APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 32
HCA/2017/000011/XM
HCA/2017/000014/XM

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

PETITIONS AND COMPLAINT

by

THE LORD ADVOCATE

Petitioner

against

SCOTTISH DAILY RECORD AND SUNDAY MAIL LTD

Respondent

Petitioner: A Prentice, QC, AD, Sol Adv; Crown Agent (For Lord Advocate)
Respondent: Clancy, QC; McCracken for Scottish Daily Record and Sunday Mail Ltd

4 October 2017

[1] In these petitions at the instance of Her Majesty's Advocate, the respondent, the Scottish Daily Record and Sunday Mail Limited, has admitted contempt of court in respect of articles published by it in the Daily Record and its website on 11 February and 22 May 2017 in relation to two separate matters. Each article related to an individual ("A" and "B") who had appeared on petition at the Sheriff Court in circumstances narrated below.

[2] On 20 January 2017 "A" was arrested on outstanding warrants in relation to earlier proceedings on other matters. One of those was a summary complaint in respect of which he had failed to attend at pleading and other continued diets. The case had not yet gone to trial. On 21 January 2017, he was arrested in connection with charges under the Firearms Act 1968. He appeared on petition on 23 January 2017, when he was committed for further enquiry and remanded. On 1 February, he was fully committed on a fresh petition, and remanded to Barlinnie Prison. The charges were substantially the same as those on the original petition. All charges were subject to bail aggravations, and all were also said to have been connected with serious organised crime.

[3] On 20 May 2017 "B" was arrested in connection with offences said to have been committed in Falkirk the previous day. He appeared on petition on 22 May 2017 on charges of attempting to abduct two 9 year old girls, and other offences, all committed whilst subject to a sexual offences prevention order granted in 2010.

[4] The article in relation to "A" was sensational in nature. It named him and printed photographs of him. It associated him with drug trafficking and dealing and with a number of shootings of members of organised crime. It used phrases such as "gang boss", "cocaine kingpin" and "cocaine baron", and suggested that he had been "involved in a violent turf war with rival gangsters". The article contained details of the allegations against him that may form part of the evidence at any future trial, and referred to the recovery of a "fearsome arsenal" and "horrific array" of weapons and money. In addition, it revealed detailed information about his criminal history, including previous convictions and prison sentences. It referred to other live proceedings against him, suggesting that he had gone into hiding in connection therewith and describing him as "one of Scotland's most wanted men".

[5] The article in relation to "B" also named him, and added photographs from at least one of which he might be identified. The photographs and captions were sensational in nature, showing him being pinned down to the ground and in handcuffs, one bearing the caption "GOT HIM". The article referred to the photograph on the ground with the words "Dramatic moment cops restrain man accused of attempting to abduct two young girls in the woods", a phrase repeated elsewhere in the article in similar terms. There is detail of the allegations that may form part of the evidence at trial. Detail of the broad circumstances of the alleged incident and what is said to have happened are narrated in the article. The article contained quotations from a Facebook posting said to have been made by the mother of one of the children saying "This absolute beastie scum tried to get my daughter and her friend to go into the woods with him in broad daylight". This is a phrase suggestive of offending of a sexual or indecent nature. The article linked "B" by name with the offences of which he is charged, and implied his guilt thereof.

[6] Initially, answers were lodged to the petition in each case disputing that there was any contempt arising. Notes of Argument to similar effect were also lodged. However, around16 September it was conceded that the articles referred to above did indeed constitute contempt of court, and that was confirmed this morning by Senior Counsel for the respondent, who also tendered an apology for the creation of circumstances where the course of justice was put at risk. Counsel recognised that the statutory test, namely whether there was a "substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" had been met. The matter was one of creation of a risk. From the point of view of whether a contempt had been committed, the fact that no actual prejudice to a trial eventuated was irrelevant. However, such a factor might have a bearing on sentence.

[7] We were advised that both sets of articles were "legalled" by solicitors engaged for that purpose, but in very different circumstances. In the "A" case, the solicitor had been seriously unwell, and there is a report from her doctor that she should not have returned to work. She was heavily sedated at the time the advice was given and the effects of the medication alone would have "rendered her incapable of rational thought let alone advising clients on legal matters".

[8] There is no such excuse in the second case. Counsel, in his submission, recognised that the nature of the articles, at least in the "A" case, might be considered so glaringly flagrant that any editor might have questioned the advice given. There is some force in that concession: in the case of "A" the terms of the article were blatant contempt. It recalls the words of Lord Emslie in *HMA* v *George Outram & Co* 1980 JC 51 where, in relation to the "legalling" of article in that case, he said:

> "We are astonished that there was the slightest doubt about the propriety of publishing the contents included in this particular article. After the Atkins and Hall cases we would have thought that even an inexperienced journalist in Scotland would have known perfectly well, without having to take legal or other advice, that to publish such an article as this would plainly constitute contempt of court of the gravest kind."

[9] In the case of "B", photographs of an untried person were printed against advice. In *HM Advocate* v *Caledonian Newspapers Limited* 1995 SLT 926 the court referred to dicta that publishers and responsible editors must not only try to avoid committing contempt of court, they must succeed in doing so. It has previously been made clear, in both *Stirling* v *Associated Newspapers* 1990 JC 5 and *HM Advocate* v *Caledonian Newspapers Ltd*, that the publication of photographs of individuals arrested in criminal proceedings is one in respect of which the greatest of care must be taken, and is one in respect of which serious issues may arise should identification be an issue at trial, as it is in the case of "B". It may be

possible to discount the effect on the jury of publication of photographs, because of the time which will elapse between the publication and trial, but the matter is much less clear in relation to witnesses, even allowing for the fact that one of the photographs was taken by a witness, and published on Facebook by the mother of one of the complainers. In *HM Advocate* v *Caledonian Newspapers Limited,* the court noted that the only safe way to publish a photograph of an untried prisoner was with the consent of the Lord Advocate. In the "B" case, the editor was warned by the solicitor engaged for advice, that publication of the photograph carried a risk of contempt but nevertheless proceeded to run that risk.

[10] Both these contempts, relating to very grave charges, are serious in nature.

[11] In the "A" case, the article is one which in our view carries a severely prejudicial risk to the course of justice: it disclosed his criminal history, including his previous convictions and the sentences imposed; reported him as having been evading the police for six months (a matter compounded by its reference to other live proceedings); gave details of the circumstances of the offences and the recovery of important items of evidence; published his photograph repeatedly captioned with material suggesting he was of bad character; and did so in terms relating to gun crime and violent, serious organised crime which are closely related to the subject matter of the charges on which he appeared, and the organised crime aggravation libelled. The clear implication of the article is that "A" is a dangerous, violent criminal, involved in serious violent crime, including gun crime, and organised crime.

[12] In the case of "B", the publication of the photograph is a particularly serious matter. However, it is also the case that the article set out details of facts which might be expected to be the subject of evidence at trial, including statements made by potential witnesses.

[13] We recognise that what is sometimes referred to as the "fade factor", arising from the gap in time between publication and trial, is an element which must be borne in mind; as is

the fact that the Trial Judge will be able to give such directions as he sees fit. It is also relevant that the respondent accepted guilt and tendered an apology. It must be noted however that these came at a relatively late stage in the proceedings, and following answers and Notes of Argument in which it was maintained that the statutory test had not been met. Of course, the original petitions also contained other allegations of contempt and other respondents, but the fact remains that the admissions were made late in the day, and the apology even later.

[14] We will impose a *cumulo* sentence in relation to both petitions which will be a fine of £80,000.