
**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2017] HCJAC 91**
**HCA/2017/000019/XM**

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

PETITION TO THE NOBILE OFFICIUM

by

MR A

Petitioner

against

PROCURATOR FISCAL, DUNDEE

Respondent

**For Petitioner: McBrearty QC, Young; Harper MacLeod**
**1st Respondent: A Prentice QC, AD (Sol Adv); Crown Agent**
**3rd Respondent: G Anderson; News Group Newspapers Ltd**
**4th Respondent: D Hamilton for BBC (Scotland)**

**4 October 2017**

**Introduction**

[1] The petitioner in this application to the *nobile officium* of the High Court is the alleged victim in a summary prosecution ("the prosecution") brought by the Procurator Fiscal in Dundee (the first named respondent). The accused person in the prosecution is the second

respondent in the petition. The third respondents in the petition are News Group Newspapers Limited.

[2] On 19 September 2017, having heard senior counsel for the petitioner, counsel for the third respondent and the advocate depute, no opposition being stated, this court pronounced an *interim* order in the present petition. That order found the petitioner entitled to anonymity in the prosecution, ordered that for the purposes of the prosecution references to him shall be withheld or removed and the pseudonym "Mr A" substituted therefor, ordered in terms of section 11 of the Contempt of Court Act 1981 that no publication of the petitioner's name, or any particulars or details calculated to lead to his identification in connection with the prosecution, be made and allowed him to be referred to as "Mr A" in the present petition. On that same date the court fixed a full hearing on the petition for 4 October 2017 and permitted any interested party to lodge answers to the petition no later than 22 September 2017. It also appointed any party intending to appear at the full hearing to lodge a written case and argument no later than 27 September 2017.

[3] At the hearing on 4 October 2017, the petitioner moved a minor amendment to part (2) of the prayer of the petition and the court thereafter granted the three parts of the prayer as amended, without opposition. The effect of that order was to grant the petitioner anonymity in the prosecution, permitting him to be referred to as "Mr A" in both the prosecution and the present petition and to order in terms of section 11 of the Contempt of Court Act 1981 that the publication of his name, or any particulars or details relating to him and calculated to lead to his identification in connection with the prosecution, should be prohibited, as should any publication calculated to lead to his identification in connection with the present petition. On that date we intimated that we would give our reasons for making the orders in writing at a later date and this we now do.

**The background**

[4] The second respondent was reported to the first respondent in December 2016 in respect of the crime of extortion and subsequently she was served with a summary complaint. That summary complaint alleged that she made threats towards the petitioner that she would take certain steps if he did not pay her a sum of money. The complaint called in the Sheriff Court at Dundee on 18 August 2017. The petitioner was not informed that the case was due to call in court and the first respondent made no submissions to the presiding sheriff concerning publication on that date. The second respondent did not appear on 18 August in answer to the complaint and the case was continued until 8 September 2017.

[5] Following the calling of the summary complaint, a number of news articles were published in which details of the complaint, the petitioner's name and occupation and the nature of the threats which the second respondent was alleged to have made towards him were all revealed. A number of those articles included photographs of the petitioner.

[6] On 8 September 2017, an application on behalf of the petitioner for an order under section 11 of the Contempt of Court Act 1981 was presented to a part-time sheriff then sitting in Dundee and was considered by him in chambers. The sheriff's attention was drawn to a number of the news articles which had been published. The sheriff granted an order under section 11 of the Contempt of Court Act which restricted publication of any reporting of the prosecution which might identify, or lead to, or result in, the identification of the petitioner. The sheriff's reasons for granting the order were recorded as follows:

> "The Court, balanced the applicant's right to privacy and protection of his reputation as against the public interest in publication. The Court, found it was necessary to make this order as there existed a pressing social need which outweighed the public interest in the particular circumstances of this case"

As expressed, the order appeared to be final.

[7] On 12 September 2017, the third respondents presented written submissions to a resident sheriff at Dundee, the part-time sheriff not being available. The representations were said to have been in terms of rule 56.3 of the Act of Adjournal (Criminal Procedure Rules) 1996. In those representations it was averred that the original order made on 8 September had been made under rule 56.2(1), which relates to *interim* orders. The representations challenged the making of the original order on the basis that reporting restrictions would be contrary to the established principles of open justice. It was averred that the third respondents were entitled to publish and broadcast contemporary reports of the prosecution and that it was: "to the petitioner's advantage that the deception against him be published as quickly as possible for the sake of his name being cleared of the malign allegations made against him". It was said that the principle of open justice required this to be so.

[8] Having heard senior counsel for the third respondent, counsel for the petitioner and the procurator fiscal depute, the sheriff considered matters overnight and gave his decision on 13 September. He revoked the previous order made and refused the petitioner's application for anonymity at common law. However, the sheriff ordered that the revocation was not to take effect until 4pm on 15 September 2017, in order to permit time for an appeal to be lodged if so advised.

[9] On Friday 15 September, the present petition was lodged and an application called before Lord Tyre who granted warrant for service, *ad interim* suspended the order of the sheriff dated 13 September, recalling the *interim* order dated 8 September until 19 September

2017 at 16.00 hours and *ad interim* prohibited any reporting in respect of the petition until the same date.

**The sheriff's decision of 13 September**

[10] On 13 September the sheriff revoked the earlier decision made under section 11 of the Contempt of Court Act. He did so on the basis of the agreed submissions before him that section 11 provides for an opportunity to make an ancillary order. Such an order would require a foundation. Since the earlier decision proceeded upon an application which failed to identify any foundational order, he concluded that it could not stand.

[11] Counsel for the petitioner however moved the sheriff to make an order for anonymity at common law and to pronounce an order in terms of section 11 as ancillary to that order. Having being referred to and considered the cases of *A* v *British Broadcasting Corporation (Secretary of State for the Home Department intervening*) [2015] AC 588, *In re Guardian News and Media Ltd* [2010] 2 AC 697 and *HM Advocate* v *Mola* 2007 SCCR 124, the sheriff concluded that no clear authority had been cited to him to support the proposition that a sheriff exercising summary jurisdiction had the power to make an order for anonymity at common law. He concluded that it would not be lawful for him to make the order sought.

**The hearing on the application to the nobile officium**

[12] At the hearing of the petition on 4 October the court had the advantage of written submissions on behalf of the petitioner, the first respondent and the third respondents, and it heard brief submissions from counsel for each. The court also permitted counsel for the BBC to address it and to adopt the written submissions which it had tendered to the court, albeit late, on 3 October.

[13] The advocate depute explained that when the case was marked for proceedings a decision was taken that it was not necessary to make a referral to the Crown Office and Procurator Fiscal Service Victim Information and Advice service ("VIA"). As a result the petitioner was not contacted to inform him that proceedings had been raised, nor of the date when the case was to call. It was accepted that this decision was inappropriate and that a referral to VIA should have been made when the case was marked. It was also explained that the Crown's practice has been to move the court to withhold the name of the complainer in cases of extortion or attempted extortion and to seek an order under the Contempt of Court Act. This was not done when the case called on 18 August and it ought to have been. Finally, the advocate depute accepted that rather than taking a neutral position when the application for the contempt of court order was first made, and again when that order was challenged before the sheriff on 12 September, the Procurator Fiscal ought to have supported the petitioner's applications.

[14] All of the parties before the court agreed that the power at common law to order that a complainer should be given anonymity was a power that was available to a sheriff in an application made for that purpose. It was also agreed that it was well established that the general principle of open justice will often require qualification in the case of victims of blackmail or extortion. It was agreed that in the circumstances of the present case the balance between the competing interests of open justice, and maintaining the integrity of the administration of justice, fell on the side of making a limited restriction to prevent disclosure of the identity of the petitioner. There was thus no opposition to the order sought in terms of the petition as amended.

**Discussion**

[15] In our opinion, this case raises an important issue concerning the balance between open justice and the claim which an alleged victim in an offence such as extortion may have to anonymity. It also raises issues as to the procedure which should be followed in addressing such applications.

*The power of the sheriff*

[16] The sheriff has an inherent power at common law to regulate proceedings in the Sheriff Court, to maintain its authority and to ensure fair and impartial administration of justice. This inherent power includes the power to depart from the general rule of open justice by withholding and prohibiting publication of information as to the identity of individuals, if appropriate.

[17] The principle is stated in Erskine's Institutes (I – II – 8) in the following manner:

> "In all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred without which the jurisdiction cannot be explicated… By the same rule, every judge, however limited his jurisdiction may be is vested with all the powers necessary, either for supporting his jurisdiction, and maintaining the authority of the court, or for the execution of his decrees."

[18] The existence of the power to punish contempt as an example of the inherent power available to all courts is recognised *in Hall* v *Associated Newspapers* 1979 JC 1. In giving the opinion of the court the Lord Justice General (Emslie) said:

> "The law of contempt of court covers many diverse forms of conduct one of which is conduct that is liable to prejudice the administration of justice generally, or in relation to the case of a particular individual. Its source is to be found in the indispensable power which is inherent in every Court to do whatever is necessary to discharge the whole of its responsibilities".

The power to withhold the identity of a complainer, or other information, where it is in the interests of justice to do so, has been recognised as a further example of the inherent power

in cases such as *HM Advocate* v *Mola 2007* SCCR 124, *HM Advocate v McAllister* 2014 SLT 1023 and in *A* v *BBC*, to which the sheriff referred.

[19] At paragraph [38] of his opinion in the BBC case when it was in the Inner House (*A* v *SSHD* 2013 SC 533) the Lord President (Gill) said:

> "[38] But in my opinion the inherent jurisdiction is wider than that. It lies at the heart of the court's constitutional function as a court of justice. In fulfilling its duty to do justice by all men, the court must have regard not only to the justice of its decision, but also to the justice of the procedures by which it gives it. It therefore has the inherent power, in my opinion, to withhold the identity of a party where, regardless of the outcome of the case, the disclosure of that party's identity would constitute an injustice to him; for example, where disclosure would endanger his safety, or would be commercially ruinous (*Scottish Lion Insurance Co Ltd* v *Goodrich Corp and ors*). Quite apart from the Convention-related aspects of the problem, I would regard it as the court's duty to withhold the identity of, say, a female pursuer where the decision turned on intimate medical evidence. Moreover, I consider that the court's inherent jurisdiction may be extended to the protection of third parties whose rights and interests may be affected in similar ways."

[20] The Lord President's opinion was confirmed by Lord Reed (with whom the other justices agreed) in the Supreme Court at paragraphs [33] to [41] of the judgement. Two particular passages are relevant to the present case. At paragraph [38] Lord Reed said this:

> "[38] As I have explained, it has long been recognised that the courts have the power to permit the identity of a party or a witness to be withheld from public disclosure where that is necessary in the interests of justice."

It is plain, in our opinion, that both the Lord President and Lord Reed were explaining the inherent power possessed by all courts.

[21] At paragraph [41] Lord Reed said the following:

> "Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson observed in *Kennedy* v *Charity Commissioner* (para 113), the court has to carry out a balancing exercise which will be fact specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."

*Cases of extortion*

[22] There is a well-established line of authority from England which vouches the proposition that the interests of open justice will often require qualification in cases in which the crime of blackmail or extortion is alleged. The rationale was stated by the Lord Chief Justice (Lord Widgery) in *R* v *Socialist Worker Printers and Publishers Ltd Ex p Attorney General* [1975] QB 637 at page 644:

> "… all of us concerned in the law know that for more years than any of us can remember it has been a commonplace in blackmail charges for the complainant to be allowed to give his evidence without disclosing his name. That is not out of any feelings of tenderness towards the victim of the blackmail, a man or woman very often who deserves no such consideration at all. The reason why the courts in the past have so often used this device in this type of blackmail case where the complainant has something to hide, is because there is a keen public interest in getting blackmailers convicted and sentenced, and experience shows that grave difficulty may be suffered in getting complainants to come forward unless they are given this kind of protection. Hence, no doubt, the ready acceptance on the part of counsel for the defence of the suggestion that the two blackmail victims should not have their names disclosed but should be known as Mr Y and Mr Z."

[23] In delivering the judgment of the Supreme Court in the case of *In Re Guardian News and Media Limited*, Lord Rodger of Earlsferry observed at paragraph [31] that the circumstance of a victim giving evidence in a prosecution for blackmail was an obvious example of where an order under section 11 of the Contempt of Court Act might require to be made.

[24] The observations made in these cases have equal force in this jurisdiction, as is recognised by the Crown's practice of seeking an anonymity order, which was not, but ought to have been, adhered to in the present case.

[25] The petitioner submitted that he was entitled to protection from the courts on the grounds that he was the victim of extortion at the hands of the second respondent, and that the extortion related to private matters of a sexual or intimate nature. He submitted that the

principle of open justice, including free reporting of his identity, required to yield to both the interests of justice and his right to personal and private life. He submitted that the public interest in ensuring blackmail victims come forward strongly favoured the granting of some form of restriction and that a limited restriction, preventing disclosure of his identity, did not make significant inroads into the public interest in reporting criminal proceedings.

[26] As indicated above, these submissions were not opposed by any of the other parties appearing. In our opinion, the submissions were well founded and we therefore gave effect to them. In our opinion, the sheriff who heard the application on 12 September erred in failing to recognise that he had jurisdiction to make the order for anonymity at common law which was requested and he ought to have done so. He ought then to have granted an order under section 11 of the Contempt of Court Act. We also recognise that the Procurator Fiscal ought to have raised the matter in court at the first calling of the case and ought to have given the sheriff hearing the matter on 12 September more assistance than simply adopting a neutral stance.

*Procedure*

[27] An order under section 11 of the Contempt of Court Act may restrict publication of matters in proceedings before the court. Such an order is an ancillary order, as is clear from the terms of the section, and is pronounced to give effect to a foundational order. In circumstances such as arose in the present case, an application for a section 11 order will require to be preceded by a motion to the court at common law to exercise its inherent power to grant anonymity.

[28] Orders made under section 11 of the Act are governed by Chapter 56 of the Act of Adjournal (Criminal Procedure Rules) 1996. The present form of Chapter 56 was introduced by the Act of Adjournal (Criminal Procedure Rules Amendment) (Reporting Restrictions) 2015, which followed on from the publication in July 2013 by the Scottish Civil Justice Council of its Consultation on Draft Court Rules in Relation to Reporting Restrictions. The results of that consultation were shared with the Criminal Courts Rules Council in order to assist it in its consideration of the Criminal Procedure Rules.

[29] Rule 56.2 provides as follows:

> "(1) Where the court is considering making an order, it may make an interim order.
> (2) Where the court makes an interim order, the clerk of court shall immediately send a copy of the interim order to any interested person.
> (3) The court shall specify in the interim order why it is considering making an order."

Rule 56.3 applies where the court has made an *interim* order. It provides an opportunity for an interested person (such as a media organisation) to be informed of the possibility of an order being made and permits representations to be made and considered by the court at a hearing. If no representations are intimated the court will reconsider whether or not to make a final order. Rule 56.5 provides that a person aggrieved by an order may apply to the court for its variation or revocation.

[30] The Lord President issued guidance on reporting restrictions on 13 March 2015. In that guidance he drew attention to the general constitutional principle of open justice that judicial proceedings are heard and determined in public. He explained that there should accordingly be public access to judicial determinations, including the reasons given for them and the identity of parties. He also explained that the general principle can only be departed

from where an order restricting the reporting of proceedings is made. Paragraph 12 of the guidance was in the following terms:

> "When the court has to consider whether to make a reporting restriction, it is generally appropriate that it should hear representations from the media. New rules of court allow the court to make an *interim* order that will apply until the media have been heard."

[31] Rule 56.2 contemplates that the court may make an order or an *interim* order. Rule 56.5 permits an order made at that stage to be varied or revoked. In this case the part – time sheriff who made the original order did not seem to contemplate the possibility of making an *interim* order, making only a final order. It is clear from the guidance issued by the Lord President that, whilst it is not necessary to make an *interim* order, in most cases there are advantages in doing so. This gives representatives of the media the opportunity to be heard and would ensure that any order made is not unnecessarily wide. In circumstances in which opposition to a contemplated order could have no realistic prospects of success, it would not seem necessary to go through the process of making an *interim* order. Such circumstances would include, for example, where the court, on appeal, quashed a conviction and granted authority for a fresh prosecution. The process which a judge or sheriff must go through in considering whether to make any form of order is the process of evaluation described by Lord Reed, as quoted in paragraph [21] above.

[32] In its submissions in the present case, the BBC expressed concerns about compliance with rule 56.2(3). It was said that this court had failed to comply with the rule in pronouncing its interlocutor of 19 September. In rather general and unspecific submissions, counsel for the BBC complained that it had been unable to understand the rationale for the restriction contemplated. Given the regularity with which orders were made under section 11 of the Contempt of Court Act, and the frequency with which, it was said,

rule 56.2(3) was not complied with, a significant and unnecessary burden was being placed on the BBC.

[33] We did not find these submissions to be convincing. The BBC published details of the summary complaint in the prosecution in the news section of its website after the first calling of the case. No explanation was given for its decision not to challenge the section 11 order made by the part-time sheriff on 8 September. Given the nature of the case, as it was reported by the BBC, and the absence of any objection to the grant of anonymity, we find the suggestion that the BBC had no basis upon which to decide whether to challenge the grant of an order by this court somewhat contrived.

[34] As to frequency, Scottish Courts and Tribunal Service records show that in 2017 a total of 60 orders under the Contempt of Court Act were made up until the end of September. This gives an average of between six and seven a month, with the range varying from one to thirteen. Other than the general suggestion made by counsel, it has not been ascertained in how many cases rule 56.2(3) was or was not complied with. There is no evidence before us to suggest that non-compliance is commonplace. Accordingly, there is no support for the complaint of over burdening made by counsel for the BBC. Nevertheless, the rule is there for a purpose and we encourage courts considering an application for an order under the Contempt of Court Act to pay close attention to the requirements of Chapter 56 of the Act of Adjournal.