CO/9898/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 16 October 2012

B e f o r e:

PRESIDENT OF THE QUEEN'S BENCH DIVISION

MR JUSTICE TUGENDHAT

Between:

HER MAJESTY'S ATTORNEY GENERAL

Claimant

v

(1) ASSOCIATED NEWSPAPERS LIMITED
(2) MGN LIMITED

Defendants

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 0207 404 1424
(Official Shorthand Writers to the Court)

David Perry QC and Jonathan Hall (instructed by Treasury Solicitor) for **the Claimant**

Jonathan Caplan QC (instructed by Reynolds Porter Chamberlain LLP) for **the First Defendant**

Pushpinder Saini QC and Kate Gallafent (instructed by Reynolds Porter Chamberlain LLP) for **the Second Defendant**

J U D G M E N T
(As Approved by the Court)

THE PRESIDENT: On 13 June 2012 we held that the defendants were in breach of the strict liability rule for publishing articles in the *Daily Mail* and *Daily Mirror* respectively before the jury in the trial of Levi Bellfield had reached their verdicts on all the counts in the indictment. They were therefore in contempt of court. Our judgments are published under the neutral citation [2012] EWHC 2029 (Admin).

The issue before us was essentially one of fact. We concluded that what was printed in the articles set out key matters that were not before the jury and that these were highly prejudicial to Levi Bellfield and created a quite separate and distinct substantial risk of serious prejudice. We also concluded there was a clear contrast between what was reported in the news channels and what was published in those articles in these two newspapers; that we could be sure there was a further and additional substantial risk of serious prejudice created by the articles in relation to Levi Bellfield's interest in the rape of girls.

Viewed overall, there was little doubt that if the jury had not been discharged because of what was described as an avalanche of publicity, the publication in the *Daily Mail* and the *Daily Mirror* would, in the respects described, have

created a seriously arguable point that the conviction was unsafe.

In considering penalty, we have taken into account the following aggravating features. First, the risk at the date of publication was the jury would be discharged and no re-trial sought. The impact on the family of Rachel Cowles was serious. Secondly, publication of material not before the jury when verdicts had not all been returned can have a particularly serious effect. This should have been appreciated. Publication was made after the CPS had issued an advisory, as we set out in paragraph 4 of the judgment to which we have referred.

As against that, the mitigation made on behalf of the *Daily Mail* and *Daily Mirror* was broadly similar. First, in the case of the *Daily Mail* there was the particularly mitigating feature that the associate news editor had phoned the CPS and pointed out that the judge had not given any guidance when the verdicts had been taken. He had enquired whether the CPS would give guidance. The advisory, to which we have referred, did not exalt publishers to a particular course of action.

Secondly, both make the point that this was a difficult judgment call in the particular and unique circumstances of this case given the public interest.

Third, in the case of both newspapers the material was reviewed by lawyers as part of their standard practice.

Fourth, a particular point is made on behalf of the *Daily Mirror* that much was publicised at the same time by others who have not been brought before the court.

Fifth, neither counsel nor the judge referred to these particular articles when discharging the jury.

Finally, the finding of contempt was based on only part of the articles and not on the full material that has been brought before us.

In considering the respective aggravating and mitigating factors we have also taken into account that both parties have agreed to contribute the sum of £25,000 each to the costs of the Attorney General, meeting significantly the public costs of bringing these proceedings.

It is clear, in our judgment, as follows from what we said in June, that both newspapers went further than what was permitted. We have little doubt that they should have appreciated the risk under the strict liability rule at the particularly sensitive point in time at which the decision was made to publish. However, we can conclude that this was a case where there was an error of judgment through a failure to properly analyse the articles - an analysis which was nonetheless essential at that point in time.

In a criminal appeal, cited as R v Ali (Ahmed) & Others, but known to the general public more as the Airline Bombers case, the court referred to the practice in major trials of the media being briefed by the police and the CPS. It is obviously common practice that the media require a very large amount of background material. Although the ACPO Guidance states that embargo agreements tailored to the case are drawn up to prevent the publication of such material until the conclusion of criminal proceedings, it appears that the importance of precise and careful conduct, where one verdict has been returned but others are outstanding, has not been fully appreciated by those in the media. This case is therefore important to the media in pointing out the necessity of very careful analysis of material that is to be published as part of a background, when one verdict (or more than one) has been delivered but others are outstanding. There is a particular need for caution at that time because the risks can be so great.

It is therefore a very important mitigating feature that the court would add in this case that the importance of that careful and detailed analysis may not have been present to the minds of those who made the decision. However, after this case, that can no longer be seen as an excuse.

We should also add that we appreciate the probability that each

publication will write to the family concerned apologising for what happened. That is important because ultimately the real victims in this case have been the family of Rachel Cowles and Rachel herself, in that they feel they have not had justice.

Bearing in mind the amount of costs paid, we can take the course in this case of fining each newspaper at the very bottom end of the scale, namely £10,000 each. But for the future the message is clear and the court's observations, we hope, will ensure others exercise the most scrupulous care at the critical time in a case where only some verdicts have been returned and others remain outstanding.

MR CAPLAN: I am never sure whether I need to ask for time, but can I ask for 14 days?

THE PRESIDENT: Why not have 28, to save the costs of writing out two cheques.

MR CAPLAN: Thank you very much.

MR SAINI: My Lord, the final matter is our application for permission to appeal. As your Lordship has just expressed, this was a case decided, in part at least, on the basis of an assessment of the facts in relation to how far my clients went beyond publicising the case. However, there is an important point of law here about inequality of treatment.

There is no other way other than defending ourselves in these proceedings that we can ventilate our complaint that there is an uneven playing field here.

THE PRESIDENT: What you are essentially saying is that the Sun should have been here too, if I take that by way of illustration.

MR SAINI: Well, either to have been here too, or the Attorney General as a public officer has to make sure that it does not take proceedings which interfere with my client's Article 8 rights and chill its freedom of expression, and at the same time no proceedings are taken against, for example, Sky News or the Sun when they have published material which is just as, if not more, serious than that material which this court has considered. One could say, well, you should perhaps bring a separate claim against the Attorney General for breaching your Article 10 rights, but that would not be the appropriate course. The appropriate course would have been for this court, in our submission, contrary to what the court has done, to have decided that it would not be consistent with Article 10 for proceedings to be taken against my clients and not taken against others. What justification is there, one asks rhetorically, for this inequality of treatment, and which other forum is there where one can make this complaint? So we submit that is an

appropriate issue for the Supreme Court.

MR JUSTICE TUGENDHAT: Mr Saini, in other cases where Article 10 is raised, in particular in civil cases, nothing is more common that that, amongst a number of publishers, proceedings are commenced against one or only a few. It is often said that it is unfair, but how can it be right that your submission would apply only in contempt proceedings and not in any other proceedings where Article 10 arises? It is impossible, is it not, to say that any complaint raising Article 10 issues has got to be raised against all possible publishers?

MR SAINI: My Lord, with respect, there is an answer to that, which is that other proceedings, for example libel proceedings or other purely private proceedings, do not include a public authority. Here we have a public authority which has obligations under section 6 of the Human Rights Act. That public authority has decided to be selective in taking proceedings which, following my Lords' judgments, has interfered -- the proceedings have interfered with my client's Article 10 rights. So when proceedings are brought by a public authority, there is a very different set of factors in play.

MR JUSTICE TUGENDHAT: I see that, but we have not actually decided that anything published by anyone else was a

contempt of court. We have decided that your clients were not guilty of contempt of court in respect of the material which is published by others, but we have not decided anything --

MR SAINI: My Lord, I would respectfully disagree with that. My Lords obviously have expressed it in that way, but my Lords in the crucial paragraphs we have been looking at earlier did go so far as to discuss what had been published the night before, 36 and 37, and the court said that the material that my clients published did significantly exacerbate the serious risk of prejudice. We say by definition, therefore, this court had concluded --

MR JUSTICE TUGENDHAT: We could not make a conclusion against people who have not been before the court.

MR SAINI: Absolutely, but we say it follows as night follows day that the court has considered that the material already in the public domain created a risk of prejudice. Obviously that did not lead to a concluded finding of contempt in the absence of those parties, but this is an unsatisfactory situation.

THE PRESIDENT: Mr Saini, what you did was you took the stance that effectively you were not causing any problems. You say it was not prejudicial, therefore you were not causing any problems. So we looked and saw what was in your article

that could be said to be different. We made no conclusion as to the others. I mean, if the Attorney wanted to bring proceedings against the Sun now, or others -- I mean, obviously I think it would be difficult for either of us to hear it, but there are plenty of my colleagues who could hear it. He has decided -- there we are.

MR SAINI: My Lord, that is one point. The second point is that there is no higher court authority considering the issue of the appropriate test in the case of multiple publications where pre-existing publications, whether or not in contempt, having prejudiced (inaudible). How much further does the second publication -- and those are the publications of the *Daily Mail* and *Daily Mirror* -- how much further they have to go. We say, with respect to the court, that the conclusion arrived at -- and this is always a difficult submission for an advocate to make -- was perverse, because when one looks at what was already in the public domain, the jury had convicted this individual of the abduction and murder of Milly Dowler. It knew he was already in prison for two murders, and it had been told the night before that this person was probably associated with the abduction and murder of Lyn and Megan Russell. It is, with respect, difficult to see how we could have significantly increased the risk. But my Lord has my submissions. Therefore we seek permission to

appeal.

MR CAPLAN: My Lord, I should say, I am not adding anything, but I will support the application.

THE PRESIDENT: Of course you will.

We take the view that the issues that have been raised in this case are essentially the application of well-known principles to facts. That was the way the case was conducted before us and we see no point of law arising.

The order under s.4(2)that has been drawn up is simply in these terms, Mr Saini:

> "It is ordered that no report of these proceedings or any part of them is to be made until the conclusion of the proceedings in Boyle."

Is that sufficient? I am not sure that is right, actually.

MR PERRY: I wonder whether it ought to be the proceedings before the jury, rather than the proceedings, because it may be that those proceedings do not necessarily conclude.

THE PRESIDENT: Until after the verdict has been given. What happens if they do not agree?

MR SAINI: I specifically put that word in because I wanted to avoid any risk of the jury coming back and deciding, for example, issues of liability and then not quantum.

THE PRESIDENT: We better leave it as conclusion of proceedings and then give you liberty to apply.

MR SAINI: I am obliged, my Lord.