

Reporting restriction order 'should never have been made'

By Mike Dodd

An order which stopped the media from reporting the trial of a surgeon accused of fraud until after the jury had delivered its verdict was unjustified and should never have been made, the Court of Appeal has said.

The court - the Lord Chief Justice, Lord Burnett, Mr Justice Stuart-Smith and Mr Justice Nicklin - upheld an appeal by the BBC, which was supported by other media organisations, and quashed the order, which Judge Robert Jukes QC had made following an application by counsel representing the defendant, Sudip Sarker.

The Court of Appeal stressed the importance of open justice, re-stated the principles courts should apply when facing applications for orders under section 4 (2) of the Contempt of Court Act 1981 postponing publication of reports or proceedings, and reminded judges that they should approach applications for such reporting restrictions with caution.

The BBC - backed by Associated Newspapers, Guardian News and Media, Mirror Group Newspapers, News Group Newspapers, the Press Association and Times Newspapers - had used section 159 of the Criminal Justice Act 1988 to appeal against the order, even though it was lifted at the end of the trial, arguing that the issue was a point of principle.

Judge Jukes made the order on the first day of Sarker's trial on January 22, 2018, and lifted it at the end of the trial, after the jury convicted him.

Counsel for the defence had argued that the order was necessary because other reports about Sarker - saying that he was being investigated, and that the deaths of three of his patients had been referred to a coroner - could be drawn to the jury's attention, possibly through links placed in contemporaneous online reports of the trial.

The prosecution initially remained "neutral" over the application.

The Lord Chief Justice said: "Counsel for the defendant submitted that in light of the historic press coverage the judge should impose an order prohibiting reporting of the trial.

"He suggested that it would last for no more than about 10 days, which was the estimated length of the trial and that it should be made, 'just to ensure that this trial is not interrupted, in particular this jury are not exposed to some of the adverse press coverage that has occurred in the past'.

"There was no reference in the course of the submissions to either Blackstone or Archbold, 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."

The BBC sent counsel Ben Silverstone to the trial to challenge the order - which was by now also being supported by the prosecution - but Judge Jukes refused to lift it.

Lord Burnett said: "The judge was satisfied that contemporaneous reports of the proceedings would give rise to a substantial risk of prejudice and that it was necessary to make an order to avoid that prejudice.

"When considering the competing interest of open justice, the judge considered that the fact that the trial was only expected to last a further four days meant that the interference with the open justice principle was limited." The issue of applications for any reporting restrictions was dealt with in parts 6.4 and 6.5 of the Criminal Procedure Rules, which had to be followed "unless unavoidable", Lord Burnett went on.

"Judges must be on their guard against applications which are advanced at the last minute or without proper consideration of the principles in play," he said.

"On many occasions, the application for the reporting restriction will either 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.

"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.

"Applications of this sort are generally advanced on behalf of a defendant. In the absence of any submissions from the media, judges are entitled to look to the prosecution for assistance, whose duty it is to ensure that the court is aware of the relevant legal principles: *ex parte News Group Newspapers Ltd* [2002] EMLR 9 at [25] per Lord Bingham CJ.

"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."

Any order postponing reporting was likely to have a serious effect, Lord Burnett said.

"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'."

The danger of "parasitic damage" to a trial by jurors seeing online comments or other news reports about a defendant was not a risk of prejudice arising from fair and accurate reporting and could not justify an order under section 4 (2), Lord Burnett said.

He concluded: "Fair and accurate contemporaneous reporting of the trial would not have given rise to any risk of prejudice.

"The perceived risk arose from an assumption that a fair and accurate contemporaneous report would contain links to earlier irrelevant and prejudicial material.

"There was no reason to make that assumption, but in any event an order under section 4(2) would not prevent the republication of earlier prejudicial material or signposting it via links.

"It should not have been used to guard against parasitic damage to the trial.

"As we have noted, to follow either course would put a publisher in breach of the strict liability rule. "At the heart of the concern articulated by the defendant's counsel was a fear that, contrary to the judge's direction, echoed in material given to the jury in writing, members of the jury might embark on a search for further material.

"There was no reason to suppose that they would do so and a postponing order pursuant to section 4(2) was anyway an impermissible mechanism to reduce any such risk."

R v Sudip Sarker, with the BBC as applicant

Neutral citation: [2018] EWCA Crim 1341

Court of Appeal: The Lord Chief Justice, Lord Burnett of Maldon; Mr Justice Stuart-Smith; Mr Justice Nicklin

Hearing: May 23, 2018; Decision: June 13

Ben Silverstone, instructed by the BBC Legal Department, for the applicant; Jacob Hallam QC, instructed by the Crown Prosecution Service, for the respondent; the defendant did not attend and was not represented.

Media Lawyer, June 13, 2018