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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

IN THE MATTER OF AN APPLICATION BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND

Before Carswell LCJ and Kerr J

KERR J

[1] This is an application by the Attorney General in which he claims that Belfast Telegraph Newspapers Ltd and Martin Lindsay have been guilty of contempt of court by publishing newspaper articles relating to one Sean Toner shortly before his trial on drugs offences. The Attorney General seeks an order punishing the respondents for that contempt.

[2] The first respondent is the publisher of the newspaper, the Sunday Life, and the second respondent is its editor. The Sunday Life is, as its name suggests, a Sunday newspaper. It has a circulation of some 90,000, confined principally to Northern Ireland. The application is made in respect of articles that appeared in the newspaper on 3 March 2002, 28 July 2002 and 15 September 2002.

[3] In the first of the three articles an account was given of a drug dealer having escaped death at the hands of a paramilitary organisation when he was a passenger in a jeep belonging to Frankie 'Boogaloo' Mulholland. A description was given of the attack on the jeep during which Mulholland was killed. Although the passenger was not named it is clear that the article was referring to Sean Toner. He was stated to have "gone on the run" after a drugs raid on his home when cocaine was discovered. It was also claimed that he had previous drugs convictions and that he was trying to take over Mulholland's cocaine empire.

[4] In the second article Toner was again not named but was described as "a big-time drug dealer who fled Ulster after narrowly escaping death at the hands of the LVF". He was again referred to as the passenger in the jeep when Mulholland was killed. It was stated that he had returned to Belfast and was trying "to muscle his way back into the lucrative drugs trade in the north of the city". The article also suggested that several warrants had been issued for his arrest on drugs offences; that he had teamed up with two others to "take on a consignment of 100,000 Ecstasy tablets, which they plan to flood the north of the city with"; and that they were known to use the Belfast Castle area as their base for drug dealing.

[5] In the final article Toner was named. Under the headline 'Fugitive Dealer Busted' the article read as follows: -

> "A drug dealer who went on the run from cops and loyalist killers, after narrowly escaping death at the hands of a LVF hitman, was last night back behind bars.
>
> The fugitive dealer, who was the passenger in Frankie 'Boogaloo' Mulholland's jeep when the cocaine dealer was lured into a UFF/LVF trap last December, had been on the run for over six months.
>
> Last March Sunday Life revealed how Sean Toner, who is in his 20s, had fled Ulster after escaping from a drugs squad raid on his south Belfast home.
>
> Toner fled from the rear of the house and escaped across fields as cops recovered cocaine from the house.
>
> According to Sunday Life sources, he fled to a bolthole in the Republic, but continued to travel back to Belfast to maintain his criminal underworld contacts.
>
> Cocky Toner later moved back to Northern Ireland, thinking cops had lost track of him.
>
> But it is believed he was arrested by police, armed with a number of bench warrants, in the last fortnight when they swooped on a property Toner had rented outside Lisburn.

> Toner escaped death by just inches when his close pal, Mulholland, was gunned down as he sat in his jeep in the Ballysillan area of north Belfast, last December.
>
> The pair were lured to the area by the promise of a £300 cocaine deal with a well-known loyalist with connections to both the UFF and the LVF in north Belfast.
>
> The murder plot was believed to have been hatched in revenge after Mulholland ripped off the LVF in a £40,000 drugs deal.
>
> Mulholland's drug dealing pal Toner escaped unhurt after lying slumped in his seat, playing dead.
>
> He later discovered a spent shell from the assassin's gun in the lining of his jacket."

[6] Toner had been arrested on 17 April 2001 for drugs offences committed on 3 May 2001. He was returned for trial and arraigned on 23 November 2001. He pleaded not guilty. His trial was due to begin on 12 February 2002. On that date he failed to appear and a bench warrant was issued. Toner was arrested on that bench warrant and brought before the court on 4 September 2002. This was eleven days before the publication of the final article. The day after the article appeared, his case was listed to fix a date for the trial to begin. It was fixed for 22 September 2002. On that date an application was made on Toner's behalf that proceedings against him should be stayed. It was claimed that he could not obtain a fair trial on account of the newspaper articles.

[7] The application to stay the proceedings was heard by His Honour Judge Burgess. On 15 November 2002 he gave a written ruling refusing the application. He concluded that, provided some breathing space was given to allow the impact of the articles to fade, Toner could receive a fair trial. He decided, however, that the matter should be referred to the Attorney General to consider whether contempt proceedings should be taken.

[8] Section 1 of the Contempt of Court Act 1981 provides: -

> "In this Act 'the strict liability rule' means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the

> course of justice in particular legal proceedings regardless of intent to do so."

[9] Section 2 (2) provides: -

> "The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced."

[10] A contempt of court may therefore arise if the effect of a publication is to interfere with the course of justice, regardless of whether that was the intention of the publisher. But before a contempt can be established it is necessary to show that the publication has created a risk of prejudice to the course of justice. The risk must be substantial and the interference must be serious.

[11] What is required to make the risk substantial? Lord Diplock provided authoritative guidance in *Attorney General v English* [1983] AC 116 at 141/2 where he said: -

> "Next for consideration is the concatenation in the subsection of the adjective 'substantial' and the adverb 'seriously,' the former to describe the degree of risk, the latter to describe the degree of impediment or prejudice to the course of justice. 'Substantial' is hardly the most apt word to apply to 'risk' which is a noumenon. In combination I take the two words to be intended to exclude a risk that is only remote."

The commentary on this passage in *Arlidge, Eady & Smith on Contempt* (2nd Edition) at paragraph 4-54 is that only *de minimis* risks are to be excluded from the strict liability provisions. The risk must, however, be practical rather than theoretical or illusory – see *Attorney General v Guardian Newspapers Ltd (No.3)* [1992] 1 WLR 874, 881.

[12] All but trivial risk is covered by section 2 (2), therefore, but when will the impediment or prejudice that flows from the publication be regarded as serious? This will depend on a number of factors. The timing of the publication is obviously one. The content of the published material is another. If, for instance, reference is made to a defendant's criminal antecedents when the trial is taking place or is imminent, serious prejudice may be more readily inferred.

[13] A further matter to be considered is the likelihood of the particular publication coming to the attention of potential jurors; and whether, if it does so, it is likely to remain in their memory. If enough time has elapsed between the publication and the trial the impact may diminish sufficiently to allow what is described in the authorities as 'the fade factor' to take effect. What is outstandingly clear from the relevant authorities, however, and what is evident as a matter of general principle is that each case will depend on its own particular blend of facts and circumstances – see for instance Lord Bridge in *Re Lonrho plc* [1990] 2 A.C. 154, 208.

[14] The requirement that there be a substantial risk is distinct from the need to show that the prejudice is serious but these concepts overlap to some extent as was recognised by Auld LJ in *A.G. v BBC* [1997] EMLR 76 at 81: -

> "As Sir John Donaldson, M.R. and Parker L.J. explained in the *News Group* case [*A.G. v News Group Newspapers Ltd* [1987] 1 Q.B. 1], the test of 'substantial risk' and 'serious prejudice' are separate but overlapping. The degree of risk of impact of a publication on a trial and the extent of that impact may both be affected, in differing degrees according to the circumstances, by the nature and form of the publication and how long it occurred before trial. Much depends on the combination of circumstances in the case in question and the Court's own assessment of the likely effect at the time of publication. This is essentially a value judgment for the court, albeit that it must be sure of its judgment before it can find that there has been contempt. There is little value in making detailed comparisons with the facts of other cases".

As Auld LJ pointed out, it is necessary that the court be convinced beyond reasonable doubt that there had been a substantial risk of serious prejudice. The final conclusion on whether a particular publication amounts to a contempt will depend on the court's own evaluation of all the circumstances of the case. Not only is this not particularly assisted by reference to other cases but the answer is not necessarily provided by the disposal of the case by the court of trial.

[15] In this context it is relevant to examine a theme that emerges from some of the cases: whether, for contempt to be established, the consequence of the publication must be that proceedings against the defendant were stayed or, where no application to stay had been made, his conviction was quashed. In *Attorney General v Unger & others* [1998] 1 Cr App R 309 at 318/9 Simon Brown

LJ addressed the question whether, in order to constitute a contempt, a publication would have to render a conviction unsafe. He said: -

> "I am certainly not saying that in respect of one and the same publication there cannot be both a contempt … and a safe conviction. Plainly there can, most obviously perhaps in cases where the trial has had to be moved or delayed to minimise the prejudice occasioned by some publication. But generally speaking it seems to me that unless a publication materially affects the course of trial in that kind of way, or requires directions from the court well beyond those ordinarily required and routinely given to juries to focus their attention on evidence called before them rather than whatever they may have heard or read outside court, or creates at the very least a seriously arguable ground for an appeal on the basis of prejudice, it is unlikely to be vulnerable to contempt proceedings under the strict liability rule."

[16] The view that a publication can amount to a contempt without necessarily rendering a conviction unsafe was articulated by the same judge with even greater clarity in *A.G. v Birmingham Post and Mail* [1999] 1 W.L.R. 361 at 369H, where he said: -

> "It seems to me necessarily to follow (although it is right to say that no specific authority was provided to us which directly establishes the point) that one and the same publication may well constitute a contempt and yet, even, though not substantially mitigated in its effect by a temporary stay, and/or change of venue, not so prejudice the trial as to undermine the safety of any subsequent conviction. To my mind that can only be because s. 2 (2) postulates a lesser degree of prejudice than is required to make good an appeal against conviction. Similarly it seems to me to postulate a lesser degree of prejudice than would justify an order for a stay. In short, s. 2(2) is designed to avoid (and where necessary punish) publications even if they merely risk prejudicing proceedings, whereas a stay will generally only be granted where it is recognised that any subsequent conviction would otherwise be imperilled, and a

> conviction will only be set aside if it is actually unsafe".

[17] A somewhat different view was expressed by Collins J in *Attorney General v Guardian Newspapers Ltd* [1999] All ER (D) 856. Referring to this passage from Simon Brown LJ's judgment, he said, at page 862: -

> "My own approach would be slightly different. It seems to me that the prejudice required by s. 2 (2), which must be serious, is not of a lesser degree than that required to make good an appeal against conviction. To establish contempt it needs only be shown that there was a substantial risk that serious prejudice, which must in my view mean such prejudice as would justify a stay or appeal against conviction, would result from the publication. That such prejudice does not in the event result is nothing to the point. Thus uniformity of approach is achieved by requiring that the prejudice within the meaning of s. 2 (2) must be such as would be likely to justify at least a stay. But, since the risk has to be judged at the time of publication, the court will have to be satisfied that jurors will be likely to have seen it and the court will disregard any extraneous factors, such as decisions by counsel for tactical or other reasons not to raise the matter or to seek a fresh trial."

[18] We do not find it necessary to choose between these differing positions in order to reach a decision in the present application. It is clear that, as at the time of publication, a substantial risk of serious prejudice existed. The final article was published just one week before Toner's trial was due to take place. The article appeared in a newspaper that circulated widely throughout Northern Ireland. It was highly likely that those liable to be impanelled as jurors would have read it. The defendant was identified in the article as a drugs dealer; he was said to have fled from his home when a police raid took place; that cocaine had been found in his home; that he had returned to Belfast in order to maintain his criminal underworld contacts; and he was described as "Mulholland's drug dealing pal". None of these allegations would have been admissible on Toner's trial. If they had been admitted, there would have been a substantial prospect at least that any conviction would have been quashed. The trial judge was able to conclude that a stay was not justified because the option of delaying the trial to allow the 'fade factor' to materialise was available. Had that not been possible, a stay of the proceedings was virtually inevitable. We are satisfied beyond reasonable doubt, therefore, that if Toner's trial had proceeded on 22 September 2002

there would have been a substantial risk of serious prejudice to the course of justice. We have concluded that both respondents are guilty of contempt.

[19] In a letter to the legal secretary to the Attorney General on 10 April 2003, the second respondent explained that the journalist who had been the author of the final article believed that the criminal process was at an early stage and that no trial would take place for "some considerable period of time". He expressed his regret that the article had raised the possibility of contempt. The staff at the newspaper had undergone training on the law of contempt. That training had been organised before these proceedings had been issued and took place on 21 October 2003. Mr G A Simpson QC, who appeared for the respondents, apologised on their behalf for the contempt that had occurred. All these matters mitigate significantly the contempt of the respondents.

[20] Nevertheless the publication of these articles – and the final article in particular - should not have taken place. When it was clear that Toner had been arrested, the respondents should have been immediately alert to the prospect of trial and the danger of that trial being impeded by the publication of plainly prejudicial material. There was no reason that the journalist who wrote the article should have assumed that the trial would not take place for a long time. At the very least, inquiry as to the likely date of the trial should have been conducted before publication of the article was contemplated. If it proved impossible to ascertain the date of trial, the article should not have been published. We consider that the appropriate penalty to impose is a fine of £4000 on the first respondent and a fine of £1000 on the second respondent.