APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJ 1
IND/2019-3401

STATEMENT OF REASONS

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in the Incidental Application by The Spectator Magazine

in the cause

HER MAJESTY'S ADVOCATE

Applicant

against

ALEXANDER ELLIOT ANDERSON SALMOND

Respondent

Applicant: Clancy, QC, Hamilton; Levy & McRae, Glasgow
Respondent: A Prentice QC (sol adv) AD; Crown Agent

11 February 2021

[1] This is an application to vary an order dated 10 March 2020 made by the court at common law and under section 11 of the Contempt of Court Act 1981:

> "preventing the publication of the names and identity, and any information likely to disclose the identity, of the complainers in the case of *HMA* v *Alexander Elliot Anderson Salmond*"

[2] Section 11 provides that where a court having power to do so, allows a name or other matter to be withheld from the public in proceedings before the court,

> "the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

It is not disputed that the court had power at common law to order the identity of the complainers in the proceedings to be withheld from the public. That part of the order is not challenged. However, the applicant maintained that the order should be varied by the adding at the end the following:

(i) "in connection with these proceedings"; and

(ii) "excluding from the effect of this order all evidence submitted to (including Submissions submitted by the First Minister, by Alex Salmond and by Geoff Aberdein), and all reports issued by, the Parliamentary Committee inquiring in to the actions of the First Minister, Scottish Government officials and special advisers in dealing with complaints about Alex Salmond, former First Minister, considered under the Scottish Government's "Handling of harassment complaints involving current or former ministers" procedure and actions in relation to the Scottish Ministerial Code."

[3] The application arises following the publication by the applicant on 9 January 2020 of an article entitled: *Full text; Alex Salmond's submission to the Hamilton inquiry ("the Article").* The article set out the text of the submission ("the Salmond Submission"), excluding annexes, submitted on behalf of Mr Salmond to the Parliamentary Committee ("the committee") inquiring in to the actions of the First Minister, Scottish Government officials and special advisers in dealing with complaints about Alex Salmond, former First Minister, under the Scottish Government's harassment procedure, and actions in relation to the Scottish Ministerial Code, following self referral by the First Minister in that regard. It is

averred that Phase 2 of the committee's proceedings concerns the former, and phase 4 the latter, issue. It is averred that the Salmond Submission was also addressed and submitted to Mr James Hamilton QC's inquiry into a possible breach of the Scottish Ministerial Code by the First Minister. The Crown Office has written to the applicant suggesting that the publication of the article may constitute contempt of court, in that if read along with other evidence which has already been published by the committee, it creates a risk of jigsaw identification of a complainer. This has prompted the making of the application, although the article as published by the applicant has been redacted as requested in the letter from the Crown Office. In the course of debate, senior counsel for the applicant indicated that he was not insisting in that part of the application relating to the second variation sought.

[4] The committee's decision not to publish a submission by the former first minister's chief of staff, Geoff Aberdein, was referred to. It was averred that the applicant reasonably apprehends that the committee considers that publication of the Salmond and Aberdein submissions might contravene the order in the manner described in the Crown Office letter to the applicant.

Submissions for the applicant

[5] Under section 11 an order ("directions") can only be made prohibiting the publication of a name or other matter "…in connection with the proceedings…" The Order is not so confined. As made, it imposes a blanket ban on the publication of the name of any complainer in any context regardless of whether that publication could or might contribute to their "jigsaw" identification as a complainer in the criminal proceedings. It is submitted that the Court does not have a common law power to impose reporting restrictions which apply to the publication of information unconnected to the proceedings in which they are

the complainers. The purpose of section 11 is to confer that power but only to the extent permitted by that provision: reference was made to *Aldridge, Eady and Smith on Contempt*, 5th edition paragraph 7-126. The words "in connection with the proceedings" was what set the limitation on the power available under section 11. Reference was made by analogy to the Children and Young Persons Act 1937 section 46, and section 47 of the Criminal Procedure (Scotland) Act 1995, where the inbuilt restriction related to reports "of the proceedings".

[6] Senior counsel submitted that it was a reasonable inference from the known information about the committee's approach to the Salmond and Aberdein submissions that the committee was interpreting the court's order in an overly restrictive way, and as preventing publication of the name of a complainer in any other contexts which did not associate her as being a complainer in the criminal proceedings.

[7] It was submitted that as presently worded the prohibition is not sufficiently clear: where an order has criminal sanctions it is very important that those on the receiving end know the full scope of the prohibition. At the moment the order was capable of being misunderstood as preventing publication of the names of complainers in any other context, distinct from the criminal proceedings in which they were witnesses. Senior counsel insisted that the addition of the words "in these proceedings" was required both to meet the terms of the statute and to clarify the order. He did not accept the court's suggestion that, should it be the case that the terms of the order required further clarification, the addition of the words "as such complainers in those proceedings" might be a better way of achieving that.

Advocate Depute

[8] The Advocate Depute submitted that the order as framed achieved the purpose for which it was made. However, given the restriction now made to the application, he would have no concerns about the possible addition to the order of the words suggested by the court.

Analysis and decision

The committee's decisions

[9] All matters relating to the decisions of the committee, its way of working, the rejection or acceptance of submissions, the question whether, when and to what extent redaction of material was necessary to enable it to consider material which could not be published for one reason or another, whether to accept material on a confidential basis, the way in which it ensured adherence both to the order and generally to the principle that complainers in sexual cases should not be identified, are in my view wholly irrelevant to any matters which it is within the jurisdiction of the court to address. These are all matters entirely in the hands of the committee and it is not for this court to interfere with that or to seek to direct the committee in any way.

[10] The only matter with which this court should be concerned is whether the order made is clear, and is sufficient as a mechanism to enforce the common law order withholding the identity of the complainers in the criminal proceedings, and preventing publication of material likely to lead to such an identification.

Section 11 generally

[11] The list of material provided in advance of the hearing contained an extract from a publication in England and Wales issued by the Judicial College on Reporting Restrictions in

Criminal Courts, dated April 2015. Sections on reporting restrictions in general were referred to by senior counsel for the applicant. Extracts from English Practice directions, relating to the imposition of reporting restrictions under section 11, and from *Aldridge, Edie and Smith on Contempt* on the same topic, were also referred to. It was not obvious what relevance these had to the issue in the present case. In England and Wales anonymity for complainers in cases of rape and the like does not hinge on the making by the court of an order under section 11 of the 1981 Act, but rests on a statutory footing (currently section 1 of the Sexual Offences (Amendment) Act 1992). In that regard the relevant section in the Judicial College publication would in fact be paragraph 3.2, which states:

> "3.2 Victims of sexual offences
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> Victims of a wide range of sexual offences are given lifetime anonymity under the Sexual Offences (Amendment) Act 1992.
>
> The 1992 Act imposes a lifetime ban on reporting any matter likely to identify the victim of a sexual offence, from the time that such an allegation has been made and continuing after a person has been charged with the offence and after conclusion of the trial. The prohibition imposed by section 1 applies to 'any publication' and therefore includes traditional media as well as online media and individual users of social media websites …"

[12] The 1992 Act provides blanket, lifelong anonymity for complainers in England and Wales, whether the publication takes place in England or in Scotland. Legislation extends a similar protection in England and Wales to rape complainers in Scotland, preventing publication in England and Wales of material likely to lead to their identification as complainers in Scottish rape cases: Section 4 of the Sexual Offences (Amendment) Act 1976. The approach which may be taken in England and Wales to section 11 orders, which by definition do not involve orders of the kind made in the present case, does not seem to offer assistance to a court in Scotland looking to provide in Scotland the same protection for rape complainers as would be afforded them south of the border.

[13] For similar reasons, I did not find the cases referred to in submission - *MH* v *Mental Health Tribunal of Scotland* 2019 SC 432; *R* v *Horsham Magistrates* [1982] QB 762; and *A* v *BBC* (IH) 2013 SC 533; (OH) 2013 SLT 324; and [2015] AC 588 to be of much assistance. The first and third of these deal with anonymity in civil proceedings; and the second essentially deals with the scope of section 4(2) of the Contempt of Court Act 1981. Of course, I accept entirely, and endorse, the observations in those cases about the importance of the public conduct of criminal proceedings, open reporting of these by a free press, and the need to limit restrictions thereon to circumstances where it is both necessary and proportionate to do so. The role of the press in this regard is a very important aspect of the rule of law, and the principles are not in dispute. However, given the long standing convention, the extent of legislation both North (in relation to those under 18, or complainers in England,) and South of the border, the decision in *Brown* v *United Kingdom* (2002) 35 EHRR CD197 (see below), and the terms of the IPSO's Editor's Code, these are issues which bear only lightly on a decision to withhold the name of a complainer from the public and to prevent publication of material likely to lead to their identification.

[14] (For completeness, the Editor's Code provides:

> "11. Victims of sexual assault
>
> The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so. Journalists are entitled to make enquiries but must take care and exercise discretion to avoid the unjustified disclosure of the identity of a victim of sexual assault.")

[15] In *Brown* v *United Kingdom*, conviction and fine of a newspaper proprietor for a breach of section 1 of the 1992 Act was found not to be a disproportionate interference with the right to freedom of expression under Article 10 of the Convention, notwithstanding the

blanket, lifelong nature of the restriction imposed by the Act, and the limited circumstances in which it can be lifted. There is no reasonable basis to suppose that a decision of a Scottish court at common law to withhold the identity of a rape complainer and back that up by a section 11 order prohibiting publication would meet any other fate.

The rationale for the section 11 order

[16] In Scotland, complainers in cases of rape and other sexual offences give evidence under "closed court" conditions, whereby the public is excluded from the court during the giving of their evidence (see sections 92(3) and 271HB of the Criminal Procedure (Scotland) Act 1995). This exclusion does not apply to *bona fide* journalists whose presence is permitted as an important aspect of open justice, to enable a public report of the proceedings to be made, to ensure that the proceedings are conducted properly and to contribute to informed public debate. There is no statutory protection for complainers in this jurisdiction, in relation to publication of information within Scotland. There is, however, a convention (see *X* v *Sweeney* 1983 SLT 48, at p 61) that the identity of complainers is withheld from publication. This is fortified by the Editor's Code. To strengthen the protection further, in some cases the court considers it necessary to make a formal order at common law withholding the identity of the complainer from the public, with a section 11 order prohibiting publication of the complainer's identity or material likely to lead to their identification as a complainer in the case. The purpose behind allowing the witness to give evidence in closed court conditions is to enable the witness to speak freely, to limit the embarrassment and awkwardness which may be felt, and to encourage complainers in other cases to feel able to come forward without concern that they may have to give evidence in a crowded court and before members of the public. It is, in short, largely the same as the

justification for providing subsequent anonymity to complainers, whether that is achieved by legislation, convention, court order, the Editor's Code, or a combination of these. In *Brown* v *United Kingdom* the court made this observation (in relation to the 1992 Act):

> "The Court recognises that the relevant provisions of the Act are designed to protect alleged rape victims from being openly identified. This in turn encourages victims to report incidents of rape to the authorities, and to give evidence at trial without fear of undue publicity. The Court recalls that the Commission has previously had regard to the special features of criminal proceedings concerning rape and to the fact that such proceedings are often conceived of as an ordeal by the victim (see *SN* v *Sweden*, No. 34209/96, para. 47). The Court considers that it must pay special regard to these factors when examining the proportionality of the restrictions at issue in the present case."

The report of the Heilbron Committee (1975) which led to the introduction of legislation in England and Wales, stated:

> "153. …public knowledge of the indignity which she has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bring proceedings...
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> 154. We are fully satisfied that if some procedure for keeping the name of the complainant out of the newspapers could be devised, we could rely on more rape cases being reported to the police, as women would be less unwilling to come forward if they knew that there was hardly any risk that the judge would allow their name to be disclosed."

The reasons for withholding from the public, and preventing publication of, material likely to lead to the identity of those making complaints of sexual offences is, I suggest, well understood.

Decision

[17] In the present case, the prohibition in the order was designed to protect the identity of those who were complainers in the criminal proceedings in which the order was made, and to prevent the publication of information which might identify them as having been complainers in the case. In my view the wording of the order:

> "preventing the publication of the names and identity, and any information likely to disclose the identity, of the complainers in the case of *HMA* v *Alexander Elliot Anderson Salmond*",

makes it clear that the scope of it is, as would be the case under the 1992 Act, to prevent publication of matter relating to the individuals which would be likely to lead members of the public to identify them as the persons against whom the offences alleged in the trial are said to have been committed. There should be no confusion about the matter. However, I recognised that a reputable journal and responsible senior counsel have suggested otherwise, and that any slight risk of misinterpretation could readily be addressed by the addition of a few words to the order, which the Crown did not oppose. I did not consider that adding the words "in connection with these proceedings" would achieve the stated aim: it seemed to me that these words ran the risk of actually creating confusion and of diminishing the protection of complainers. I considered that the addition of the words "as such complainers in those proceedings" would serve to highlight the scope of the order whilst maintaining the necessary protection for complainers. I agreed therefore to vary the order to that extent.