Neutral Citation Number: [2008] EWCA Crim 50

Case No: CAP 2007/03279C5

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
IN THE MATTER OF AN APPEAL UNDER SECTION 159 CRIMINAL JUSTICE ACT 1988
FROM CROYDON CROWN COURT
H.H. JUDGE WARWICK MCKINNON T2006/0697

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2008

Before:
THE RIGHT HON SIR IGOR JUDGE, PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE RIGHT HON SIR MARK POTTER, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE WILSON
LADY JUSTICE HALLETT
and
MR JUSTICE DAVID CLARKE

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	REGINA	
	v	
	CROYDON CROWN COURT	
	Ex Parte TRINITY MIRROR plc, TIMES NEWSPAPERS LTD, NEWS GROUP NEWSPAPERS LTD AND NEWSQUEST LTD	**Appellants**
	And	
	A and B (MINORS, acting by the OFFICIAL SOLICITOR TO THE SUPREME COURT)	**Interveners**

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Mr Gavin Millar QC and Mr Anthony Hudson (instructed by **Charles Collier-Wright**) appeared on behalf of the Appellants.

Mr Hugh Tomlinson QC and Miss Kate Blumgart (instructed by **The Crown Prosecution Service)** appeared on behalf of the **Crown.**
Mr Andrew Nicol QC (instructed by **the Official Solicitor to the Supreme Court)** appeared on behalf of A **and B, Minors.**

Hearing date: 28 November 2007

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Judgment

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION:

This is the judgment of the Court.

1. This is an appeal by Trinity Mirror and three other media companies pursuant to s. 159 of the Criminal Justice Act 1988 against an order made by H.H. Judge Warwick McKinnon at Croydon Crown Court on 11 April 2007, and varied by him on 7 June 2007. The order on 11 April was made shortly after the end of proceedings against Raymond Cortis (the defendant). Its effect was to restrain the media from identifying him and his convictions, on the basis that were he to be identified, his children, who were neither witnesses in the proceedings against him nor victims of his offences, would be likely to suffer significant harm. The question raised in this appeal is whether the judge had power to make this order, and if he did, whether he was right to make it. Two conflicting principles are engaged, first, the protection and well being of children, and second, open justice in courts exercising criminal jurisdiction.

2. On 15 December 2006, the defendant pleaded guilty to 20 counts of making or possessing indecent images of children. He downloaded them from the internet. A pre-sentence report was ordered, and following an application on his behalf, HH Judge MacRae made an order in the interests of his children restraining his identification. On 2 April 2007, when passing sentence, Judge McKinnon refused an application by a court reporter to discharge the order made on 15 December 2006. On 11 April having received written submissions on behalf of three of the four appellants, Judge McKinnon substituted for the order dated 15 December 2006, an order in different terms but to similar effect. On 19 April the appellants, represented by counsel, argued that the injunction should be discharged. The hearing was adjourned so that if possible the children should be represented. In the result a firm of solicitors, willing in principle to represent them, failed to secure public funding. At the adjourned hearing on 7 June Judge McKinnon delivered a careful judgment refusing to discharge the order made on 11 April. The terms were varied in a way which did not alter its practical effect.

3. On 9 October 2007 this court granted the appellants leave to appeal against the order dated 11 April 2007, as varied ("the order") and invited the Official Solicitor to represent the children. We are grateful to the Official Solicitor for consenting to act, and to Mr Andrew Nicol QC who, on his instructions, appeared on behalf of the children. His written and oral arguments gave us valuable assistance.

4. The appeal was heard on 28 November 2007. Mr Gavin Millar QC, on behalf of the appellants, submitted that the judge had no power to make the order and, alternatively, that, if he had power, he was wrong to exercise it. Mr Nicol submitted that the jurisdiction existed, although its source was different from the one identified by the judge; and that he was right to exercise it.

5. At the hearings in the Crown Court, the prosecution had not supported the reporter's application for the discharge of the 15 December 2006 injunction, and in her initial written submissions in relation to the application for leave to appeal, Miss Blumgart suggested that it was at least arguable that the judge was entitled to make the order. However, at the hearing of this appeal, Mr Hugh Tomlinson QC on behalf of the Crown supported Mr Millar's contention that the judge lacked the necessary

jurisdiction.

6. At the conclusion of the hearing we announced that the appeal would be allowed on the date when this judgment would be handed down. The reasons for this unusual order will become apparent later in the judgment. The result is that the judge's order remained in force until now. Today it is discharged.

7. The history of proceedings in Croydon Crown Court must be explained in greater detail.

History

8. At the hearing on 15 December 2006 no attempt, whether in the published court list or in the court itself, was made to withhold the defendant's name. After the pleas of guilty were taken at the invitation of both counsel, HH Judge MacRae adjourned for a pre-sentence report. At the same time the defendant's counsel asked him to make an order to prohibit any reporting of the case in the media which might identify the defendant's children. She informed the judge that:

(a) the defendant had two young children;

(b) they were both at school;

(c) the social services department of the local authority had become involved with the family;

(d) the two children were on the Child Protection Register; and

(e) he was living separately from the children and their mother.

Counsel submitted that, given the nature of the offences, identification of the defendant's children in the press might cause difficulty for them, particularly at school. The judge agreed, and ordered that nothing should be published which would enable the defendant, and therefore his children, to be identified. The order would remain in force until further order, and could be reviewed by the sentencing judge. When counsel for the prosecution pointed out that the children were not complainants, the judge reiterated the facility for review at the date of sentence.

9. In the discussions no attempt was made to identify any statutory power under which the order might be made. However when the order was drawn up, it was headed as "ORDER UNDER SECTION 4(2) OF THE CONTEMPT OF COURT ACT 1981" and provided:

> "An Order has been made under the above mentioned Act in relation to the above mentioned case to restrict the publication thereof.
>
> REPORTING RESTRICTION
> THERE IS TO BE NO
> REPORTING OF THIS CASE
> WHICH WOULD ENABLE

THE DEFENDANTS IDENTITY AND THEREFORE HIS CHILDRENS IDENTITY TO BE KNOWN

This order applies until Further Order."

10. Section 4 of the Contempt of Court Act 1981 provides:

> "(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, ... order that the publication of any report of the proceedings ... be postponed for such period as the court thinks necessary for that purpose."

Although the validity of the order dated 15th December 2006 is not directly in question in this appeal, in our judgment the order was not "necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings". Accordingly the invocation of s.4(2) of the Contempt of Court Act 1981 (the 1981 Act) was inapt. Mr Nicol did not suggest otherwise.

11. At the hearing on 2 April 2007, the defendant's name was again published in the court list, and referred to in open court. Passing sentence, Judge McKinnon concluded that the defendant did not pose a significant risk of serious sexual harm to members of the public and, in the light of his previous good character, his guilty plea, and the fact that none of the indecent material had been distributed, a community order for three years with requirements for supervision by a probation officer and attendance at a Sex Offender Group Work Programme would be appropriate. A reporter then present asked the judge to discharge the order dated 15 December 2006, of which, until then, he had been unaware. Counsel for the defendant explained that the order had been made for the protection of his two daughters, aged eight and six years, who lived locally and attended local schools. She submitted that, if it became known that the defendant had been convicted of offences relating to child pornography, the unusual surname which he and they shared would lead to their identification as his children, and to their exposure to bullying and unpleasantness at school. On behalf of the Crown, Miss Blumgart did not support the discharge of the injunction. The reporter, perceptively, responded to the effect that the arguments in favour of the order in this case would apply in almost every such case. However the judge was unpersuaded. He declined to discharge the order so as to protect the children from the sins of their father; and he noted with approval that the injunction had been made under s.4(2) of the 1981 Act.

12. On 11th April three of the four appellants argued that s.4(2) did not confer the necessary jurisdiction on the Crown Court, which was vested exclusively in the High Court. Although Judge McKinnon accepted the argument that s.4(2) did not provide

appropriate jurisdiction, he considered that the order could properly be made in the Crown Court under s.11 of the 1981 Act. Section 11 is headed "Publication of matters exempted from disclosure in court", and provides:

> "In any case where a court (having 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."

13. Judge McKinnon announced a revised order in the following terms:

"IN THE CROYDON CROWN COURT

CASE NUMBER T2006/0697

THE QUEEN

V

******* ******

ORDER UNDER SECTION 11

OF THE CONTEMPT OF COURT ACT 1981

Whereas this defendant, having pleaded guilty to charges involving the viewing of indecent child images on the internet, and the retention of those images on his computer and other storage media, and whereas the said defendant, having been sentenced to a community order for a period of three years with requirements of supervision and to attend an accredited programme for the rehabilitation of Sex Offenders, as well as to be subject to the monitoring and registration requirements of the Sexual Offences Act 2003 for a period of five years, and whilst it is recognised that there is a legitimate and important interest in the freedom of the press to report court proceedings in full, and whilst it is recognised also the general public revulsion, anxiety, and intensity of feelings over offences involving any element of paedophilia and the abuse and ill treatment of children in whatever form, the court upon the application of the defendant and unopposed by the Crown, and taking into account certain oral representations made by a member of the freelance press and written representations from Time Mirror PLC, Newsgroup Newspapers Ltd and the Press Association, and considering in particular the relevant principles under the Human Rights Act and issues of proportionality, makes the following order under Section 11 of the Contempt of Court Act 1981:

For the protection of the two young daughters of the defendant who are under the age of 18 years from abuse and ill treatment, and being vulnerable, of school age and liable to the risk of social exclusion by their peers, teasing and taunting, harassment, intimidation, bullying and violence, and for their continued privacy, welfare and wellbeing which is necessary taking into account the particular circumstances of the case, and given that hitherto they have been protected from identification by an order made under Section 4(2) of the Contempt of Court Act 1981 by His Honour Judge MacRae on the 15th December 2006:

> 1. No newspaper or other media report of the proceedings shall reveal the names, addresses or schools of the two children as aforesaid, or include any particulars calculated to lead to their identification.
>
> 2. For the avoidance of doubt 'any particulars calculated to lead to their identification' includes the identification of the defendant himself by his name and/or address, and any particulars which are themselves calculated to lead to his identification.
>
> 3. This order shall last until further order.
>
> 4. Any application to vary or lift this order (normally because of a change of circumstance) is reserved to the Resident Judge at the Crown Court sitting at Croydon.
>
> 5. This order replaces the order originally made by HH Judge Kenneth MacRae which is hereby discharged ..."

14. The present appellants swiftly intimated their objection to this fresh injunction. Judge McKinnon agreed to re-examine it. This hearing began on 19 April, but was then was adjourned so that the children could be made parties, and their interests represented. Their mother approached Bindman and Partners, who at once applied for L.S.C. funding. They were unsuccessful, and therefore unable to appear for the children at the adjourned hearing. In the interim however, *pro bono,* they wrote a well-reasoned letter to the court in which, supported by a letter from the children's headteacher, which they enclosed, they asserted that public identification of the defendant would be likely to damage the children and contended that, whether or not the judge had power to make an order under s.11 of the 1981 Act, it was provided by s45(4) of the Supreme Court Act 1981.

15. On 7 June at the conclusion of the adjourned hearing, Judge McKinnon gave a full judgment, which appears to have been written and handed down. He decided not to discharge the order dated 11 April but to vary it by omitting paragraph 2 of the order, but, in lieu, to add a footnote to para. 1 in the following terms:

> "For the avoidance of doubt the Press are advised that any newspaper or other media report which identifies the defendant or publishes any particulars calculated to lead to his identification will amount to a breach of this order and those responsible will be liable to a fine and imprisonment for contempt of court."

This variation had no practical effect.

16. In his judgment the judge accepted that, as the court had not allowed - indeed had not been asked to allow - the name of the defendant to be withheld from the public in the proceedings, s.11 of the 1981 Act did not enable him to make an express direction prohibiting its publication. He held, however, that, as the names of the children were not mentioned in the proceedings, s.l 1 provided jurisdiction to prohibit publication of any facts leading to their identification. Since in the particular circumstances the identification of the defendant would be likely to lead to identification of the children, his identification should be prohibited. The judge accepted that, in considering whether to exercise its discretion under s.11, a court was required to conduct a careful balance of the rights of the press and public to freedom of expression under Article 10 of the European Convention on Human Rights 1950 and of the children to respect for their private and family life under Article 8 of it. After referring in particular to the decisions of the House of Lords in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 and of Sir Mark Potter, President of the Family Division, in *A Local Authority v. W and others* [2006] 1 FLR 1, and after considering the letter from the children's headteacher and a letter to the court from their mother, the judge held that the balance lay in favour of continuation of the order "at least for the time being". This, he considered, was consonant with the limit of his jurisdiction.

17. At the hearing of the appeal the Official Solicitor was permitted to adduce further evidence:

> (a) a statement from the children's mother. She says that she decided to separate permanently from the defendant and will seek a divorce; that he lives close to her home; that he has frequent contact with the children; that she trusts him not to harm them; that, on advice, she has told them only that he has done something wrong; that, because of their unusual surname, public identification of him would lead parents at their school and others to realise that he is their father; and that she is concerned that in any event they would be teased and bullied by other children.
>
> (b) a statement from the social worker allocated to the family by the local authority. He says that the children have been removed from the Child Protection Register; that, were the defendant publicly identified,

the children would in effect need to be given sexually explicit information which they are not old enough to receive without emotional distress; and that the knowledge of their father's offences on the part of their peers would prejudice their social integration.

(c) two further letters from the children's headteacher. She says that public identification of the defendant would immediately put the children at risk of teasing or bullying and might do serious psychological damage to them; that, unless conducted carefully over time, an explanation of his offences would be traumatic for them and that, if the court were to allow the appeal, it should at least delay publicity until they have had access to psychological services in helping them both to cope with the likely reactions of others and to find appropriate ways of expressing their distress.

(d) a report from a consultant child psychiatrist. She says that explanation to the children of the offences committed by the defendant needs to be given gradually and in accordance with professional planning and that, in the event of his public identification, the children would instead learn of them in an unplanned, haphazard manner which would be likely to make them angry, unhappy and isolated.

Discussion

18. The starting-point in Mr Millar's submission was that the jurisdiction which the judge was purporting to exercise under s.11 of the 1981 Act was unavailable. On this point Mr Nicol sensibly accepted that he could not defend the judge's reasoning.

19. The power conferred by s.11 arises "where a court ... allows a name or other matter to be withheld from the public in proceedings before the court". Any such withholding has to be "for [a] purpose" and the heading of the section itself underlines its application to matters "exempted from disclosure in court". The judge accepted that the court had not allowed the defendant's name to be "withheld", or indeed "exempted" it from disclosure. Nevertheless he seems to have approached the problem as if permission had been given for the names, address and school of the children to be withheld. However the stark reality was that these facts were quite irrelevant to the proceedings, and no attempt was made, or indeed could properly be made, to refer to them. Accordingly the question of withholding them from the public never arose for consideration. Unless the court deliberately exercises its power to allow a name or other matter to be withheld, s.11 of the 1981 Act is not engaged.

20. Reference was made to a decision of McKinnon J, as Judge Advocate, sitting in a General Court Martial, in *R v. Payne and others* on 19 September 2006, OJAG No 2005920. He held that the addresses of defendants charged with violent offences when serving in HM Forces in Iraq which, apparently without prior discussion, had simply not been given, even to the court, and which were irrelevant to any issue before it, had been "withheld" for the purposes of s.l 1. We cannot discern any basis for concluding that s.11 was engaged, and this decision should be confined to its own unusual circumstances. It cannot be treated as authority for the proposition that s.11 had any application to the present case.

21. In any event, notwithstanding the judge's understandable concern for the welfare of the children, it was inappropriate to seek to achieve by a footnote what could not otherwise be achieved in the main body of the order. Even on the hypothesis that the names, address and school of the children had indeed been allowed to be withheld, his power extended only to prohibit publication of *their* names address and school. Although Mr Tomlinson may be right that the express prohibiting power may be undermined unless the section is construed so as to include a power to make any necessary ancillary provisions, that question did not arise here.

22. Mr Nicol begins his substantive argument with two concessions. First, at common law a criminal court has no power to forbid third parties from publishing evidence given publicly: *Independent Publishing Co. Ltd v. Attorney General of Trinidad and Tobago* [2005] 1 AC 190. When it arises, this power depends on legislation. Second, the Crown Court is a creature of statute (the Supreme Court Act 1981) and therefore lacks "inherent" jurisdiction: *In re S (A Child) (Identification: Restrictions on Publication).* Mr Nicol then contends that the High Court was vested with power to forbid third parties from publishing evidence given publicly to a criminal court. This contention was not in controversy. On this basis the essential question would not be the existence of the power, but the very limited and exceptional circumstances in which it may be appropriate for it to be exercised. For present purposes we are inclined to agree with Mr Nicol that the foundation of the High Court's jurisdiction is found in s.6 of the Human Rights Act 1998 (See *In re S* read in conjunction with s 37 of the Supreme Court Act 1981). This is headed "Powers of High Court with respect to injunctions..." and , by subsection (1) provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction...in all cases in which it appears to be just and convenient to do so"

Finally Mr Nicol advances the submission that these powers of the High Court were extended to the Crown Court by s.45(4) of the Supreme Court Act 1981.

23. Section 45 of the Supreme Court Act 1981 is headed "General jurisdiction of Crown Court", and subsection (4) provides:

> "Subject to section 8 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (substitution in criminal cases of procedure in that Act for procedure by way of subpoena) and to any provision contained in or having effect under this Act, the Crown Court shall, in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court."

24. Mr Nicol submits that the proposed identification of the defendant in the media as the person convicted in the Crown Court is a matter "incidental to its jurisdiction", in that it flows directly from his trial in that court. If, therefore, the proposed identification would infringe the rights of the children under Article 8 of the European Convention on Human Rights, s.45(4) confers upon the Crown Court "the

like powers ... as the High Court" "in relation to" the proposed identification, in particular the power -indeed presumably by virtue of s.6 of the Human Rights Act, the duty - to restrain it by injunction. Mr Millar, supported by Mr Tomlinson, denies that the proposed identification of the defendant in the media can possibly be described for the purposes of s45(4) as a matter "incidental to [the] jurisdiction" of the Crown Court.

25. As a prelude to their submissions, both Mr Nicol and Mr Millar draw attention to s.39(l) Children and Young Persons Act 1933, which, until the coming into force of a replacement provision in different terms in s.45(3) of the Youth Justice and Criminal Evidence Act 1999, continues to apply to criminal proceedings. Section 39 is headed

> "Power to prohibit publication of certain matters in newspapers" and subsection (1) provides:-
>
> > "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)...
> > >
> > > except..."

Section 39(1) has no direct application to this case: for the defendant's children were neither complainants "by ... whom", nor defendants "against ... whom", nor victims "in respect of whom", the proceedings were taken, nor witnesses in them. Mr Nicol nevertheless argues that in such cases the Crown Court is well accustomed to exercise a discretion which now requires not only reference to the welfare of children but a balancing of competing Convention rights; that the power under s.39(l) is inevitably but significantly described as "in relation to [the] proceedings in [the] court"; and that it is but a small step to discern in the Crown Court an analogous statutory power available for exercise in favour of children who, though not "concerned in the proceedings" in any of the respects specified by the subsection, may be just as likely to suffer significant harm if they are identified. Mr Millar, by contrast, but with considerable force, reminds us that Lord Steyn in *In Re S (a child),* observed:

> "... in regard to children not concerned in a criminal trial, there has been a legislative choice not to extend the right to restrain publicity to them. This is a factor which cannot be ignored."

26. On the construction of s.45(4) Mr Millar raises two arguments. Mr Tomlinson associates himself only with the second. Mr Millar's first argument represents a play on the words "jurisdiction" and "powers" in the subsection. He stresses that, where the

Crown Court has "jurisdiction", then, in relation either to all or to certain matters "incidental to" it (such being the territory of the second argument), the subsection confers upon it the "powers" of the High Court. He then submits that the judge's injunction was made in the purported exercise not of a "power" but of a "jurisdiction" and so cannot find its authority within the subsection. Where is the dividing line between a "jurisdiction" and a "power", and is it clear that the injunction made by the judge is of a type which requires him to have had the "jurisdiction" rather than merely the "power" to make it? With a view to answering these questions, Mr Millar conducted a detailed examination of the Supreme Court Act 1981, in particular Part II, headed "Jurisdiction". The primary difficulty is that in the interpretation section of the Act itself, namely s.151 (1) "jurisdiction" includes powers, thus blurring any significant distinctions. The authority to issue an injunction in at least the somewhat analogous circumstances identified in s.39(l) of the Act of 1933 is definitely a "power", as the heading of that section makes clear. Moreover it is by no means obvious that the order made by Judge Mackinnon represented a purported exercise of "jurisdiction" rather than a power. The decision *In Re S* undermined the submission that the judge was purporting to exercise the inherent "jurisdiction" of the High Court; on the contrary if the proper analysis is that the High Court's authority to make such an injunction stems from the conjunction of s.6 of the Act of 1998 with s.37(l) of the Supreme Court Act 1981, then, in the light of the heading of s.37, and indeed of the terms of other of its subsections, for example s.37(3), it must clearly be classified as a power. In our judgment this argument did not avail Mr Millar.

27. Mr Millar's second argument is that the children's claim, that their rights under Article 8 would be infringed by the defendant's identification, is not a matter "incidental to" the jurisdiction of the Crown Court for the purposes of section 45(4). The key to Parliament's intention lies in a careful study of the context in which the phrase appears in subs (4) itself:

> "..., in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction, ..."

First, as Mr Nicol concedes, the use of the word "other" demonstrates that the matters previously specified, that is relating to witnesses, contempt of court and enforcement, are themselves "matters incidental to its jurisdiction". Second, so Mr Millar and Mr Tomlinson in effect submit, a golden thread runs through all three matters and illuminates the meaning to be ascribed to the words "incidental to": they are areas in which the powers may be needed in order to achieve the proper despatch of the proceedings before the court. This requires that the witnesses should attend and be examined, that contempts of court should be punished and that orders should be enforced. They concede that the powers conferred by s.45(4) may be exercised after the end of the proceedings: a contempt of court may, for example, have brought the proceedings to a premature end or indeed be perpetrated during their aftermath, for example, by an intimidating approach to a juror. However they argue that this consideration does not derogate from the proposition that the powers granted by the subsection are conferred in aid of the proper despatch of the proceedings. From this they argue that the protection of the rights of the defendant's children was remote from the proper conduct of the defendant's trial at the Crown Court.

28. Mr Nicol responds to the effect that this argument requires that words limiting the ambit of s45(4), which are not there, must be read into it. He points for example to s.4(2) of the 1981 Act and says that, when Parliament wishes to confer a power for use "where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings", it says so.

29. There is a dearth of reported authority on the construction of s.45(4) of the Supreme Court Act 1981. In ex parte *HTV Cymru (Wales) Ltd* [2002] EMLR 184. Aikens J restrained a television company from interviewing witnesses who had given evidence until all the evidence was complete. He pointed out that one witness would have to be recalled, and others might be recalled, and accordingly held that the proposed interviews would constitute a contempt of court pursuant to ss.1 and 2 of the 1981 Act. He proceeded to hold that s.45(4) of the Supreme Court Act 1981 conferred upon the Crown Court the same power to make an injunction as was conferred upon the High Court by s.37 of the same Act. He observed:

> "23. Of course the power of the Crown Court to grant injunctions is strictly limited to the specific matters that are set out in section 45(4). There is no general power in the Crown Court to grant injunctions. But I am satisfied that the Crown Court has the power to grant an injunction to restrain a threatened contempt of court in relation to a matter that is before the Crown Court in question."

This decision seems unimpeachable. Mr Nicol points to Aikens J's use of s.45(4) as a source of power to make an injunction such as can be made in the High Court by virtue of s.37. On the other hand Mr Millar relies on its use "to restrain a threatened contempt of court in relation to a matter that is before the Crown Court". Reasonably enough Mr Nicol responds that the judge's words were not designed to be prescriptive of the ambit of the subsection, but to identify the particular mischief at which his order was aimed. Nevertheless Mr Millar suggests that this decision provides a prime example of the proper use of the subsection, to ensure the proper despatch of the proceedings.

Conclusion

30. In our judgment for the purposes of s.45(4), and for the reasons advanced by Mr Millar and Mr Tomlinson, matters are "incidental to" the jurisdiction of the Crown Court only when the powers to be exercised relate to the proper dispatch of the business before it. We agree with Aikens J that the Crown Court has no "general" power to grant injunctions. There is no inherent jurisdiction to do so on the basis that it is seeking to achieve a desirable, or indeed a "just and convenient" objective. Unless the proposed injunction is directly linked to the exercise of the Crown Court's jurisdiction and the exercise of its statutory functions, the appropriate jurisdiction is lacking. The order was not incidental to the defendant's trial, conviction and sentence. Accordingly, the ambit of s45(4) of the Supreme Court Act 1981 did not extend to protect the children from the consequences of the identification of their father in the criminal proceedings before the Crown Court.

31. The court with jurisdiction to make this order, if it were ever appropriate to be made, is the High Court. The nature of the problem which would confront the High

Court is summarised by Sir Mark Potter P in *A Local Authority v. W and others*, the only reported case to date in which the High Court has agreed to restrain identification in the media of the defendant to criminal proceedings on the basis that this order was necessary to protect the rights and interests of her (or his) children. He said of Articles 8 and 10, at para 53:

> "... each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or 'trumps' the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out."

32. This appeal succeeds on the jurisdiction argument. We must however add that we respectfully disagree with the judge's further conclusion that the proper balance between the rights of these children under Article 8 and the freedom of the media and public under Article 10 should be resolved in favour of the interests of the children. 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 offices should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime. Moreover the principle protects his interests too, by helping to secure the fair trial which, in Lord Bingham of Cornhill's memorable epithet, is the defendant's "birthright". 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.

33. It is sad, but true, that the criminal activities of a parent can bring misery, shame, and disadvantage to their innocent children. Innocent parents suffer from the criminal activities of their sons and daughters. Husbands and wives and partners all suffer in the same way. All this represents the further consequences of crime, adding to the list of its victims. Everyone appreciates the risk that innocent children may suffer prejudice and damage when a parent is convicted of a serious offence. Among the consequences, the parent will disappear from home when he or she is sentenced to imprisonment, and indeed, depending on the crime but as happened in this case, there is always a possibility of the breakdown of the relationship between their parents. However we accept the validity of the simple but telling proposition put by the court reporter to Judge McKinnon on 2 April 2007, that there is nothing in this case to distinguish the plight of the defendant's children from that of a massive group of children of persons convicted of offences relating to child pornography. If the court

were to uphold this ruling so as to protect the rights of the defendant's children under Article 8, it would be countenancing a substantial erosion of the principle of open justice, to the overwhelming disadvantage of public confidence in the criminal justice system, the free reporting of criminal trials and the proper identification of those convicted and sentenced in them. Such an order cannot begin to be contemplated unless the circumstances are indeed properly to be described as exceptional.

34. This court is naturally concerned for the welfare of the defendant's children. We accept the assessments of their mother, their headteacher, their social worker and the consultant child psychiatrist. Nevertheless we must adopt a much wider perspective. For the reasons set out above, we concluded at the end of the hearing that all we could properly do in the interests of the children was - exceptionally - to announce our decision in advance both of the delivery of our judgment and of our setting aside of the judge's order. Our intention was to create a period in which work might be done with the children, with a view to enable them better to cope with the public identification of their father following its earlier postponement.