



Neutral Citation Number: [2017] EWCA Crim 326

Case No: 2016/05551/B1 & 2016/05552/B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON A REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION
ON APPEAL FROM A COURT MARTIAL AT BULFORD
(THE JUDGE ADVOCATE GENERAL)

Strand, London, WC2A 2LL

Date: 28/03/2017

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

and

THE VICE-PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION

Between:

Regina

Respondent

- and -

Alexander Wayne Blackman

Appellant

- and -

BBC, ITN, Times Newspapers Limited, British Sky
Broadcasting, Guardian News and Media and Associated
Newspapers Ltd

**Interested
Parties**

- and -

The Ministry of Defence

**Interested
Party**

Mr J Goldberg QC, Mr J Israel and Mr S Kong for the Appellant
Mr R Whittam QC and Katherine Hardcastle for the Respondent
Mr J Nicholls for the Media as interested parties, save for Associated Newspapers
Mr G de Wilde for Associated Newspapers Ltd
Mr O Glasgow QC for the Ministry of Defence

Hearing date: 31 January 2017

**REASONS FOR JUDGMENT ON THE APPLICATIONS BY THE MEDIA FOR THE
RELEASE OF THE VIDEO CLIPS**

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The Court:

1. This judgment sets out our reasons for refusing the application by the media parties, the BBC, ITN, Times Newspapers Limited, British Sky Broadcasting, and Guardian News and Media, that the court make available to the media six video clips taken by Marine B before and during the killing of the insurgent. The background to the application is fully set out in the judgment the court gave on 15 March 2017 allowing the appeal: [2107] EWCA Crim 190.

The applications during the course of the court martial

2. During the course of the court martial the media parties made various applications to the Judge Advocate General for the release of transcripts of the soundtrack of the videos and various still photographs. On 28 October 2013 the Judge Advocate General, in a series of rulings, declined to order the release of the video clips but allowed the release of a transcript of the soundtrack. In a subsequent ruling on 7 November 2013 he ruled that certain stills taken from the video should be released.
3. Those rulings are referred to in the judgment of this court in *R v Marines A, B, C, D and E and Guardian News and Media and Other Media* [2014] 1 WLR 3326, [2013] EWCA Crim 2367 at paragraphs 68 to 73 on an appeal against them. The court set out at paragraphs 49 to 67 and 78 to 80 its reasons for upholding the rulings of the judge in relation to the six video clips but allowed certain further images to be made public.

The publicity surrounding the reference by the CCRC

4. The decision by the Criminal Cases Review Commission to make a reference to this court in respect of the conviction of the appellant was attended by a considerable amount of publicity, as had been a campaign on behalf of the appellant to secure the reference. In the directions hearings for the appeal on 16 and 21 December 2016 it was intimated by the media parties that they would apply for release of the video. A hearing took place for that purposes on 31 January 2017 at which the Ministry of Defence opposed the application in respect of three of the six clips; they agreed to release three of the clips. The three have been released. The three clips showed the landscape and some of the marines shortly before the killing of the insurgent took place.
5. In addition to hearing counsel for the media parties who sought release of the video clips (save for Associated Newspapers Ltd which expressed itself neutral), we heard from counsel for the Crown, The Ministry for Defence and the appellant. At the conclusion of the hearing we stated that we would refuse the application for the release to the media parties of the three video clips for reasons to be given later. These are our reasons.
6. We also made an order imposing reporting restrictions in relation to the hearings for directions and for the application by the media parties. We lifted these restrictions at the outset of the hearing of the appeal.

The evidence before the court

7. When the matter was considered by the Judge Advocate General and by this court in 2013 there was evidence from the Ministry of Defence before the court, as is apparent from paragraph 17 of the judgment.
8. On this occasion the evidence filed by the Ministry of Defence comprised a statement by Peter Wilson, the Head of the Research Information and Communications Unit in the Office of Security and Counter-Terrorism at the Home Office. His initial statement was dated 18 January 2017, supplemented by a short statement of 25 January 2017.
9. It is unnecessary for us to set out the statement in detail. The essence of the statement was that if the three video clips were made available to the media parties for public broadcast, any broadcast would be recorded by the terrorist organisations and then used as propaganda in order to radicalise others. It would provide terrorists with material they could use to underpin their ‘justification’ for undertaking terrorist attacks against the Western powers and to underpin their extremist narrative at a tactical and strategic level. They would use it to argue that Western powers are corrupt, do not adhere to their own rules, such as the military rules of engagement and the Geneva Convention and claim that this was the way the armed forces of the Western powers treat insurgents on the battlefield.
10. It was said that in the three years since the video emerged, nothing had been seen that surpassed it in terms of radicalisation potential. Releasing it would therefore present a real threat to life, the members of the Armed Forces and the wider British public and to British interests overseas.
11. The statement pointed to the increase since 2013 in the ambitions, capabilities and scale of terrorist communications, the murder of Lee Rigby in 2013 and the attacks that had taken place. The statement set out illustrations of particular individuals who had been radicalised by material that did not have the potential of this video. Mr Wilson concluded in his supplementary statement:

“The presentation of any of this footage will be used as compelling evidence for supporters [of violent Jihad] to act and respond immediately, specifically and violently. They will use it to evidence and justify the claim that the West is at war with Islam and that it operates outside its own legal restraints; it will trigger a tipping point for many sympathisers who may have been on the verge of active response into immediate violent action. It will in short create a real and immediate risk to life.”
12. The media parties were shown the video clips prior to the hearing on 31 January 2107 and offered an opportunity to cross-examine Mr Wilson but they decided not to do so.
13. In addition, there was a statement from the appellant’s wife setting out advice received from the police and her fears for her own safety. Again, no application was made to cross-examine her.

14. The video clips were played at the hearing of the appeal; the court made clear that no attempt was to be made to film or otherwise record the video when played.
15. The content of two of the three clips is set out at paragraphs 20 to 22 of our judgment of 17 March 2017 allowing the appeal of the appellant.

The material in the public domain

16. There is in the public domain:
 - i) The transcript and audio of all six clips of the video.
 - ii) Some stills taken from the video.
 - iii) The appellant and two of the marines on the patrol have been publicly identified; the photograph of the appellant has been very prominent in the media reports of what has happened.
17. In addition to that material the Ministry of Defence decided at the hearing of 31 January 2017 that they would consent to the release of video clips 1 to 3 as we have set out above.

The legal principles

18. The basic approach is set out in *R (Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2013] QB 618, [2012] EWCA Civ 420 and the judgment of this court in *Marine A* to which we have referred.
19. If there is a threat to life within the meaning of Article 2 of the European Convention on Human Rights, the court does not have to balance the principle of open justice and the rights of the media under Article 10, as the State through its judicial branch cannot release material into the public domain which would threaten the life of a citizen. On the other hand, if there was no obligation under Article 2, then it is accepted the court must balance the principles of open justice and the right of the media under Article 10 against the other circumstances militating against disclosure.
20. It was submitted on behalf of the Ministry of Defence that the evidence advanced by them showed that there was a real and immediate threat to life through the release of the video and therefore the court should simply not order its release. In submissions made on behalf of the media parties (save Associated Newspapers Ltd) by Mr Jesse Nicholls it was contended that there was no immediate threat to life within the meaning of Article 2, as Article 2 required the identification of the perpetrator of the threat and the victim of the threat in all circumstances. Reliance was in particular placed on the decision of *In re Officer L* [2007] 1 WLR 2135 and decisions of the Strasbourg Court to that effect. It was said to make no difference whether the case concerns the failure of a State to take action to protect a named individual from a threat as distinct from a case like the present where the State is being requested to act in a way that would not endanger the lives of citizens in general.
21. It was, in our view, not necessary for us to determine the issue under Article 2. It seemed to us clear on the evidence before us that the balance under Article 10 was clear beyond any doubt. Sufficient has been put into the public domain to make it

possible fairly to report the appeal without creating the real and immediate danger to life that would result from making available the three clips so far withheld. The evidence before us from Mr Wilson was clear and compelling as to the threat.

22. We accepted, of course, that the media applicants to this court would show the three video clips in issue responsibly in a way that might have assisted in the fair reporting of the appeal. We also accepted, for the reasons summarised in the judgment in *Marine A* at paragraphs 55 to 58, that the position of the media parties as a public watchdog is different from that of the general public. We also accepted that the media parties have obligations under the relevant Codes of Conduct with which they would be expected to comply. However, it is self-evident in respect of three video clips that such clips could be misused by others. The evidence in this case was overwhelming that these clips would be so misused.
23. Balancing, therefore, the principles of open justice and the rights of the media parties under Article 10 there was no doubt in our minds that the release of the three clips would significantly endanger a large number of people, not only in the United Kingdom but elsewhere. We therefore considered that the balance lay against their disclosure and refused the application.