

Neutral Citation No. [2014] NIMag 2

Ref:

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **08/10/2014**

Judgment

PPS

-V-

JOSEPH GEORGE MCCLOSKEY

Before District Judge McNally

1. Joseph George McCloskey is charged with a single count of harassment contrary to Articles 3 and 4 of the Protection from Harassment Order (Northern Ireland) Order 1997.

On the 25th June 2014 I refused an application by the Prosecution for a reporting restriction on the identity of the main prosecution witness. I further refused an application to vacate the contest date of 2nd day of July 2014.

On the 2nd day of July two fresh applications were lodged by the prosecution:

- a) A reporting restriction on the identity of the main prosecution witness under Section 46 of the Youth Justice and Criminal Evidence Act 1999 and Articles 2 and 8 of ECHR and Section 6(1) of the H.R. Act 1968
- b) A special measures direction under Article 7 of the Criminal Evidence (Northern Ireland) Order 1999.

I made a preliminary ruling that both these applications raised fresh issues and were based on new information and that they could be made. Accordingly I vacated the Contest on that date.

At that stage the defence indicated they wished to make a third party application for disclosure of the medical notes and records of the witness. I subsequently granted this order and forwarded to the defence and prosecution any papers which I considered to be relevant to the issues arising from these two applications.

2. In A -v- British Broadcasting Corporation [2014] UKSC 25 the Supreme Court provided an extensive review of the jurisprudence surrounding the principle of open justice. Whilst emphasising that the starting point is openness of proceedings and the right of the press to report the proceedings it made it clear that Courts had the power to depart from the principal of open justice where appropriate, and to permit the identity of the party or a witness to be withheld from public disclosure where necessary in the interest of justice. Lord Reed said as follows “Whether a departure from the principal of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson observed in Kennedy -v- The Charity Commission 2014 UKSC 20 Paragraph 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 disclosure may cause to the maintenance of an effective Judicial process or the legitimate interests of others.”

There are, of course, cases where statute automatically restricts the provision of certain details in reports of court proceedings the most common being the ban of identification of the victim of a sexual offence under section 1 of the Sexual Offences (Amendment Act) 1992.

3. The first ground for the Prosecution application for reporting restriction is under Section 46 of the 1999 Act. I have to say the format of this application is to say the least, unusual. The initial application which I refused under Section 46 did not contain any evidence that the quality of the witness’s evidence or his co-operation was likely to be diminished by reason of fear or distress in connection with identification by the public as a witness. It did not contain any reference whatsoever to co-operation with the preparation of the case being likely to be diminished.

The present application however, in addition to his Article 2 right to life, appears to be solely based on his co-operation with the preparation of the case.

It has to be noted, however, that whilst being absent from this application the effect of the quality of his evidence is at the centre of the special measures application and I shall deal with this in due course.

Under Section 46 (3) an adult witness is eligible for protection if the quality of his evidence or the level of his co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with the identification by the public as a witness.

Section 46 (2) provides that the Court may make a reporting restriction in respect of such a person if the making of such an order is likely to improve the quality of the evidence of the witness or his co-operation in the preparation of that parties case.

Under Section 46 (4) in determining whether a witness is eligible for protection, the Court must take into account:

- a) The nature of and alleged circumstances of the offence
- b) The age of the witness
- c) The social and cultural background of the witness and his ethnic origin, if relevant
- d) The domestic and employment circumstances of the witness if relevant
- e) Any religious or political opinion of the witness is relevant
- f) Any behaviour towards the witness on the part of the defendant, his family or associates or other witnesses in the proceedings.

Finally, under Section 46(8) in determining whether to give a reporting restriction the Court shall consider:

- a) Whether it would be in the interests of justice to do so
- b) The public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings.

4. In considering the matters under Section 46 (4) as at:

- a) The background to the application is central to the charge of harassment levelled at the defendant. The facts largely do not seem to be in dispute taken into account the content of the defendant's interview. The defendant posted a report of the case on Facebook in regards to the witness. A number of comments from various people were subsequently published on his Facebook page describing the witness variously as a

scumbag, dirtbag, a dirty lousey root bastard and suggesting that he should be hung and that “these scumbags need to be taken out of society.” The post by the defendant referred to the witness assaulting a young lad when he was 13 and smashing up the home of the grandparents of the victim. The witness argues that it was these publications which caused threats to his life and that further threats can be anticipated should he be identified in these proceedings.

b) The witness is 24 years of age

The only relevant factor in **C**, **D** and **E** is that there is a letter from the housing executive to indicate he had to move home.

f) The witness has very clearly stated expressed his view in his statement dated 26th June 2014. The prosecution application advises that when he was informed of my original decision to refuse the reporting restriction the applicant felt unable to continue to assist the prosecution of the case.

He advises he suffers from anxiety and depression and that his mental health has deteriorated since the publication of the Articles in the Sunday World. He believes that without a reporting restriction his ability to give evidence would be impaired to the extent he would not be able to proceed to give evidence in Court.

5. In coming to a conclusion on this issue I take into account additionally the evidence of Constable Crean who confirms that he has witnessed a deterioration in the witness’s health over the course of time he has been dealing with him and that the Constable believes his statement that he would not attend to give evidence in the absence of a reporting restriction. It must be remembered this is not a defendant who is attempting to escape being identified to the public as a person who has committed crimes. In this case the witness complains that the defendant has committed a crime against him by harassing him in regards to offences which he did commit and for which he was dealt with by the due process of law.

I have also taken into account the representations made by the press.

Firstly I am not satisfied to the standard of proof in a criminal case, that there is real and immediate risk to life, real in the sense, that it is objectively verified and immediate in the sense that it is present and continuous. The evidence by Constable Crean was that there was a threat which constituted a possible risk to life. I was not advised of the nature of the threat or from whom it emanated. I am satisfied that threats were made to the witness but if this was the sole ground for an application for anonymity I would not grant the application.

However, secondly, I am satisfied that under Section 46 the witness is eligible for protection as his level of co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with the identification by the public as a witness in the proceedings.

I conclude that it is in the interests of justice to make a reporting restriction on his identity. At the end of the day the press will be able to report the identity of the defendant, the full facts of the case, the result of the case and the public interest will not be seriously damaged solely by not knowing the identity of the witness. The important issues in the case are did the defendant harass the witness and in what manner did he harass the witness. The identity of the witness in my view is not crucial to the understanding of the case by the public and any desire for the public to have the witness identified is outweighed by the effect that his identification in the proceedings would have on his cooperation in the preparation of the case.

6. I shall now deal with the witness's application for special measures direction under Article 7 of the Criminal Evidence (Northern Ireland) Order 1999. In particular he applies to have his evidence in chief and cross examination by live link and he is screened from the public gallery while he is giving evidence by live link.

Under Article 5 of the order the witness is eligible for assistance if the court is satisfied that the quality of the evidence given by the witness is likely to be diminished by the reason of fear or distress on the part of the witness in connection with testifying in the proceedings. In determining whether a witness is eligible the court shall take into account the factors set out in Article 5 (2) which are similar to those set out in Section 46 (4) of the 1999 Act.

Article 4 (5) of the Order makes clear the references to the quality of the witness's evidence are to its quality in the terms of completeness, coherence and accuracy. Coherent refers to the witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

In the event that the court concludes that the witness is eligible it is directed by Article 7 to determine whether any of special measures would be likely to improve the quality of the evidence given by the witness. In doing so the Court should take into account any views expressed by the witness and whether the measures or measures may intend to inhibit such evidence being effectively tested by a party to the proceedings.

7. In coming to a conclusion I have taken into account the factors set out at Article 5 (2). I have also taken into account the statement made by the witness on the 26th June 2014 in support of his application, the evidence of Constable Crean, the report from

Doctor Burke, the witness's GP, dated 24th June 2014 and the disclosed medical records. It is apparent he has had mental health issues for some considerable period of time. His GP confirms that he attended the surgery in early April with significant low mood and anxiety. He was commenced on anti-depressants and referred urgently to the Community Mental Health team. As of 24th June 2014 his mental health has continued to deteriorate to the point he was referred to home treatment for acute adult mental health assessment and advice. The Doctor finally opines that his attendance at court in person would be detrimental to the progress that he has been making albeit in small steps but does not go on to give any insight as to how his mental health problems would impact upon the quality of his evidence.

In any event that is an issue which I have to decide. I am satisfied that the statement made by the witness is corroborated by the medical evidence and the evidence of Constable Crean and that his attendance to give evidence in court in the circumstances of this case and in his present mental state would lead to the quality of his evidence being diminished by reason of fear or distress in his part in testifying in the proceedings. In further considering the matters at Article 7 (2) and (3) I am satisfied that he should give his evidence in chief and cross examination by live link. However, I do not feel it is appropriate or necessary to screen the witness from the public gallery and the defendant while he is giving evidence by live link. Finally, I add this finding in relation to the quality of his evidence as a further basis for granting the application for a reporting restriction under section 46.

Liam McNally

8th October 2014.