Restrictions in the Criminal Courts (April 2015, revised May 2016) contains an accurate statement of the law. It says this, in part, at paragraph 3.2:

> "**3.2 Victims of sexual offences**
>
> Victims of a wide range of sexual offences are given lifetime anonymity under the Sexual Offences (Amendment) Act 1992.
>
> The 1992 Act imposes a lifetime ban on reporting any matter likely to identify the victim of a sexual offence, from the time that such an allegation has been made and continuing after a person has been charged with the offence and after conclusion of the trial. The prohibition imposed by section 1 applies to 'any publication' and therefore includes traditional media as well as online media and individual users of social media websites …
>
> The offences to which the prohibition applies are set out in section 2 of the 1992 Act and include rape …
>
> …
>
> There are three main exceptions to the anonymity rule. First, a complainant may waive the entitlement to anonymity by giving written consent to being identified (if they are 16 or older).
>
> Secondly, the media is free to report the victim's identify in the event of criminal proceedings other than the actual trial or appeal in relation to the sexual offence. This exception caters for the situation where a complainant in a sexual offences case is subsequently prosecuted for perjury or wasting police time in separate proceedings. It appears to have been the intention of Parliament, however, that a complainant would retain anonymity if, during the course of proceedings, sexual offences charges are dropped and other non-sexual offence charges continue to be prosecuted.
>
> Thirdly, the court may lift the restriction to persuade defence witnesses to come forward, or where the court is satisfied that it is a substantial and unreasonable restriction on the reporting of the trial and that it is in the public interest for it to be lifted. This last condition cannot be satisfied simply because the defendant has been acquitted or other outcome of the trial."

**The Second Point**

15. Section 4 of the 1981 Act provides, in part, as follows:

> "(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
>
> (2) In any such proceedings the court may, where it appears to be 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."

16. The point that arises here is a straightforward one of jurisdiction. The power given under section 4(2) has clear limitations: it is for the protection of the administration of justice in particular proceedings. The particular proceedings are "those proceedings", that is, either the proceedings being heard at the relevant time, i.e. when the order is sought (see *Horsham Justices, ex parte Farquharson* [1982] QB 762 at 773B); or other proceedings that are "pending or imminent". Section 4(2) does not give power to make an order restricting publication for the purposes of protecting the administration of justice generally, as in our judgment the judge purported to do in this case.

17. The judge accepted that naming Miss Beale would not create a substantial risk of prejudice to the administration of justice in the current proceedings; and no relevant proceedings were identified that were "pending or imminent". It follows that there was no power to make the order.

18. We would add that the focus on the protection of the administration of justice in particular proceedings (rather than the administration of justice generally) is entirely consistent with the

express limitation of the scope of section 4(2) to postponement (unlike an order made under section 11 of the 1981 Act, for example). Thus, an order made under section 4(2) cannot postpone the publication of proceedings indefinitely, as the use of the word "postponement" in the statute makes clear: see *Times Newspapers Limited v R* [2007] EWCA Crim 1925; [2008] 1 WLR 234. This can be achieved by providing a particular date when the order made will expire, or by incorporating in the order a reference to the point when the relevant proceedings (as defined above) have concluded. We note in this context, that the section 4(2) order made in this case provided no such end point; indeed, on the judge's interpretation of the section none could ever be provided since the rationale advanced for making the order in this case (namely ensuring the preservation of anonymity of complainants to prevent others from being deterred) would inure whatever the outcome of the trial.

19. Open justice and freedom of the press are fundamental principles. A reporting restriction under section 4(2) represents an interference with those principles and such a restriction can only be imposed where this is "necessary".

20. The judge failed to ask himself whether the restriction he imposed was "necessary". He therefore failed to explore what test should be applied in reaching a decision on that issue, or to apply that test. The law is clear: an order is only "necessary" if it satisfies the requirements of Article 10(2) of the European Convention on Human Rights, that is to say, it is "necessary in a democratic society" in pursuit of one or more of a number of specified aims. This includes the requirement that the measure be a proportionate means of achieving such aims.

21. In order to avoid an unwarranted incursion into open justice, the step-by-step approach to making a section 4(2) order, identified in *R v Sherwood and Others, ex parte Telegraph Group* (CA) [2001] 1 WLR 1983, at [22] must be followed. At [20] and following, the court

(Longmore LJ, Douglas Brown and Eady JJ) said this:

> "20. Before turning to this, however, we should observe that care needs to be taken to avoid confusing the two senses in which the word 'necessary' is used in this context. First, the statute requires the court to address the question of whether a ban is necessary, in the light of the facts, to avoid the perceived risk of prejudice. Unless this is demonstrated, no such order should be made. Even if that hurdle has been overcome, however, it does not follow that the order has to be made. There then will arise the question of whether such an order is necessary in the second sense; that is to say the sense contemplated by Article 10(2) of the European Convention. Sometimes wider considerations of public policy will come into play such as to justify the refusal of a banning order even though there is no other way of eliminating the prejudice anticipated.
>
> 21. This is sometimes called the 'discretion stage', although the phrase can be misleading, since whether or not such an order is 'necessary in a democratic society' clearly involves consideration of objective criteria and the making of value judgments. There is a parallel with regard to the notion of 'discretion' in the law relating to the disclosure of journalists' sources under section 10 of the Contempt of Court Act. Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd.* [1991] 1 AC 1, 44 made the following comment:
>
> > 'Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of a judge's discretion, but, like many other questions of fact, such as the question whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment.'
>
> Thorpe LJ, in *Camelot Group Plc v Centaur Communications Ltd* [1999] QB 124, 138, has also drawn attention to this fine distinction:
>
> > 'The making of a value judgment on competing facts is very close to the exercise of a discretion dependent on those facts.'
>
> 22. These possible sources of confusion can perhaps be avoided if applications to restrict media coverage of court proceedings are approached in the following way:
>
> (1) The first question is whether reporting

would give rise to a 'not insubstantial' risk of prejudice to the administration of justice in the relevant proceedings. If not, that will be the end of the matter.

(2) If such a risk is perceived to exist, then the second question arises: would a section 4(2) order eliminate it? If not, obviously there could be no necessity to impose such a ban. Again, that would be the end of the matter. On the other hand, even if the judge is satisfied that an order would achieve the objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so, it could not be said to be 'necessary' to take the more drastic approach: see *Re Central Independent Television Plc* [1991] 1 WLR 4, 8D-G (*per* Lord Lane CJ).

(3) Suppose that the judge concludes that there is indeed no other way of eliminating the perceived risk of prejudice; it still does not follow *necessarily* that an order has to be made. The judge may still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being 'the lesser of two evils'. It is at this stage that value judgments may have to be made as to the priority between 'competing public interests': see *Ex parte The Telegraph Plc* [1993] 1 WLR 980, 986B-C."

22. We do not say or decide that there would be no circumstances in which the reporting of perjury proceedings such as these could properly be restricted or postponed. However, in our judgment, no such circumstances arise here, and it was not open to the judge to reach the conclusion that he did. His decision did not depend on the individual facts of this case, or those of any other individual case, 'pending or imminent'. It was instead a general overall assessment of the desirability or otherwise of permitting, as a matter of policy, reports of proceedings in which those who have complained of rape are prosecuted for perjury. That is an important

matter of public policy: see *Economou v De Freitas* [2016] EMLR 4 [144] - [147]; but it is a matter for Parliament, not for the court. Nor do we consider that it was or would have been open to the judge to conclude that this order was 'necessary in a democratic society'. To make a section 4(2) order on that basis comes very close indeed to legislating for anonymity in a situation which Parliament has expressly exempted from the general rule.

23. Accordingly, we grant leave and the appeal is allowed.

24. Finally, we discharge the section 4(2) order that the court made at the outset of this hearing in order to preserve the position pending the outcome, but make a further section 4(2) order postponing any report of this judgment as specified below. This order, to which all parties assent, is made to prevent any prejudice to the current criminal trial.

**Order:**

> **Upon hearing Counsel for News Group Newspapers Ltd, for Miss Beale and for the CPS, and upon the court giving permission to any person directly affected by this order to apply or discharge it within 24 hours of being notified of it.**
>
> **<u>Order under Section 4(2) of the Contempt of Court Act 1981</u>**
>
> **It appearing to the court to be necessary to do so for avoiding a substantial risk of prejudice to the administration of justice in the ongoing proceedings against Miss Beale in the Crown Court at Southwark, it is hereby ordered that the publication of any report of this appeal, including of the judgment of this court, be postponed until the verdicts of the jury in the said trial at Southwark are delivered or the jury is otherwise discharged.**
>
> **[For the avoidance of doubt, in the event of the need for a retrial of Miss Beale, on any of the counts of the indictment she faces at Southwark, a continuation of this order pending the conclusion of that re-trial will require a further application to be made to this court.]**