Neutral Citation Number: [2022] EWCA Crim 678

Case Nos: 202101595 B2
202101596 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM ISLEWORTH CROWN COURT
Recorder D Balcombe QC
Indictment No: T20180226

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 May 2022

Before :

LORD JUSTICE WARBY
MR JUSTICE TURNER
and
HIS HONOUR JUDGE SLOAN QC
(RECORDER OF NEWCASTLE)

- -

Between:

SANA MUSHARRAF	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Farrhat Arshad (instructed by **GT Stewart Solicitors & Advocates**) for the **Appellant**
Carole Fern (instructed by **CPS Appeals & Review Unit**) for the **Respondent**
The Press Association and **Evening Standard** also made written submissions

Hearing date: 4 May 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 18 May 2022.

LORD JUSTICE WARBY:

1. This is a ruling on an application for anonymity following the hearing of applications for leave to appeal.

2. In March 2019, this appellant was convicted of two offences of stalking contrary to the Protection from Harassment Act 1997. In July of that year she was sentenced to 33 months' imprisonment, and made the subject of a 10-year restraining order. On 4 May 2022 we heard her renewed applications for lengthy extensions of time for leave to appeal against conviction and sentence, which had been refused by the single judge. We extended time and granted leave to challenge conviction on three grounds, refusing leave to pursue three other grounds of challenge. We refused the application so far as the custodial sentences were concerned but extended time and granted leave to challenge the breadth of the restraining order. We gave our reasons in an extempore judgment at the end of the hearing.

3. Counsel for the appellant, Ms Arshad, then asked the court to anonymise the transcript of the judgment. She relied on the provisions of s 1(1) of the Sexual Offences (Amendment) Act 1992. As is well known, the effect of those provisions is that where an allegation has been made that an offence to which the Act applies has been committed against a person nothing must be included in a publication that would be likely to lead to that person's identification as the complainant. Where this right applies the practice of this court is to make an announcement to that effect at the start of the hearing, to refer to the provisions of s 1 in its judgment, and to anonymise the judgment.

4. Before her trial in the Crown Court this appellant had made allegations of sexual offences that fall within the scope of the 1992 Act. Those allegations had featured in the trial. They featured in the appeal documents. But the papers did not suggest that she had been anonymised at the trial, nor had there been any notice of any application or request for any form of anonymity in this court. We had nevertheless considered this point of our own motion before the hearing began. We had formed the view that s 1(1) did not apply here because of the qualification in s 1(4) of the 1992 Act. This provides as follows:

> "Nothing in this section prohibits the inclusion in a publication of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence."

5. It appeared to us that the Crown Court proceedings against this appellant were not "proceedings at … a trial at which the accused is charged with the offence" of which the appellant had complained. Nor were her applications in this court proceedings "on an appeal arising out of" such a trial. The man accused by the appellant, Mr Whiston, was never prosecuted. The police had decided to take no action against him. He was one of the two complainants of stalking, the other being his then partner and now wife. The appellant's allegations against Mr Whiston featured prominently in the evidence and argument in the Crown Court and in this court; as we said in our judgment on the applications, they were "an inextricable feature of the factual context". But that was because the appellant had relied on them at trial to defend the behaviour that was alleged to amount to stalking of Mr Whiston and his partner, the prosecution had alleged that

the allegations were untrue, and in this court the appellant complained that the jury had received inadequate guidance from the trial Judge on how to approach these issues.

6. Reflecting on the effect of s 1(4) before the hearing we had considered what this court said in *R v Beale (Jemma)* [2017] EWCA Crim 1011, [2017] EMLR 26. In that case, the defendant was prosecuted for perjury on the basis that she had made false accusations of rape on oath, which had led to a wrongful conviction. The issue of anonymity was raised. The trial Judge concluded that he could not make an order under s 1 of the 1992 Act, but he made an order under s 4(2) of the Contempt of Court Act 1981, postponing reports identifying Ms Beale. This court allowed an appeal against that order, observing at [13]:

> "… the right to anonymity, and the duty to preserve it, are clearly qualified by section 1(4). The plain and obvious meaning of the language in section 1(4) is that section 1(1) does not operate to prohibit a report of any criminal proceedings other than those in which a person is accused of the sexual offence in question, or proceedings on appeal from such proceedings."

7. In addition, we had done an internet search to see whether there might be some indication that the appellant had sought anonymity or had been given anonymity in practice. It was clear that there had been reports of the trial in the national and local media which contained her name, photographs, and other identifying details about her.

8. It was in these circumstances that our judgment not only referred to the appellant's allegations but also named her and gave other identifying details.

9. We mentioned all of this when Ms Arshad sought anonymisation of the transcript. She made clear that her client wished to press the application. As there had been no prior notice there was nobody present in court to represent the prosecution or the media who would be affected by any such order. We therefore directed that any such application should be made in writing on notice to the prosecution and the Press Association, and that the transcript of our judgment would not be made public in the meantime. Our directions required the prosecution to assist us by providing information as to any application or discussion about the topic of anonymity that (to its knowledge) took place at the trial. We made provision for a right of reply.

10. Written submissions were then filed by Ms Arshad (who did not appear in the Crown Court proceedings). We received written representations on the facts from Ms Carole Fern of Counsel, who appeared for the Crown at trial. These were accompanied by some documentation. We have had written submissions on the law and its application to this case from two reporters, Ms Jess Glass for the Press Association and Mr Tristan Kirk for the Evening Standard. The appellant has made written representations on the facts and submissions on the law by way of reply.

11. The prosecution representations and accompanying papers make this much clear. The appellant's trial Counsel never suggested that she had a right to anonymity. The issue was raised in open Court by the trial Judge on the first day of the trial, and again by a reporter later that day, but no application or representation was made to the effect that the appellant should be anonymised. The case was then opened, and the trial was conducted without any order being sought or made or any suggestion being made at

any stage that anonymity should be given. It was not given. Reporters attended the trial. Articles appeared in *The Times* on 13 March 2019 and 27 March 2019 which reported the appellant's allegations, named her, and contained photographs of her. No objection was raised. The *Evening Standard* of 4 July 2019 carried a report of the sentencing hearing which again named the appellant and included a photograph of her, as well as reporting her allegations. Reports of the sentencing appeared in other papers. It is plain that the relevant facts of the case, including the appellant's allegations, have received extensive national publicity in conjunction with the appellant's name and image.

12. Other aspects of the factual account given by the prosecution are in dispute. It is unnecessary to detail them here.

13. Ms Arshad submits that the appellant had a s 1(1) right to anonymity throughout and that "the fact that her right to anonymity was not observed in the Courts below is not reason why it should not now be observed." Counsel points out that in *Beale* the defendant was being prosecuted for perjury on the basis that her accusations were false. She also relies on a passage from the Judicial College Guide to Reporting Restrictions in the Criminal Courts ("the Guide") which was mentioned in *Beale* and which says that the exception with which we are dealing "caters for the situation where a complainant in a sexual offences case is subsequently prosecuted for perjury or wasting police time …". Ms Arshad seeks to distinguish the present case on its facts. She also submits that there is no public policy reason why section 1(1) should cease to apply to the Applicant just because she is the subject of criminal proceedings. She argues that s 1(4) does not say that s 1(1) ceases to apply in the event of subsequent criminal proceedings, and that we should give it effect by anonymising the judgment.

14. As we have indicated, we accept the starting point of Ms Arshad's argument. The appellant has alleged that sexual offences within the Act have been committed against her. Other things being equal, her case would fall within the scope of s 1(1). But the right conferred by s 1(1) is qualified. It does not restrict reporting of proceedings such as the trial of the stalking charges against the appellant, or any appellate proceedings resulting from that trial. That is the ordinary meaning and effect of the language used by Parliament in s 1(4). We do not consider that Ms Arshad has provided us with any justification for departing from the ordinary meaning of the sub-section.

15. *Beale* may be distinguishable on its facts, but its reasoning applies here. The Guide, besides being commentary not authority, does not assist. It merely identifies two classes of case to which the subsection applies; it does not exclude the wider effect that we think must be given to s 1(4). In our judgment, that provision means that the right to anonymity does not apply to the reporting of a trial or appeal in a case such as this, where the sexual offences of which complaint has been made are not the subject of the charges before the court (or any other charges).

16. We therefore conclude that the matter was appropriately dealt with at the trial and at the hearing before us, and that the 1992 Act provides no basis for anonymising the transcript of our judgment of 4 May 2022.

17. Had it done so then in the light of the prosecution's account of the facts it might have been necessary to consider whether anonymity might have been waived by the appellant, but we need not say more on that topic. Nor do we need to explore the

potential significance of s 3 of the 1992 Act, to which the media parties have alluded. This gives a trial judge power to "displace" section 1 if and to the extent the judge is satisfied "(a) that the effect of section 1 is to impose a substantial and unreasonable restriction on the reporting of proceedings at the trial and (b) that it is in the public interest to remove or relax the restriction." We are satisfied that these provisions were not and are not engaged in this case.

18. Ms Arshad's written application did not assert that the appellant had any legal right to anonymity other than that conferred by the 1992 Act. We have considered that issue for ourselves, and we see no basis for overriding the ordinary rule of open justice on the undisputed facts of this case that we have summarised.

19. In her written reply, Ms Arshad made a further application, suggesting for the first time that s 4(2) of the Contempt of Court Act 1981 provides a ground for anonymising our judgment and imposing restrictions on the reporting of the appellant's identity pending a possible retrial. She argued that there was "no reason why such an order could not be made at this stage as a holding position". We have considered these submissions, but we see no arguable merit in them and have therefore not found it necessary to call on the prosecution or media representatives to respond.

20. Section 4(2) does not confer a right to anonymity. Its purpose is to protect the fairness of proceedings. It gives a court jurisdiction to postpone reporting of proceedings in open court if, and only to the extent that, an order "appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice" in the proceedings in question or in "any other proceedings pending or imminent". We are not confident that a retrial could be said to be "pending or imminent" at the present time (see the discussion in Arlidge, Eady & Smith on Contempt, 5th ed, para 7-205 to 7-207). Assuming that it could, the starting point would be to consider whether reporting would pose a not insubstantial risk of prejudice to such a trial. If not, there can be no jurisdiction to make an order: see *Beale* [16]-[17]. Ms Arshad has not identified how a potential retrial might be prejudiced by reporting of the appellant's identity as a complainant. We have reviewed the transcript of the judgment given on 4 May 2022 and cannot see a basis for believing that its publication would pose any risk of prejudice to any retrial. That is the end of the matter: see *R v Sherwood, ex parte Telegraph Group Ltd* [2001] EWCA Crim 1075, [2001] 1 WLR 1983 [22].

21. The applications are therefore refused. The transcript of our oral judgment of 4 May 2022 will be made publicly available at the same time as this written judgment.