

Open justice is default position, says Court of Appeal

The default position for a court dealing with an application for a reporting restriction order is the general principle that all proceedings in courts and tribunals are conducted in public – the principle of open justice, the Court of Appeal has declared.

"Media reports of legal proceedings are an extension of the concept of open justice," said the Lord Chief Justice, Lord Burnett, who was sitting with Mr Justice Stuart-Smith and Mr Justice Nicklin.

His comments came as the court upheld the BBC's appeal against an order under section 4(2) of the Contempt of Court Act 1981 made by Judge Robert Jukes QC which postponed all reporting of the trial of surgeon Sudip Sarker until after the jury had delivered its verdict.

Sarker was convicted earlier this year of having fraudulently obtained a consultant surgeon's post by exaggerating his abilities and experience.

Lord Burnett said that in *R v Horsham Justices ex parte Farquharson* ([1982] QB 762, at 793H) one of the first cases decided under the 1981 Act, Lord Denning had noted that open justice and freedom of the press were "two of our most fundamental principles".

At common law, the court had no power to make an order postponing the publication of a report of proceedings conducted in open court; any such power had to be conferred by legislation.

"Attending court in person is not practical for any but a handful of people, and live-streaming and broadcasting of court proceedings remain restricted," Lord Burnett said.

"The only way that citizens can be informed about what takes place in most of our courts is through media reports. In that way the media serve both as the eyes and ears of the wider public and also as a watchdog."

Full contemporaneous reporting of criminal trials - and other legal proceedings - promoted public confidence in the administration of justice and the rule of law.

The public nature of court hearings, and media reports about them fulfilled several practical objectives - it enabled the public to know that justice was being administered impartially; it could lead to evidence becoming available which would not have been forthcoming if reports were not published until after the trial had ended, or not at all; it reduced the likelihood of uninformed or inaccurate comment about the proceedings; and it deterred inappropriate behaviour on the part of the court, and others taking part in the proceedings.

"On the rare occasions when a court is justified in sitting in private, both the public and media are prevented from accessing the proceedings altogether," Lord Burnett said.

"Reporting restrictions are different. The proceedings are there to be seen and heard by those who attend court, but they cannot be reported."

Reporting restriction orders, although not as great a departure from open justice as the court sitting in private, were nevertheless "direct press censorship", as Lord Sumption had said in the Supreme Court in *Khuja v Times Newspapers Ltd* ([2017] 3 WLR 351, at [16]).

"Reporting restrictions orders are therefore derogations from the general principle of open justice," Lord Burnett said.

"They are exceptional, require clear justification and should be made only when they are strictly necessary to secure the proper administration of justice.

"Any derogation from open justice must be established by clear and cogent evidence."

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