

Obey the rules on reporting restrictions, Court of Appeal tells judges

Judges facing applications for the imposition of restrictions on reporting trials must follow the relevant provisions in the Criminal Procedure Rules and ensure that proper notification of such requests is given first, the Court of Appeal said today.

They should also be on their guard against applications which were made at the last minute or without proper consideration of the principles which had to be applied, said the Lord Chief Justice, Lord Burnett.

The declarations came as the court upheld an appeal by the BBC against an order made at Worcester Crown Court by Judge Robert Jukes QC which postponed the publication of report of the trial of surgeon Sudip Sarker until after the jury had delivered its verdicts.

The judge made the order following an application by defence counsel, who argued that it was necessary to avoid the risk that the jury would be prejudiced against the defendant if reports of the trial included links to other online stories reporting that he was under investigation by hospital authorities and that the deaths of three of his patients had been referred to a coroner.

But defence counsel made no reference during his submissions to either *Blackstone's Criminal Practice* or *Archbold Criminal Pleading, Evidence and Practice*, the two main books for criminal law practitioners, "both of which have succinct sections on the principles governing section 4(2) of the 1981 Act, or to any authority or the Criminal Procedure Rules", said Lord Burnett.

Applications for reporting restrictions were subject to specific provisions in parts 6.4 and 6.5 of the Criminal Procedure Rules, he went on, adding: "Unless unavoidable, those rules must be followed."

Rule 6.4(3) said any party seeking a reporting restriction must apply for the order "as soon as reasonably practicable"; notify every other party to the case and any other person that the court directs; and explain what power the court had to make the order and why an order in the terms proposed was necessary.

Lord Burnett said: "In section 4(2) cases, the explanation for why the order is necessary needs to address, clearly (and ordinarily in writing): (i) how contemporaneous fair and accurate reports of the trial will cause a substantial risk of prejudice? and (ii) why a postponement order would avoid the identified risk of prejudice?"

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An application for a reporting restriction might be supported - or at least unopposed - by the other party.

"Although a reporter may be in court (as was the case here) he or she is unlikely to be in a position instantly to advance considered submissions in response to an application," Lord Burnett said.

"It is when these factors, individually or collectively, are present that the court must be most vigilant to ensure that an application for reporting restrictions receives careful consideration."

These applications were generally made on behalf of a defendant - and in the absence of any submissions from the media, judges were entitled to look for help to the prosecution, which was under a duty to ensure that the court was aware of the relevant legal principles, as was said in *ex parte News Group Newspapers Ltd* [2002] EMLR 9 by Lord Bingham, the then Chief Justice, at paragraph 25.

"Judges can also consider whether the application for the reporting restrictions could be adjourned and notice of the application given to the media (pursuant to a direction under Rule 6.4(3)) so that they have the opportunity of making submissions if they wish," Lord Burnett said.

"If the media are unable or unwilling to make representations, then the obligation to ensure section 4(2) orders are only made when justified remains on the court.

"The reality is that most local newspapers, for decades the mainstay of reporting the work of our courts, will be unable to justify the cost of applying to discharge or appealing a reporting restriction order.

"One need only look through the names of the appellants in this type of cases to see the rarity of appeals by local media.

"In *ex parte News Group Newspapers*, Lord Bingham CJ noted at [26] that the problem is exacerbated in the ordinary run of cases where the story itself, although something that a local newspaper would wish to publish, is not one of the highest public interest such as to justify the expenditure of large sums of money in seeking to have the order rectified.

"Even if a challenge is launched, the time constraints of the relevant trial may mean it is not heard until it is too late to allow any contemporaneous reporting of the trial..."

Lord Burnett went on: "Sometimes, as in this case, judges are urged to grant an order postponing reporting because it is expected that the trial will last only for a short period.

"But the practical effect of even a relatively short postponement order is likely to reduce the chances of any reporting at all.

"In order to publish a postponed report of a trial, the media organisation would have to commit the resources of a journalist attending the trial in the certain knowledge that only a fraction of what would have been published in daily reports will be likely to be published when the order is lifted.

"In the modern era of communications, it is truer than ever that 'stale news is no news'.

"Postponement orders, even if only of short duration, are likely to have a damaging effect on the very important public interest in reporting proceedings in courts."

Lord Burnett added: "These points serve to underline the importance of judges giving careful scrutiny to any application for reporting restrictions.

"There is comprehensive assistance in 'Reporting Restrictions in the Criminal Courts' published by the Judicial College and prepared in collaboration with the Media Lawyers Association, the News Media Association and the Society of Editors. This guide covers all types of reporting restrictions. Part 4.5 deals with postponement orders under section 4(2).

"As we have noted, the principal textbooks on criminal practice and procedure, Blackstone and Archbold, also provide guidance on reporting restrictions.

"The general application of the very strong common law principle of open justice has the result that for individual judges and practitioners, cases in which reporting restrictions of this sort are considered are relatively rare. In itself

that exemplifies the importance of all concerned proceeding with caution only after a careful examination of the underlying principles."

Media Lawyer, June 13, 2018