

Case No: 201800497/C4

Neutral Citation Number: [2018] EWCA Crim 1341

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM WORCESTER CROWN COURT

HHJ Juckes QC

T20170027

Royal Courts of Justice
Strand, London, WC2A 2LL

Date 13 June 2018

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON

LORD CHIEF JUSTICE OF ENGLAND AND WALES

THE HONOURABLE MR JUSTICE STUART-SMITH

and

THE HONOURABLE MR JUSTICE NICKLIN

Between:

Regina

Respondent

- and -

Sudip Sarker

Defendant

- and -

British Broadcasting Corporation

Applicant

Ben Silverstone (instructed by **BBC Legal Department**) for the **Applicant**
Jacob Hallam QC (instructed by **Crown Prosecution Service**) for the **Respondent**
The Defendant did not attend and was not represented

Hearing date: 23 May 2018

Judgment

Lord Burnett of Maldon:

1. This is an application by the British Broadcasting Corporation (“BBC”) (supported by Associated Newspapers, Guardian News and Media, Mirror Group Newspapers, News Group Newspapers, the Press Association and Times Newspapers) for permission to appeal a reporting restriction order imposed by His Honour Judge Juckes QC at Worcester Crown Court on 22 January 2018, the first day of the defendant’s trial (“the Order”). The Order was made under section 4(2) of the Contempt of Court Act 1981 (“the 1981 Act”). It prohibited publication of any report of the trial until after the jury returned its verdict. The BBC’s application is made under section 159 of the Criminal Justice Act 1988. The defendant has been notified of the BBC’s application, but he has not sought to participate in the proceedings.
2. The jury convicted the defendant on 2 February 2018 following which the judge discharged the Order. Nevertheless, the BBC seeks to challenge the Order as a matter of principle. It is common ground that an appeal under section 159 can be made even after the reporting restriction order has been discharged: *ex parte Central Independent Television* [1991] 1 WLR 4, at 9E *per* Lord Lane CJ.

The Criminal Proceedings

3. The defendant was a surgeon. He was charged with a single count of fraud contrary to section 1 of the Fraud Act 2006. The prosecution alleged that, between 9 May 2011 and 1 September 2011, he had dishonestly exaggerated his professional experience in order to obtain an appointment as a consultant surgeon at the Alexandra Hospital in Redditch (part of the Worcestershire Acute Hospital Trust (“the Trust”)), a post he took up in August 2011. The work he undertook included bowel surgery and the use of keyhole surgical techniques.
4. Colleagues of the defendant soon raised concerns about his competence. He was said to be performing surgery poorly and there were incidents where procedures went wrong. In 2012, the Trust undertook an initial investigation into events which included six incidents and a death. The results showed stark contrasts in the complication rates for the defendant’s patients when compared with other surgeons performing similar operations. Ultimately, the defendant was made subject to an independent surgical review by the Royal College of Surgeons. He was suspended and then dismissed in 2015. There was a police investigation into a number of deaths of his patients.
5. Concerns over the defendant’s competence and the Trust’s investigation were reported in the media.
 - i) On 19 June 2013, a report appeared in the Hereford & Worcester section of the BBC News website under the headline: “Worcestershire surgeon Sudip Sarker investigated by trust”. It quoted a statement from the Trust that the defendant had been suspended in October 2012 after “a number of concerns” had been raised about him and that three deaths had been referred to a coroner.
 - ii) On 21 February 2014, a Sky News report appeared on its website under the headline: “Surgeon faces police probe over deaths”. It reported that a police investigation had been opened into the deaths of a number of patients under

the care of the defendant. A senior police officer confirmed that the families of the patients who were the subject of the inquiry had been informed and would be kept updated on the investigation. The Trust issued a statement indicating that the records of those who had undergone a major operation at the hands of the defendant had been reviewed. Where there were concerns the relevant individual had been recalled for further assessment. The extent of the concern can perhaps be gauged by the fact that a designated telephone number and email address were given for patients to contact the Trust.

- iii) On 15 July 2015, an article appeared on the website Worcester News under the headline: “Worcester cancer surgeon Sudip Sarker investigated over patient deaths fired”. The article was accompanied by a large photograph of the defendant with the caption: “Colorectal cancer surgeon Sudip Sarker”. The article contained references to both the police and Trust investigations.
- iv) On 1 November 2016 an article appeared on the Birmingham Mail website under the headline: “Scandal-hit Trust accused of death rates ‘cover-up’ at Alexandra Hospital.” Although the article centred on wider issues concerning the Trust, it included the following words which appeared under a large photograph of the defendant:

“... a three-month investigation by the Birmingham Mail has now discovered the [mortality rate] data was potentially flawed as it included patients of Sudip Sarker, a now shamed surgeon who was sacked for having DOUBLE the death rate of colleagues... A police investigation into a number of his patient deaths is continuing.”

- 6. The prosecution evidence in the defendant’s trial focussed on the representations that he made prior to his appointment and which the prosecution said were false. The subsequent events that had been the subject of media reporting were not relevant. The jury would not learn about the later concerns surrounding the defendant’s competence as part of the trial. The defendant’s counsel was concerned that knowledge of the inquiry and police investigation would be prejudicial.
- 7. That concern led to the defence application to the Judge for reporting restrictions under section 4(2) of the 1981 Act.

The 1981 Act

- 8. Section 1 identifies “the strict liability rule” which treats conduct that tends to interfere with the course of justice in particular legal proceedings as a contempt of court. Section 2 sets out the scope of the rule:

“(1) The strict liability rule applies only in relation to publications, and for this purpose “publication” includes any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.

(2) 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.

(3) The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.

...”

9. The circumstances in which criminal proceedings are active are set out in Schedule 1. Section 3 provides a defence of innocent publication or distribution. Section 4 is entitled “Contemporary reports of proceedings” and provides:

“(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

...”

The Reporting Restriction Order

10. The application for an order was made at the end of general pre-trial ‘housekeeping’ and just before the jury were empanelled. Counsel for the defendant indicated that he would be seeking postponement of reporting. Copies of press reports (including the articles summarised in paragraph 5 above) were handed to the judge. Counsel then submitted:

“...there [was] initially consideration as to whether [the defendant] caused or contributed to the deaths of certain people, so it would have been big news, I would imagine, in this area about the Trust... [T]here’s been a drip of press coverage, rightly so, dealing with all the turns and twists of the disciplinary and so on. But what you do find in a lot of these, and you can see it straight away, is these stories that appeared on the internet initially do link immediately to more on the story which is past stories... I know you Honour will give the usual warning [to the jury] about going on the internet, but our fear is if this is published – these proceedings – it will inadvertently link to other stories connected to it, and therefore may prejudice or expose this jury to that”.

11. We have set out this submission in full because it makes clear the concern: a contemporaneous on-line report of the trial would have links to other stories of the

sort illustrated in paragraph 5 above. If the jury clicked through they would encounter prejudicial material.

12. No immediate ruling was made and the jury were empanelled. Questions had been asked of the jury in waiting to select a jury whose members had no prior knowledge of the defendant. The judge gave conventional opening directions to the jury including an express prohibition on carrying out any research of any kind themselves. The jury were then sent home for the day and the judge returned to the application for reporting restrictions. Counsel for the defendant identified that the application was being made under section 4(2) and from the wording of the section indicated that the test was whether publication would create a substantial risk of prejudice and that postponement of reporting was necessary in order to avoid that risk. Prosecuting counsel indicated that the Crown's position on the application was 'neutral' and made no submissions. Counsel for the defendant submitted that in light of the historic press coverage the judge should impose an order prohibiting reporting of the trial. He suggested that it would last for no more than about 10 days, which was the estimated length of the trial and that it should be made, "just to ensure that this trial is not interrupted, in particular this jury are not exposed to some of the adverse press coverage that has occurred in the past". There was no reference in the course of the submissions to either *Blackstone* or *Archbold*, both of which have succinct sections on the principles governing section 4(2) of the 1981 Act, or to any authority or the Criminal Procedure Rules.

13. The Judge made the Order and gave a short ruling:

"The reason [why the order is sought is] that there has already been coverage, entirely appropriate coverage – no one is critical of it – about the progress of this particular issue through other tribunals and the consequences of it, mixed in with elements of the suggestion that there have been very serious consequences of the matters which form the subject matter of an allegation in this case, including the loss of life. We have just gone through a careful process of empanelling a jury who in fact knows nothing about Mr Sarker, and has no connection with the hospital at which he was working, and therefore does not know anything in advance about his particular case, because it would prejudice the trial if in fact people did know those things.

It may or may not be that they will discover something of this background as the case continues... and it would prejudice the defendant if there were matters published at this stage and during the course of the trial in such a way that we could not have a fair trial, and therefore I will make the order sought, and that order will be that there should be no press coverage of this case until it concludes, which as I say, should be in a relatively short space of time."

14. On 26 January 2018 counsel for the BBC appeared at the trial and applied to discharge the reporting restriction. He provided a skeleton argument which set out the statutory framework for reporting restrictions and a number of the key authorities. He also drew attention to the Judicial College guidance: "Reporting Restrictions in the Criminal Courts" (revised edition May 2016). Three paragraphs in his skeleton set out the BBC's essential submissions:

"(1) Any report of this trial would necessarily focus only on the evidence that has been placed before this jury. Therefore, a fair and

contemporaneous report of this trial could not, by itself, give rise to any risk of prejudice.

- (2) There is prejudicial material, that does not concern this trial, already in the public domain. The s.4(2) order does not and cannot prevent the republication of (or otherwise bringing the audience's attention to) that prejudicial material. The act of republishing (or signposting audiences to) that prejudicial material is prohibited under s.1 Contempt of Court Act 1981, because it would create a substantial risk of unfairness to the proceedings. The BBC and other media organisations are highly experienced in reporting on criminal trials... No reasonable news editor would broadcast or publish prejudicial material. Neither would they allow it to be published on their platforms, including on message boards, social media, or through links to previous news stories...
- (3) The jury have been directed that they must not conduct their own research and must reach their verdict upon the evidence heard in court. The criminal justice system relies upon jurors adhering to these directions. Any suggestion that a report of this trial will incite jurors into undertaking research about the defendant is unfounded and goes against the principle, referred to in *R -v- B* ... that juries must be trusted faithfully to adhere to their duties. In any event, if a juror were minded to disobey their directions, they would find the prejudicial material by simply 'Googling' the defendant's name. Therefore, the prohibition on publishing a report of this trial does nothing to prevent the risk that the juror may read the prejudicial material."

15. The prosecution now actively supported the defence application for the reporting restrictions to continue. The judge refused to discharge the Order. He gave an *ex tempore* judgment in which he recognised that orders under section 4(2) were measures of last resort. Nevertheless, he considered that the case was exceptional. Information about the defendant's post appointment record as a surgeon would not be presented during the trial. The judge was concerned that contemporaneous reports of the trial might increase the risk that jurors would see this prejudicial information. He explained:

"The fear is that if any report of the proceedings in this matter were made containing as they will a photograph there is such a weight of material, as it were, behind that photograph that it would be very difficult to avoid discovering the matters which at this stage of the trial are considered to be irrelevant in the determination of the particular issues.

As to the submission that the risk of jurors seeking out information about the defendant or the Trust could be dealt with by the usual direction, the judge said:

"... in this particular case we have gone to some trouble to pick a jury who know nothing about Mr Sarker or the background to the case. They were told in advance of the selection of the jury that they should indicate to us if they knew anything about him or the hospital trust or the particular hospitals, or the issues in this case that arose. None of them have done so... I cannot ban a jury from reading newspapers or watching the television. Jury service is onerous enough... I can direct them [not to look for material], of course, but the fear is

in this case if there is publication of the proceedings in this case with photographs of the defendant and so on it would lead inevitably to the discovery of those matters that I have mentioned.”

16. The judge was satisfied that contemporaneous reports of the proceedings would give rise to a substantial risk of prejudice and that it was necessary to make an order to avoid that prejudice. When considering the competing interest of open justice, the judge considered that the fact that the trial was only expected to last a further four days meant that the interference with the open justice principle was limited.

The parties’ submissions

17. Mr Silverstone for the BBC referred us to several leading cases on postponement orders under section 4(2) of the 1981 Act: *R v Central Criminal Court (ex parte Telegraph plc)* [1993] 1 WLR 980; *R v Sherwood (ex parte Telegraph Group)* [2001] 1 WLR 1983 (“*Sherwood*”); *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 WLR 190; *R -v- B* [2007] EMLR 145; and *Re MGN Limited* [2011] EMLR 14. And also, to authorities making plain the significant importance of open justice and the role of the media in reporting what takes place in court, and particularly in criminal cases: *Scott -v- Scott* [1913] AC 417; *Attorney General v Leveller Magazine Limited* [1979] AC 440; *ex parte Kaim Todner* [1999] QB 966; *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593; *In re Trinity Mirror* [2008] QB 770; and *Khuja v Times Newspapers Limited* [2017] 3 WLR 351. He has also referred us to jurisprudence on Article 10 of the European Convention on Human Rights (“ECHR”) (the right to freedom of expression and information) but the domestic authorities so clearly articulate the relevant principles that it is unnecessary for us to refer to it.
18. Mr Silverstone submits that for the reasons articulated in the submissions made to the judge, encapsulated in paragraph 14 above, it was wrong as a matter of principle to make the order.
19. Mr Hallam QC does not dissent from any of the legal principles which the BBC submits apply to section 4(2) postponement orders. On reflection, he found it difficult to support the order but reiterated the unusual facts of the case. There had been substantial media coverage of the ‘fall-out’ from the defendant’s appointment. All concerned were seeking in good faith to protect the fairness of the trial.

Discussion

(1) General points

20. Before attempting to distil the principles that emerge from the authorities we make some general observations.
21. Applications for reporting restrictions (not limited to section 4(2) postponement orders) are subject to specific provisions in the Criminal Procedure Rules: Rules 6.4 and 6.5. Unless unavoidable, those rules must be followed. Rule 6.4(3) provides that a party who seeks any form of reporting restriction must:
 - i) apply for the order “as soon as reasonably practicable”;

- ii) notify every other party to the case and any other person that the court directs; and
 - iii) explain what power the court has to make the order and why an order in the terms proposed is necessary.
- 22. In section 4(2) cases, the explanation for why the order is necessary needs to address, clearly (and ordinarily in writing): (i) *how* contemporaneous fair and accurate reports of the trial will cause a substantial risk of prejudice? and (ii) *why* a postponement order would avoid the identified risk of prejudice?
- 23. Judges must be on their guard against applications which are advanced at the last minute or without proper consideration of the principles in play. On many occasions, the application for the reporting restriction will either be supported or at least unopposed by the other party. Although a reporter may be in court (as was the case here) he or she is unlikely to be in a position instantly to advance considered submissions in response to an application. It is when these factors, individually or collectively, are present that the court must be most vigilant to ensure that an application for reporting restrictions receives careful consideration.
- 24. Applications of this sort are generally advanced on behalf of a defendant. In the absence of any submissions from the media, judges are entitled to look to the prosecution for assistance, whose duty it is to ensure that the court is aware of the relevant legal principles: *ex parte News Group Newspapers Ltd* [2002] EMLR 9 at [25] *per* Lord Bingham CJ. Judges can also consider whether the application for the reporting restrictions could be adjourned and notice of the application given to the media (pursuant to a direction under Rule 6.4(3)) so that they have the opportunity of making submissions if they wish.
- 25. If the media are unable or unwilling to make representations, then the obligation to ensure section 4(2) orders are only made when justified remains on the court. The reality is that most local newspapers, for decades the mainstay of reporting the work of our courts, will be unable to justify the cost of applying to discharge or appealing a reporting restriction order. One need only look through the names of the appellants in this type of cases to see the rarity of appeals by local media. In *ex parte News Group Newspapers*, Lord Bingham CJ noted at [26] that the problem is exacerbated in the ordinary run of cases where the story itself, although something that a local newspaper would wish to publish, is not one of the highest public interest such as to justify the expenditure of large sums of money in seeking to have the order rectified. Even if a challenge is launched, the time constraints of the relevant trial may mean it is not heard until it is too late to allow any contemporaneous reporting of the trial: *In re S* at [35]. The BBC in this case is pursuing the appeal because it seeks to establish, as a matter of principle, that the order should not have been made.
- 26. Sometimes, as in this case, judges are urged to grant an order postponing reporting because it is expected that the trial will last only for a short period. But the practical effect of even a relatively short postponement order is likely to reduce the chances of any reporting at all. In order to publish a postponed report of a trial, the media organisation would have to commit the resources of a journalist attending the trial in the certain knowledge that only a fraction of what would have been published in daily reports will be likely to be published when the order is lifted. In the modern era of

communications, it is truer than ever that ‘stale news is no news’: *Sherwood* at [16] *per* Longmore LJ; *Kelly v BBC* [2001] Fam 59, at 90A *per* Munby J. Postponement orders, even if only of short duration, are likely to have a damaging effect on the very important public interest in reporting proceedings in courts: *In re S* at [35] *per* Lord Steyn.

27. These points serve to underline the importance of judges giving careful scrutiny to any application for reporting restrictions. There is comprehensive assistance in “*Reporting Restrictions in the Criminal Courts*”¹ published by the Judicial College and prepared in collaboration with the Media Lawyers Association, the News Media Association and the Society of Editors. This guide covers all types of reporting restrictions. Part 4.5 deals with postponement orders under section 4(2). As we have noted, the principal textbooks on criminal practice and procedure, *Blackstone* and *Archbold*, also provide guidance on reporting restrictions.
28. The general application of the very strong common law principle of open justice has the result that for individual judges and practitioners, cases in which reporting restrictions of this sort are considered are relatively rare. In itself that exemplifies the importance of all concerned proceeding with caution only after a careful examination of the underlying principles.

(2) Open Justice

29. When dealing with applications for reporting restrictions, the default position is the general principle that all proceedings in courts and tribunals are conducted in public. This is the principle of open justice. Media reports of legal proceedings are an extension of the concept of open justice.
 - i) In one of the first cases decided under the 1981 Act, Lord Denning MR noted that open justice and freedom of the press are “two of our most fundamental principles”: *R -v- Horsham Justices ex parte Farquharson* [1982] QB 762, at 793H. At common law, the court has no power to make an order postponing the publication of a report of proceedings conducted in open court; any such power must be conferred by legislation: *Independent Publishing Co Ltd* at [67] *per* Lord Hoffmann.
 - ii) Attending court in person is not practical for any but a handful of people, and live-streaming and broadcasting of court proceedings remain restricted. The only way that citizens can be informed about what takes place in most of our courts is through media reports. In that way the media serve both as the eyes and ears of the wider public and also as a watchdog: *In re S* at [18] *per* Lord Steyn.
 - iii) Full contemporaneous reporting of criminal trials (and other legal proceedings) promotes public confidence in the administration of justice and the rule of law: *In re S* at [30].

¹ Available at the date of this judgment on line at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>

- iv) On a practical level, the public nature of court hearings (and media reports of them) fulfils several objectives: (1) it enables the public to know that justice is being administered impartially; (2) it can lead to evidence becoming available which would not have been forthcoming if reports are not published until after the trial has completed or not at all; (3) it reduces the likelihood of uninformed or inaccurate comment about the proceedings; and (4) it deters inappropriate behaviour on the part of the court (and we would add others participating in the proceedings): *ex parte Kaim Todner* at 977E-G *per* Lord Woolf MR.
- v) On the rare occasions when a court is justified in sitting in private, both the public and media are prevented from accessing the proceedings altogether. Reporting restrictions are different. The proceedings are there to be seen and heard by those who attend court, but they cannot be reported. Reporting restriction orders, albeit not as great a departure from open justice as the court sitting in private, are nevertheless “direct press censorship”: *Khuja* at [16] *per* Lord Sumption.
- vi) Reporting restrictions orders are therefore derogations from the general principle of open justice. They are exceptional, require clear justification and should be made only when they are strictly necessary to secure the proper administration of justice: *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 at [10]; they are measures of last resort: *In re Press Association* [2013] 1 WLR 1979 at [13] *per* Lord Judge CJ.
- vii) Any derogation from open justice must be established by clear and cogent evidence: *Scott -v- Scott* [1913] AC 417, at 438–439 *per* Viscount Haldane LC; *Practice Guidance (Interim Non-disclosure Orders)* at [13].

(3) *The proper approach to a section 4(2) postponement order application*

30. A clear articulation of the approach to be adopted is to be found in the judgment of Longmore LJ in *Sherwood* at [22] (which was approved by the Privy Council in *Independent Publishing Co Ltd* at [69]).
 - i) The first question is whether reporting would give rise to a substantial risk of prejudice to the administration of justice in the relevant proceedings (see paragraph 32 below). If not, that will be the end of the matter.
 - ii) If such a risk is perceived to exist, then the second question arises: would a section 4(2) order eliminate it? If not, there could be no necessity to impose such a ban. On the other hand, even if the judge is satisfied that an order would achieve the objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so, it could not be said to be “necessary” to take the more drastic approach: *ex parte Central Television plc* at 8D-G *per* Lord Lane CJ.
 - iii) If the judge is satisfied that there is indeed no other way of eliminating the perceived risk of prejudice; it still does not necessarily follow that an order has to be made. The judge may still have to ask whether the *degree* of risk contemplated should be regarded as tolerable in the sense of being “the lesser of two evils”. It is at this stage that value judgments may have to be made as to

the priority between the competing public interests; fair trial and freedom of expression/open justice: *ex parte Telegraph plc* at 986B-C.

(a) *Substantial Prejudice*

31. The word “substantial” in the section does not mean “weighty”. It means “not insubstantial” or “not minimal”: *Attorney General -v- News Group Newspapers* [1987] QB 1, at 15D-E *per* Lord Donaldson MR; *Re MGN Limited* at [15] *per* Lord Judge CJ.
32. It is important to focus on what prejudice it is said would be occasioned by the reports sought to be postponed. In most cases, no possible prejudice to the immediate trial could arise from the publication of contemporaneous reports of the trial itself (at least so much of the proceedings that take place in front of the jury) having regard to:
 - i) the fact that the jury will have themselves seen and heard the evidence or submissions that are the subject of the report;
 - ii) the express directions given to jurors at the start of a trial (see Criminal Practice Directions 2015, paragraph 26G and now also given to all juries in writing) (a) to try the case on the evidence presented during the trial; (b) not to carry out any research themselves; and (c) to ignore any media reports that they may see of the case they are trying; and
 - iii) the principle that the Court must proceed on the basis:
 - a) that juries have “a passionate and profound belief in, and commitment to the right of a defendant to be given a fair trial” and their integrity “is an essential feature of our trial process”; juries will abide by the directions of the trial judge, not only because they are directions of law that they must follow, but because they will “appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair”: *R -v- B* at [31] *per* Sir Igor Judge PQBD; *ex parte Telegraph plc* at 987E-G *per* Lord Taylor CJ. (We note these statements are borne out by the evidenced-based conclusions of the Law Commission in their 2014 Report “*Contempt of Court (2): Court Reporting*” (Law Com No.344) paragraph 2.30(3) that “jurors find the trial process absorbing, and significantly prioritise what they hear during the trial over what they might have heard from the media outside of the trial”); and
 - b) that media reports of the trial (1) will be “responsible, fair and accurate”: *Sherwood* at [9] *per* Longmore LJ; and (2) will not include (or link to) any prejudicial material the publication of which would be a breach of the strict liability rule under sections 1 and 2 of the 1981 Act. This last point bears emphasising. Journalists and their editors will strive to avoid any publication which risks putting them in breach of the strict liability rule. They are well used to ensuring that on-line reporting of a trial does not refer to earlier prejudicial material or contain links to that material.

33. Judges may fear that publication on-line of fair and accurate contemporaneous reports will give rise to a risk of prejudice arising from third parties making prejudicial comments upon the reports of proceedings (or providing links to prejudicial material). We echo two points made by Sir Igor Judge PQBD in *R -v- B* at [24]-[25]):
- i) First, the risk of prejudicial third-party commentary in user-generated content should not be exaggerated. Media organisations are able to disable any facility allowing comments to be made on website reports of jury trials and for good reason: publication of prejudicial material like this would risk falling foul of the strict liability contempt regime and “the responsibility for avoiding the publication of [such material] rests fairly and squarely on those responsible for the publication”.
 - ii) Secondly, and in any event, this sort of “parasitic damage” is not a risk of prejudice arising from fair and accurate reporting and cannot justify the imposition of a reporting restriction order under section 4(2) of the 1981 Act.
34. Even in the more typical cases of sequential or connected trials, where a section 4(2) order is made in the first trial to protect the second trial or re-trial, the judge must still consider carefully the nature of the prejudice that is relied upon to justify the order. Where the following trial will take place some months after the first, it must be demonstrated convincingly that the risk of prejudice is substantial (or that an order is necessary), having well in mind (a) that the jury in the following trial must be taken to be willing and able faithfully to discharge their duty (see paragraph 33(iii)(a) above); and (b) the established “fade factor” (the effect of the lapse of time between publication and trial) that applies in news cases. In terms of jurors remembering publicity about a trial or the people involved in it, the “staying power of news reports is very limited”: *Re C (A Child)* [2016] 1 WLR 5204 at [30] *per* Lord Dyson (but cf. *Sherwood* at [31] in respect of very high-profile cases).

(b) Is an order necessary?

35. At this stage, if any order is thought to be required, the key question is whether a less restrictive order might avoid the risk of prejudice that has been identified. For example, in *R -v- F (ex parte BBC & Others)* [2016] 2 Cr App R 13, targeted orders under section 45(4) of the Senior Courts Act 1981 were made, essentially: (a) directing various publishers (including social media platforms) to remove prejudicial comments (described as an “avalanche of public outrage” [12]) and; (b) prohibiting further third-party commentary on reports of the re-trial. On that basis, the Court of Appeal was satisfied that a blanket section 4(2) order postponing reporting of the retrial could not be justified as necessary or proportionate. The scope of the power exercisable under section 45(4) was also considered in *In re Trinity Mirror* at [29] *per* Sir Igor Judge PQBD). Other restrictions that may be sufficient to avoid the identified prejudice, rather than a blanket postponement order, are orders limited to postponing the identification of certain persons involved in the first trial or to particular aspects of the evidence in the first trial. These are just examples, but they show that consideration must be given to whether an order stopping short of a total postponement of reporting of the proceedings can be fashioned.

(c) The ultimate balance

36. There is reference in some of the authorities to the final stage being one at which the court exercises a discretion to make an order, or not. That is not strictly accurate. The court is required to make a value judgment about the competing rights and interests: *Sherwood* at [21] *per* Longmore LJ. A reporting restriction is, to use the language of article 10(2) ECHR, an interference with the right of freedom of expression. It must both be prescribed by law and “necessary in a democratic society”. This last stipulation requires any order to be proportionate, with a balance being struck between the competing interests of free speech and the risk of prejudice to a trial. The balance is similar to that performed by the court when two competing convention rights come into conflict. It requires “an intense focus on the comparative importance of the specific rights being claimed in the individual case”: *In re S* at [17] *per* Lord Steyn. In the language of the headnote from *Sherwood* (and approved in *Independent Publishing Co Ltd* at [69]), at the third stage, the question is:

“whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage value judgments might have to be made as to the priority between the competing public interests represented by Article 6 and Article 10...”

Application to this Appeal

37. Applying the principles as we have identified them, it becomes clear that the Order should not have been made. The BBC’s submissions before the Judge (see paragraph 14 above) correctly identified the issues and their bearing on the legal principles underpinning the section 4(2) regime. Fair and accurate contemporaneous reporting of the trial would not have given rise to any risk of prejudice. The perceived risk arose from an assumption that a fair and accurate contemporaneous report would contain links to earlier irrelevant and prejudicial material. There was no reason to make that assumption, but in any event an order under section 4(2) would not prevent the republication of earlier prejudicial material or signposting it via links. It should not have been used to guard against parasitic damage to the trial. As we have noted, to follow either course would put a publisher in breach of the strict liability rule. At the heart of the concern articulated by the defendant’s counsel was a fear that, contrary to the judge’s direction, echoed in material given to the jury in writing, members of the jury might embark on a search for further material. There was no reason to suppose that they would do so and a postponing order pursuant to section 4(2) was anyway an impermissible mechanism to reduce any such risk.
38. We grant permission to appeal, allow the appeal and quash the Order.