HIGH COURT OF JUSTICIARY

[2021] HCJ 3
HCA/2020-06/XM

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

PETITION AND COMPLAINT

by

HER MAJESTY'S ADVOCATE

Petitioner

against

CRAIG MURRAY

Respondent

for a decision in an application for permission to appeal to the UK Supreme Court

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Petitioner: A Prentice, QC, Sol Adv, AD; Crown Agent
Respondent: Dean of Faculty (R Dunlop) QC, Harvey; Halliday Campbell WS, Solicitors, Edinburgh

8 June 2021

[1] The applicant was found to be in contempt of court following the publication by him of material which was likely to lead to the identification of complainers in the trial in *HMA* v

Salmond which related to allegations of sexual offending. The court considered the contempt to be a serious one, and for reasons given in its written decision on sanctions, imposed an order for imprisonment for eight months. The applicant seeks permission to appeal to the UK Supreme Court in terms of section 288AA of the Criminal Procedure (Scotland) Act 1995, which provides that "for the purpose of determining any compatibility issue an appeal lies to the Supreme Court against a determination in criminal proceedings by a court of two or more judges of the High Court ".

Competency

[2] A preliminary issue arose as to whether the contempt proceedings were "criminal proceedings" for the purpose of section 288AA of the 1995 Act. The Lord Advocate accepted that they could be so categorised. We are satisfied that this is at least arguable. The order breached was an order of the High Court of Justiciary and the contempt proceedings were conducted in that court. Contempt proceedings are *sui generis* but their true nature may reflect the nature of the proceedings to which they relate, in this case criminal proceedings, as may be seen from the fact that appeals against such decisions traditionally have been taken to the *nobile officium* of the High Court, not the Court of Session, where appeals against findings of contempt in relation to civil orders would be entertained. In presenting the petition the Lord Advocate, unlike the position in extradition proceedings (see *Kapri* v *LA* [2013] UKSC 48), seems to be exercising his authority as head of the system of prosecution. We are less persuaded by the applicant's arguments that the characterisation flows from the nature of the sanction, which may follow, and which includes immediate imprisonment, having regard to section 307(1) of the 1995 Act and to the fact that a similar sanction can follow in what are clearly civil proceedings. One can at least say that contempt proceedings

in criminal cases are "quasi criminal", although such a classification does not import criminal procedure to the proceedings. For all these reasons, we are willing to proceed on the assumption that the proceedings here can be categorised as criminal for the purposes of section 288AA of the 1995 Act, and that the application is competent.

Merits

Preliminary observations

[3] It is worth noting that it has not been suggested that the court should not have made the section 11 order; or that it should be recalled; or that the order itself was not compatible with article 10 ECHR. The submission at the original hearing was twofold: that in the absence of intention on the part of the applicant, and in the "unprecedented" circumstances of the original trial, should the publications be found to breach the order, a finding of contempt would not be compatible with Article 10. This submission was not further developed, and in the absence of concerns about the making of the original order, or an argument that publication was somehow justified by the public interest, there were clear difficulties with that submission. Otherwise the argument for the applicant was simply that the material published did not in fact have the effect asserted by the Crown. Article 10 was relied on in the sanctions hearing, in relation in particular to the need for the sanction to be proportionate to the nature of the breach, and culpability therefor. No compatibility minute, or devolution minute, was lodged until the making of this application.

[4] The applicant describes himself as a "journalist in new media". Whatever that may involve, it is relevant to distinguish his position from that of the mainstream press, which is regulated, and subject to codes of practice and ethics in a way in which those writing as the applicant does are not. To the extent that the submissions for the applicant make

comparisons with other press contempts, and the role of mainstream journalists, this is a factor which should be recognised.

Compatibility issues

[5] The applicant seeks to raise three alleged compatibility issues.

Issue one

[6] It is submitted that the court's finding of contempt is incompatible with Article 6 ECHR because in its conclusions about the article of 18 March 2020 it goes beyond the contempt alleged in the petition, under reference to *Byrne* v *Ross* 1992 SC 498 and *Yaxeley Lennon* [2018] EWCA Crim 1856. In our view this argument places far too narrow a construction on the court's decision. This addresses an issue considered by the court at paragraphs 62 and 63 of its opinion. The court concluded that it could not and would not consider whether the earlier articles which did not form part of the petition, and of which the 18 March article was one, constituted on their own contempt of court. What the court did consider permissible was to consider these articles as part of the background against which the subsequent articles would be read and ask whether the content made it more likely that the subsequent articles would lead to identification of complainers. This is no different from considering other material in the public domain to assess the likely effect of a subsequent publication, and is a familiar approach in cases of jigsaw identification. The reference in paragraph 80 of the court's opinion to the article of 18 March as breaching the court order needs to be read with paragraph 63 where it was concluded that whilst the court would be entitled to consider whether the article factually breached the order, it would not reach a conclusion as to the article constituting a separate contempt. The fact that paragraph 38 of the petition referred to this article only in relation to one complainer is of no moment to the task upon which the court required to embark. That task was to examine

objectively whether the individual articles said to amount to contempt, read alone or with other material in the public domain, and in particular material published by the applicant, were likely to lead to identification of complainers. The court was not bound in doing so by the terms of paragraph 38 of the petition and the applicant could not reasonably have thought it would be. The argument also ignores paragraphs 71-75 of the petition which contain a more general reliance on the effect of the 18 March article on interpretation of subsequent articles. We do not consider that any arguable point of law arises under this head.

Issue two

[7] It is submitted that the court's finding of contempt is incompatible with Article 10 ECHR because the test it applied is not prescribed by law for the purposes of Article 10(2), being insufficiently precise and foreseeable. This argument focuses on a section of paragraph 57 of the court's opinion. That paragraph is part of the court's consideration of the scope of the protection which commences at paragraph 54. The court clearly proceeded on the basis that the appropriate test to apply was an objective one, and that the issue was whether, objectively speaking, the applicant had published material which was likely to disclose the identity of complainers in the trial. The issue regarding the individual complainers in this case was that there was already information in the public domain about the case and the complainers which by its very nature narrowed the possibilities as to the identity of those involved. This was perfectly relevant to the issue which the court required to address, and involves no imprecision or lack of foreseeability.

[8] The paragraph complained of deals with the applicant's submission that it could not be contempt should the material be capable of allowing identification by say, work colleagues or part of the community. The court rejected that argument, but in fact made no

finding that any likely identification was so restricted. Although in certain instances the Crown had submitted that anyone who had contact with a complainer personally or through work would have been likely to be able to identify her from the information, as can be seen from the findings made in respect of individual articles, (and especially the section addressing the application of the objective test to the articles in question, found at paragraph 72 onwards), the court did not proceed on this narrow basis, but on a risk of identification by members of the public. In one case, where the Crown argument relied on a physical feature of the complainer (D), and the identification would thus have been made by someone who knew the complainer, the court did not make a finding of contempt. This is in contrast to the position of other complainers where the information which gave rise to the contempt related to material already known within the public domain, or otherwise easily accessible to the public. Thus, even if the court erred in paragraph 57, that error had no consequences, since the court did not proceed on that narrower basis. The court did not conclude that the risk of identification was restricted to those in any complainer's immediate or personal circle. It made no error in applying the correct objective test. As the Crown submitted, the decision of the court met the requirements of article 10(2), having taken account of the terms of both the Contempt of Court Act 1981 and the Independent Press Standards Organisation Guidance on the reporting of sexual offences.

[9] We do not consider that there is an arguable point of law arising when para 57 is read in context.

Issue three

[10] It is submitted that the sanction of eight months' imprisonment is disproportionate and thus incompatible with Article 10.

[11] The applicant accepts that journalists and others who exercise their freedom of expression have duties and responsibilities, and they cannot be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them a fail-safe defence. However, it is submitted that, where there are other methods of achieving the desired end, the sanction of imprisonment is disproportionate and thus incompatible with Article 10 ECHR. It is submitted that "the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired" (*Cumpana and Mazare* v *Romania* (2005) 41 EHRR 14, para 115). The present case is, of course, a case in which the rights of others have been seriously impaired. The right of the complainers not to be identified has been seriously and flagrantly impaired by the applicant's actions.

[12] In its sanctions determination, the court referred to the features identified in *Yaxeley-Lennon* as relevant to sanction, and which bear also upon the question of the proportionality of the sanction selected. One of those factors is the potential consequences for participants in the trial, in this case the complainers. The scale of the offending was also taken into account as a relevant factor, with the observation that some complainers were the subject of repeated articles, thus constituting aggravations of the original breach. The level of culpability - high - was also taken into account, as were the personal circumstances of the applicant. The sanctions determination was in itself an exercise in proportionality. In its determination the court considered the rationale for the protection of anonymity, and the fact that it extends beyond the rights of complainers in the individual case to providing comfort to those who may be considering reporting a sexual offence. It considered that the actions of the applicant were such as struck at the heart of the fair administration of justice.

The facts as summarised in the sanctions determination demonstrate exceptional circumstances seriously impinging on article 8 rights of complainers in the trial. This is precisely the kind of situation envisaged within *Cumpana and Mazare.*

[13] It is not the case that the order prevented reporting of the trial, or other matter of public interest. The suggestion is made that the applicant's genuinely held belief that the prosecution of the former first minister was unwarranted is the relevant matter of public interest, the inference from the context of that submission being that the sanction is such as to prevent discussion of a legitimate matter of public concern. However, that is not a tenable argument. It is the repeated publication of material likely to lead to identification of complainers in the face of a clear order of the court prohibiting that which drew the sanction. The order did not prevent discussion of whether the prosecution was objectively justified. The applicant remains free to pursue discussion of that issue, as long as the anonymity of the complainers is respected. The concerns expressed in para 113 of *Cumpana and Mazare* do not arise.

[14] The legislation - which is not attacked - provides for a sanction up to two years imprisonment. The sanction selected was well within the constraints of the legislation.

[15] We do not think that there is an arguable point of law arising under this paragraph.

Devolution issue

[16] The applicant adopted an *esto* position that the bringing of a petition and complaint for contempt is a function of the Lord Advocate, and that a question arises whether the exercise of that function is compatible with the applicant's article 6 and 10 rights, which constitutes a devolution issue within the meaning of paragraph 1(d) of schedule 6 to the

1998 Act, presumably the inference of the application being that if the application under section 288AA fails, an appeal lies under para 13 of schedule 6 to the Scotland Act.

[17] The scope of devolution issues in criminal proceedings was significantly narrowed by Part 1 of Schedule 6 to the Scotland Act 2012. The effect of that legislation, insofar as relevant to these proceedings, was to restrict devolution issues to what are often referred to as "pure" devolution issues, such as whether an Act of the Scottish Parliament relates to a reserved matter. The net effect is that challenges against the Lord Advocate in his prosecutorial role or against the court relative to convention rights constitute compatibility, not devolution, issues. The argument advanced by the applicant cannot properly be categorised as a devolution issue and no arguable point of law can be identified.

Conclusion

[18] Having reached the conclusion that there are no arguable points of law arising, the court will refuse the application. We understand that it is the applicant's intention to seek to apply for leave directly to the UKSC. In the circumstances we will suspend the warrant for a further four weeks.