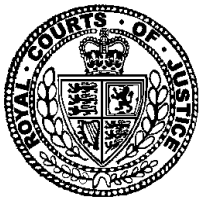

Neutral Citation Number: [2019] EWCA Crim 1304

Case No: 201800671 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Leicester Crown Court
His Honour Judge Dean QC
T20167040

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 24 July 2019

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE EDIS
and
MR JUSTICE BUTCHER

- -

Re: Sadhana Soni (Appeal against a Wasted Costs Order)

- -
- -

T. Schofield for the **Appellant, Sadhana Soni**
G. Pons for the **Respondent, the Crown Prosecution Service**

Hearing date: 19 June 2019

- -

Approved Judgment

Lord Burnett of Maldon:

1. This is an appeal by Sadhana Soni against a wasted costs order made by His Honour Judge Dean QC in the Leicester Crown Court on 19 January 2018. She is a solicitor and sole director of Denning Sotomayor Ltd, a company which trades as solicitors and is regulated by the Solicitors Regulation Authority. The appellant was ordered to pay wasted costs of £4,000 (£2,000 to the Crown Prosecution Service and £2,000 to Judge Sykes Frixou, Solicitors). She had made a request on behalf of clients for information that had been ventilated in a public contempt of court hearing culminating in the imprisonment of the contemnor, Kalpesh Patel, together with associated documentation. The central issue before us is whether the wasted costs regime found in the Prosecution of Offences Act 1985 ("the 1985 Act") conferred power on the judge to make the order.

The Facts

The proceedings against Kalpesh Patel

2. In September 2015 Kalpesh Patel was charged with fraud and money laundering. The fraud prosecution arose from an operation called Operation Tarlac. 15 individuals were prosecuted. Kalpesh Patel was one of nine who were tried before His Honour Judge Head and a jury between October and December 2016. He was acquitted of the charges against him.

3. On 27 October 2015 the prosecution had applied for a restraint order under the Proceeds of Crime Act 2002. His Honour Judge Pini QC granted an order restraining Kalpesh Patel from dealing with his assets and requiring him to serve a witness statement which set out details of all his assets and the assets under his control. It also required him to provide copies of specified types of civil process. An unsuccessful application had been made to discharge that restraint order in mid-2016.

4. Kalpesh Patel did not comply with the requirements of the restraint order. On 13 September 2016, the Crown served an application pursuant to Part 48 of the Criminal Procedure Rules ("CrimPR") for a finding that he was in contempt of court. In October and November 2016 further orders were made for him to provide information and disclosure. He did not comply with those ancillary orders.

5. On his acquittal on 21 December 2016 the restraint order was discharged.

6. The proceedings for contempt continued. On 26 January 2017 a hearing in those proceedings took place before His Honour Judge Dean QC. Kalpesh Patel admitted three allegations of contempt. First that he had failed to provide disclosure of his means prior to 12 October 2016. Secondly that he had failed to comply with the first ancillary order; and thirdly that he had failed to comply with the second ancillary order.

7. The matter came back before the judge on 21 March 2017. He sentenced Kalpesh Patel to 12 months' imprisonment for the first contempt, and 8 months, concurrent, for each of the second and third contempts. He also imposed a fine of £330,000.

8. Kalpesh Patel appealed against the length of his committal for contempt but this Court dismissed the appeal: [2017] EWCA Crim 820.

The role of the Appellant and Denning Sotomayor Ltd

9. The appellant had worked for Kalpesh Patel and a company with which he was associated, Western Avenue Properties Ltd, until about February 2016 as an in-house lawyer. During a part of that period she had acted on his behalf in relation to the criminal prosecution for fraud and money laundering. She acted for him as his solicitor when the restraint order was served on him. She initiated the application to discharge it. In that process she was involved in an exchange of correspondence with the Crown Prosecution Service and the court. She appears to have ceased to act at some point in November 2015 after the application to discharge the Restraint Order had been issued and lodged by her.

10. After ceasing to act for Kalpesh Patel, the appellant worked through Denning Sotomayor Ltd, which had been incorporated in October 2015. In about March 2017, Denning Sotomayor, through the appellant, was approached by Aman Thukral and members of his family. They wanted Denning Sotomayor and the appellant to act for them on matters concerning the ownership of shares in Western Avenue Properties and in relation to possible litigation arising from a possession order made in the Willesden County Court against Aman Thukral for a property owned by Western Avenue Properties. Before accepting instructions to act on behalf of the Thukrals, and because of the fact that she had previously acted for Kalpesh Patel and Western Avenue Properties, the appellant asked that the Thukrals should sign a document acknowledging and accepting that she could not disclose any documents or information relating to Kalpesh Patel or that company which she and Denning Sotomayor might have. On 20 March 2017 Aman Thukral signed the document. She also consulted the Solicitors Regulation Authority about the propriety of her accepting instructions from them.

11. Thereafter, Denning Sotomayor and the appellant acted for the Thukrals until 26 October 2017 when His Honour Judge Curran QC, sitting as a Judge of the High Court, granted an injunction to Western Avenue Properties and Kalpesh Patel restraining them from so acting. There was an unacceptable risk that confidential information would become known to a party (the Thukrals) with an adverse interest.

The Request for Information

12. During the period she was acting on behalf of the Thukrals, the appellant made the requests which led to the wasted costs order. In March 2017 Denning Sotomayor, by the appellant, asked the CPS to disclose certain material relating to the contempt proceedings against Kalpesh Patel. The CPS did not accede to those requests and copied the extensive correspondence to the Crown Court.

13. On 11 April 2017 Denning Sotomayor wrote to the Chief Clerk at Leicester Crown Court. The letter had a heading referring to Operation Tarlac and Kalpesh Patel and was in the following terms:

> "We refer to the above matter in which HHJ Dean QC sentenced Mr Kalpesh Patel to 12 months imprisonment on 21 March 2017 for breaches of and failure to comply with Restraint Order dated 28 October 2015. This is as per the information provided to us by the Court.

> We should be grateful if we could be provided copies of the following documents, which would form part of the public proceedings:
>
> 1. Summary of offences on the indictment or List of charges brought against Kalpesh Patel.
>
> 2. Summary of offences in relation to the failure to comply with the Restraint Order dated 28 October 2015.
>
> 3. Application for the contempt of court proceedings.
>
> 4. Documents and witness statements submitted in support of the failure to comply with the Restraint Order which lead (sic) to a judgement or order of 12 months imprisonment.
>
> 5. Order made by HHJ Dean QC on 21 March 2017.
>
> 6. Confirmation if an appeal to the order has been filed, if so details of the appeal filed.
>
> We require this information to assist us in proceedings issued at another court. Please do not hesitate to contact us in the event of queries and we would be very grateful if our request could be treated as urgent due to the pending court proceedings."

14. On the same day the Case Progression Officer at Leicester Crown Court emailed Denning Sotomayor to say that the request had been referred to the judge and that "His Honour has indicated that before the court responds, you are required to confirm the legal basis on which the information is requested; i.e. are you acting for Kalpesh Patel, and if so, on what basis?" Denning Sotomayor replied in a letter which we have not seen but which is referred to in the judge's ruling. She said she acted for Mr Thukral, a party to proceedings brought by a company which is part of Mr Patel's assets. She did not identify it as Western Avenue Properties, nor did she mention her previous legal involvement with Mr Patel. She asserted a right (on behalf of her clients) to the material she had sought on their behalf. The Case Progression Officer responded by email enclosing a copy of the order the judge had made on 21 March 2017, when he sentenced Kalpesh Patel, and stating "… if you wish to apply for any further information or documentation, please notify the court. A hearing date will then be allocated, at which hearing you and the Crown will have an opportunity to make your representations."

15. The appellant responded by email on 12 April, asking for "the reasons for the refusal to release documents requested which relate to an open or public hearing", and stating "upon receipt of the reasons for refusal we will consider with Counsel the best way to proceed". The Case Progression Officer replied by email:

> "Thank you for your recent email which has been referred to His Honour Judge Dean QC.
>
> His Honour observes that there has been no refusal by the court to comply. The Judge however wishes to know more about why

> the information is sought and thinks that this would be best achieved by discussion in open court.
>
> Please confirm the availability of your counsel in the week commencing 24th April in order that this matter can be listed for a hearing and hopefully be resolved."

16. The appellant responded on 20 April 2017. She said that she was acting on behalf of Aman Thukral and that her client had asked for an explanation "as to why the Judge would want him to incur additional and unwarranted costs for a hearing to which he is not a party to, but is a public hearing and his request for documents relate to the public hearing". She referred to, but did not explain, the possession proceedings in the county court. She had on the same day provided more information to the CPS with whom she was still in correspondence, with a view to seeking material from the CPS, in particular the application to commit and witness statement in support. She indicated that Mr Thukral had earlier been in independent contact with both the CPS and the police. She enclosed some pleadings in the possession proceedings, explained some of the background and said that "we require the documents to issue further proceedings and application for a declaration of our client's interest in the property."

17. The CPS has been pressing for an explanation of the legal basis upon which disclosure was sought and were concerned by the appellant's previous involvement as Kalpesh Patel's lawyer.

The Hearing of 4 May 2017

18. By 24 April 2017, the Court had listed a hearing for 4 May 2017. At that hearing counsel appeared for the Thukrals (Sneh Prabha, Aman and Sonal Thukral) on the instructions of Denning Sotomayor. In a Note for the Assistance of the Court counsel explained in some detail the nature of the dealings between the Thukrals and Kalpesh Patel, and the fact that Western Avenue Properties had obtained a possession order in relation to a property which it owned but at which the Thukrals had operated a car sales company. It was further explained that the Thukrals believed that Kalpesh Patel had transferred shares in Western Avenue Properties to another company called Omega Barnes Finance Ltd in breach of the restraint order. If this were the case, they proposed to bring proceedings to restrain Omega Barnes Finance from enforcing the possession order in relation to the property. The documents had been sought from the court in order to further this proposed claim. Counsel's Note repeated the request for a copy of the restraint order, ancillary orders, and the witness statement which Kalpesh Patel had been ordered to provide of his assets, indicating that the statement could be redacted to exclude assets not related to Western Avenue Properties.

19. At the hearing on 4 May the CPS was represented by counsel and Kalpesh Patel was represented by a solicitor from Judge Sykes Frixou, Solicitors. Counsel for the CPS raised questions as to the propriety of the appellant representing the Thukrals in view of her previous engagement by Kalpesh Patel. The judge sought an explanation from the Thukrals' counsel of the basis on which the Thukrals were entitled to the documents sought. He ruled that the Thukrals could have the transcript of the hearing at which Kalpesh Patel was sentenced, but not the statements or pleadings in the proceedings. At the conclusion of the hearing, he gave the appellant 14 days to show cause why she

should not pay the costs incurred by the representatives of the CPS and Kalpesh Patel for attending the hearing.

20. The judge had in mind the provisions found in section 19A of the 1985 Act.

The Statutory Provisions

21. Section 19(1) of the 1985 Act provides for awards of costs between parties to criminal proceedings in respect of unnecessary or improper acts or omissions.

22. Section 19A deals with wasted costs orders against representatives of a party to criminal proceedings:

> "19A Costs against legal representatives etc.
>
> (1) In any criminal proceedings—
>
> …
>
> (b) the Crown Court;
>
> …
>
> may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with regulations.
>
> …
>
> (3) In this section—
>
> "legal or other representative", in relation to any proceedings, means a person who is exercising a right of audience, or a right to conduct litigation, on behalf of any party to the proceedings;
>
> "regulations" means regulations made by the Lord Chancellor; and
>
> "wasted costs" means any costs incurred by a party—
>
> (a) as a result of any improper, unreasonable, or negligent act or omission on the part of any representative or any employee of a representative; or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."

23. The 1985 Act distinguishes between making a wasted costs order against a representative of a party to criminal proceedings, and an order for costs against a third

party to such proceedings. One feature of the distinction is that an order for costs pursuant to section 19B of the 1985 Act against a third party may be ordered only if there has been "serious misconduct", whereas there can be an order under section 19A if there has been an "improper, unreasonable or negligent act or omission" by a party's representative.

24. The CrimPR govern applications for material relating to proceedings in the Crown Court. Rule 5.5 concerns transcripts of proceedings. The general approach is that any person may have a transcript of proceedings in open court (subject to payment of the fee) but with safeguards to protect information that may not be published or is otherwise subject to restrictions. Rule 5.7 governs applications by parties to proceedings (and those affected by orders made by the court) and rule 5.8 applications by non-parties. It was this last provision that the judge was concerned with in this case.

> "Supply to the public, including reporters, of information about cases
>
> 5.8. - (1) This rule—
>
> (a) applies where a member of the public, including a reporter, wants information about a case from the court officer;
>
> (b) requires the court officer to publish information about cases due to be considered by the court;
>
> (c) does not apply to—
>
> (i) a recording arranged under rule 5.5 (Recording and transcription of proceedings in the Crown Court),
>
> (ii) a copy of such a recording, or (iii) a transcript of such a recording.
>
> (2) A person who wants information about a case from the court officer must—
>
> (a) apply to the court officer;
>
> (b) specify the information requested; and
>
> (c) pay any fee prescribed.
>
> (3) The application—
>
> (a) may be made orally, giving no reasons, if—
>
> (i) paragraph (4) requires the court officer to supply the information requested, and
>
> (ii) the information is to be supplied only by word of mouth;

(b) must be in writing, unless the court otherwise permits, and must explain for what purpose the information is required, in any other case.

(4) The court officer must supply to the applicant—

(a) any information listed in paragraph (6), if—

(i) the information is available to the court officer,

(ii) the supply of the information is not prohibited by a reporting restriction, and

(iii) the trial has not yet concluded, or the verdict was not more than 6 months ago; and

(b) details of any reporting or access restriction ordered by the court.

(5) The court officer must supply that information—

(a) by word of mouth; or

(b) in writing, including by—

(i) written certificate or extract, or

(ii) such arrangements as the Lord Chancellor directs.

(6) The information that paragraph (4) requires the court officer to supply is—

(a) the date of any hearing in public, unless any party has yet to be notified of that date;

(b) each alleged offence and any plea entered;

(c) the court's decision at any hearing in public, including any decision about—

(i) bail, or

(ii) the committal, sending or transfer of the case to another court;

(d) whether the case is under appeal;

(e) the outcome of the case; and

(f) the identity of—

(i) the prosecutor,

(ii) the defendant,

(iii) the parties' representatives, including their addresses, and

(iv) the judge, magistrate or magistrates, or justices' legal adviser by whom a decision at a hearing in public was made.

(7) If the court so directs, the court officer must—

(a) supply to the applicant, by word of mouth or in writing (including by written certificate or extract), other information about the case; or

(b) allow the applicant to inspect or copy a document, or part of a document, containing information about the case.

(8) The court may determine an application to which paragraph (7) applies—

(a) at a hearing, in public or in private; or

(b) without a hearing.

(9) Where a case is due to be heard in public …

(10) The information that paragraph (9) …

(11) Where a case is ready to be tried without a hearing under rule 24.9 (Single justice procedure: special rules) …

(12) The information that paragraph (11) requires the court officer to publish …

[Note. Rule 5.8(4) requires the court officer to supply on request the information to which that paragraph refers. On an application for other information about a case, rule 5.8(3)(b), (7) and (8) apply and the court's decision on such an application may be affected by—

(a) any reporting restriction imposed by legislation or by the court (Part 6 lists the reporting restrictions that might apply);

(b) Articles 6, 8 and 10 of the European Convention on Human Rights, and the court's duty to have regard to the importance of— (i) dealing with criminal cases in public, and (ii) allowing a public hearing to be reported to the public;

(c) the Rehabilitation of Offenders Act 1974 (section 5 of the Act lists sentences and rehabilitation periods);

> (d) section 18 of the Criminal Procedure and Investigations Act 1996, which affects the supply of information about material, other than evidence, disclosed by the prosecutor;
>
> (e) the Data Protection Act 1998 (sections 34 and 35 of the Act contain relevant exemptions from prohibitions against disclosure that usually apply) and Part 3 of the Data Protection Act 2018 (sections 43(3) and 117 of which make exceptions for criminal proceedings from some other provisions of that Act); and
>
> (f) sections 33, 34 and 35 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which affect the supply of information about applications for legal aid.]"

25. The Criminal Practice Direction is also material:

> "5B.8 An application to which CrimPR 5.8(7) applies must be made in accordance with rule 5.8; it must be in writing, unless the court permits otherwise, and 'must explain for what purpose the information is required.' A clear, detailed application, specifying the name and contact details of the applicant, whether or not he or she represents a media organisation, and setting out the reasons for the application and to what use the information will be put, will be of most assistance to the court. Applicants should state if they have requested the information under a protocol and include any reasons given for the refusal. Before considering such an application, the court will expect the applicant to have given notice of the request to the parties. 5B.9 The court will consider each application on its own merits. The burden of justifying a request for access rests on the applicant. Considerations to be taken into account will include: i. whether or not the request is for the purpose of contemporaneous reporting; a request after the conclusion of the proceedings will require careful scrutiny by the court; ii. the nature of the information or documents being sought; iii. the purpose for which they are required; iv. the stage of the proceedings at the time when the application is made; v. the value of the documents in advancing the open justice principle, including enabling the media to discharge its role, which has been described as a 'public watchdog', by reporting the proceedings effectively; vi. any risk of harm which access to them may cause to the legitimate interests of others; and vii. any reasons given by the parties for refusing to provide the material requested and any other representations received from the parties. Further, all of the principles below are subject to any specific restrictions in the case. Courts should be aware that the risk of providing a document may reduce after a particular point in the proceedings, and when the material requested may be made available."

It continues by setting out a series of suggested approaches to different categories of material. The governing principle might be summarised as being that if material has

been given in open court it should be provided, unless there is a good reason not to, with all appropriate savings for confidentiality, reporting restrictions, statutory prohibitions and other legitimate interests.

The Hearing of 22 December 2017 and the Wasted Costs Order Made

26. The hearing to show cause was listed before the judge on 22 December 2017. The appellant was represented by counsel. He argued that the court had no power to make an order for costs against the appellant under section 19 or section 19A of the 1985 Act, and that the only relevant power might be in section 19B, but that the requirement of "serious misconduct" provided for by that section was clearly not met. The judge reserved judgment.

27. The judge handed down his judgment on 22 January 2018. He explained that he had been concerned when the documents were first requested that "the request might have some questionable or unlawful purpose behind it". That was because in the contempt proceedings he had found Kalpesh Patel to have been dishonest. He said that counsel who had appeared for the Thukrals on 4 May 2017 had not been able to provide any legal basis on which the requests had been made, nor to "provide satisfactory explanations about the propriety of [the appellant's] involvement, given what might be thought to be the very obvious conflicts of interest involved".

28. The judge recognised the principle of open justice. He cited *R (Guardian News and Media Ltd) v Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618 as demonstrating both the importance of the principle and that it has limitations. With respect to the appellant's requests for documents which had been deployed in public in the committal proceedings, the judge said that her clients had had no right to the documents sought. He treated the request as made under CrimPR 5.8(7). At the heart of the judge's concerns was that the appellant had not properly dealt with issues raised about the purpose of the application or the propriety of her acting for the Thukrals. He continued:

> "The Court's concerns (and those of the CPS) were either not understood or not addressed, or both. Ms. Soni failed to disclose relevant information in ways that suggest information was being actively concealed from the Court."

29. Counsel had submitted that there was no jurisdiction to make a wasted costs order under section 19A of the 1985 Act against the appellant because

    a. she was not a person exercising a right of audience on behalf of a party to criminal proceedings.
    b. The persons in whose favour the order was proposed were not themselves parties to any criminal proceedings.

30. The judge rejected this submission applying the following definitions of the relevant terms:

> "The use of the word "any" as a prefix to "criminal proceedings" in s.19A (1) anticipates that there are many forms of criminal proceedings. The Crown Court's jurisdiction is exclusively

> criminal, Ms. Soni's application was being brought under the *Criminal* Procedure Rules and the application was ancillary to Kalpesh Patel's prosecution for *criminal* contempt. Whilst not part of a criminal trial, Ms. Soni's application was clearly "any" criminal proceedings. A "party to criminal proceedings in this context is an individual with a legitimate interest in its outcome. … These were criminal proceedings and the CPS and Mr Kalpesh Patel were parties to the application."

31. The judge found that the appellant had "acted wholly unreasonably" after 12 April 2017. He proceeded to make a wasted costs order under section 19A of the 1985 Act in respect of the costs of the CPS and of Kalpesh Patel.

The Appeal

32. The appellant appeals to this court pursuant to the Costs in Criminal Cases (General) Regulations 1986 ("the General Regulations"), regulation 3C.

33. There was some question whether the Notice of Appeal had been served in time. If and insofar as necessary, we extend time to allow the appeal to be considered on its merits.

34. Mr Schofield on behalf of the appellant puts forward five Grounds of Appeal: (1) that the Court had no power to make a wasted costs order under section 19A of the 1985 Act because the appellant and her clients were not parties to criminal proceedings; (2) that she had not wasted the costs of the hearing on 4 May 2017 in circumstances where it had been listed by the Court against the representations which she had made; (3) that she had not had a conflict of interest in representing Aman Thukral and his family; (4) that her request for documents had not been misconceived or wholly without merit; and (5) as to quantum.

Could an order under section 19A be made against the appellant?

35. As a result of the definition of "legal or other representative" in section 19A of the 1985 Act, a wasted costs order could only be made against the appellant in favour of another party to the same proceedings if she was conducting litigation on behalf of a party to criminal proceedings. She was acting for the Thukrals. The underlying proceedings in connection with which the Thukrals sought information were the committal proceedings for contempt against Kalpesh Patel.

Did the Thukrals become parties to the contempt proceedings and were they "criminal proceedings"?

36. By 11 April 2017, when the appellant made her request for documents and information from the Court, the criminal prosecution of Kalpesh Patel was no longer extant: it had concluded with his acquittal in December 2016. The restraint proceedings, which were ancillary to the prosecution, ended at the same time. The Thukrals were clearly not a party to those proceedings and it is equally clear that nothing that happened in April 2017 made the Thukrals party to those, by then concluded, criminal proceedings.

37. We are also satisfied that the Thukrals did not become a party to the contempt proceedings.

38. A person does not become party to the underlying proceedings simply by making a request to the court for information or documents about a case which is being or has been dealt with by that court. That is borne out by the structure and terms of Part 5 of the CrimPR. Rule 5.7 deals with the supply of information or documents from records or case materials kept by a Court Officer to (i) a party to the proceedings, and (ii) a person affected by an order, or warrant issued, by the court. Rule 5.8, by contrast, deals with the supply of information about a case to members of the public. Applicants for information under rule 5.8 will necessarily not be parties to the underlying proceedings, for if they were, their application would be governed by rule 5.7. In the present case, the judge correctly dealt with the appellant's application under rule 5.8. The appellant's clients were not a "party" to the proceedings about which the request was made.

39. Moreover, we are satisfied that the contempt proceedings were, in any event not "criminal proceedings" for the purpose of the 1985 Act. We respectfully disagree with the judge's conclusion on that issue. Mr Pons, who appeared before us for the CPS, did not seek to suggest otherwise. Breach of a restraint order made under the Proceeds of Crime Act 2002 involves conduct which is not itself a crime, and which, if it is a contempt, is a civil and not a criminal contempt, notwithstanding that the restraint order may have been imposed by a criminal rather than a civil court: *R v O'Brien* [2014] UKSC 23; [2014] AC 1246. That case arose in the context of extradition. The appellant had been extradited to the United Kingdom to face fraud charges. He had been the subject of a restraint order under the 2002 Act, the terms of which it was alleged he had breached. The Supreme Court held that a contempt of court constituted by a breach of a restraint order was not itself a crime. The principle of specialty in extradition law did not preclude the court from dealing with such a contempt when the person concerned had been extradited to face criminal charges and not contempt proceedings. At para 42 Lord Toulson, giving the only judgment, said:

> "It is necessary to look at the nature and purpose of the order. It is fallacious to argue that because the order was made by a criminal court, rather than a civil court, disobedience to the order amounts to a crime, whereas it would not have been a crime to disobey a similar order imposed by a civil court. The question whether a contempt is a criminal contempt does not depend on the nature of the *court* to which the contempt was displayed; it depends on nature of the *conduct*. To burst into a court room and disrupt a civil trial would be a criminal contempt just as much as if the court had been conducting a criminal trial. Conversely, disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings. To hold that a breach of a procedural order made in a criminal court is itself a crime would be to introduce an unjustified and anomalous extension of the criminal law. "Civil contempt" is not confined to contempt of a civil court."

Did the request for documents made by letter give rise to "criminal proceedings?"

40. The CrimPR and Criminal Practice Direction govern practice and procedure in the criminal courts. Even where the nature of the underlying contempt proceedings (as here) was civil and not criminal both the Rules and the Practice Direction apply with

necessary modification. CrimPR 5.8 and the accompanying practice directions govern the provision of information and material to a non-party (and the balance of Part 5 to other matters) whatever the nature of the underlying proceedings in the Crown Court.

41. Two possible issues arise in connection with the question whether the request contained in the appellant's letter of 11 April 2018 gave rise to criminal proceedings. The first is whether a request made by a non-party for information concerning proceedings in the Crown Court initiates new "proceedings" at all. Only secondly does the issue arise whether those proceedings are criminal.

42. In unusual factual and procedural circumstances, in *Re a Solicitor (Wasted Costs Order)* [1996] 1 FLR 40, this court held that proceedings initiated by summons for the attendance of a witness before the Crown Court under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, to produce documents, fell within the rubric of "in any criminal proceedings" in section 19A of the 1985 Act. In fact, no such summons had been issued and the matter was being dealt with informally by the parties concerned. Nonetheless a wasted costs order was made and upheld. That decision preceded amendments to that Act in 1996 which made express costs provision by the addition of sections 2C(8) and (9) to the 1965 Act.

43. Whether or not that case was correctly decided, we do not consider that *Re a Solicitor (Wasted Costs) Order* provides any foundation for the proposition that when a non-party to proceedings in the Crown Court, with or without the assistance of a solicitor, writes to the court seeking information pursuant to CrimPR 5.8 that such a request initiates criminal proceedings. A person or entity does not, merely by seeking documents or information from the court which the court holds about proceedings pursuant to CrimPR 5.8(2), initiate or become a party to proceedings at all. The application is dealt with administratively by an official obliged to provide specified material without reference to a judge.

44. The position is different if a request is made, or as in this case includes, an application for material the disclosure of which lies within the discretion of the court. The Practice Direction requires that the parties to the underlying proceedings must be provided with the application for the obvious reason that they might have an interest in the outcome. The matters to which the judge will have regard in deciding what should be provided touches on their interests. The Practice Direction provides detailed guidance on the approach to be taken to different categories of information and documents. The purpose of giving the underlying parties notice is to allow them, if they wish, to make representations whether the judge decides the matter on the papers or calls for a hearing, at the behest of those interested or unilaterally.

45. An application under CrimPR 5.8(7) initiates proceedings which call for judicial resolution; but are they criminal proceedings?

46. The general test governing the nature of "criminal proceedings" was stated by Lord Bingham CJ In *Her Majesty's Commissioner for Customs and Excise v City of London Magistrates' Court* [2000] 2 Cr App R348, 352:

> "It is in my judgment the general understanding that criminal proceedings involve a formal accusation made on behalf of the State or by a private prosecutor that a defendant has committed

> a breach of the criminal law, and the State or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

47. The parties to criminal proceedings for the purposes of the 1985 Act are, at least in all but exceptional cases, "the Crown or other prosecutor on the one side and the defendant on the other": see *R v P* [2011] EWCA Crim 1130 at [6].

48. In our judgment the making of a request to the Court for documents or information and for a direction under CrimPR 5.8(7) as required by CrimPD 5B.8 cannot be regarded as initiating its own criminal proceedings distinct from any about which the request is made. No such analysis was supported by Mr Pons, and correctly so. Any such notional "proceedings" would not culminate in a criminal conviction or condemnation of a defendant or involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant had committed a breach of the criminal law, and would thus not conform to the general understanding of "criminal proceedings", as expressed by Lord Bingham CJ in *HM Commissioner for Customs & Excise v City of London Magistrates' Court*.

49. It follows that in making her request for information, the appellant was not acting on behalf of a party to criminal proceedings, and the CPS and Kalpesh Patel were not parties to criminal proceedings to which her clients, the Thukrals, were also party. In the circumstances, no order under section 19A POA 1985 could be made against her.

50. On this ground without more the appeal must be allowed. In the circumstances, it is unnecessary to deal with the remaining grounds.

51. We have referred to the Criminal Practice Direction and the practical guidance it gives in assisting the public and court to determine whether materials deployed in open court should be provided when requested. The whole of the relevant part of the Practice Direction repays close attention and should be referred to by all concerned in the event of such an application. The CrimPR and Practice Direction provide controls which should be exercised where necessary. There were good reasons in this case why both judge and others were concerned to establish the appellant's underlying role and the interest of her clients in disclosure. But the controls should not routinely be allowed to prevent the release of information and documents to a member of the press or public referred to in open court, who wishes to understand the proceedings in question.

Conclusion

52. For the reasons we have set out, the appeal must be allowed. The wasted costs order made against the appellant is revoked in accordance with regulation 3C (6) of the General Regulations.