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Case Comment

The effect of s.39 of the Children and Young Persons Act 1933 when a person attains the age of 18

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Legislation: Children and Young Persons Act 1933 (c.12) s.39, s.49

European Convention on Human Rights 1950 art.8

European Convention on Human Rights 1950 art.10

Cases: R. (on the application of JC) v Central Criminal Court [2014] EWHC 1041 (Admin); [2014] 1 W.L.R. 3697 (DC)

R. v Central Criminal Court Ex p. W [2001] 1 Cr. App. R. 2 (DC)

T v DPP [2003] EWHC 2408 (Admin); (2004) 168 J.P. 194 (DC)

***J. Crim. L. 368** The two claimants in this case, known as JC and RT, were both charged with joint possession of an explosive substance without lawful reason contrary to s. 4(1) of the Explosive Substances Act 1883. During their appearance at the Central Criminal Court both defendants pleaded guilty to the charges. At the time of the hearing (15 November 2013) both defendants were aged 17.

A third defendant, MP, who was also 17 years old, was charged under s. 4(1) of the Explosive Substances Act 1883 and in addition with the more serious offences of possession of articles for a purpose connected with terrorism and possession of a document likely to be useful to a person committing or preparing an act of terrorism under the Terrorism Act 2000. MP admitted the offences under the Explosive Substances Act 1883, but denied the charges brought under the Terrorism Act 2000. The Recorder of London made an order in respect of all three defendants under s. 39 of the Children and Young Persons Act 1933 preventing their identification until their 18th birthdays.

The charges against the third defendant related to a plot named by MP in his notebooks as '*Operation New Columbine*'. MP was accused of stockpiling weapons including crossbows, air rifles, petrol bombs and pipe bombs, all of which he allegedly planned to use to attack various targets including a school, a mosque, a cinema and local council offices. Also found in MP's possession were the banned *Mujahideen Poisons Handbook* (a book explaining how to make homemade poisons), which he had downloaded onto his phone, and videos showing MP, JC and RT testing homemade explosives by throwing them against occupied buildings.

MP was tried, but the jury was unable to reach a verdict and a retrial was ordered. Meanwhile, JC and RT were sentenced for their offences. The prosecution accepted that JC and RT had not intended to endanger life or cause serious damage to property, and the Recorder of London imposed community orders upon each of them. At this hearing, the Recorder also heard argument about the effect of s. 39 of the Children and Young Persons Act 1933. The Recorder ruled that the s. 39 order in respect of JC and RT would expire on their 18th birthdays.

Section 39 of the 1933 Act makes it a criminal offence for a newspaper to publish the name, address, school or any other information which could lead to the identification of a child or young person involved in proceedings as a defendant, victim or witness. This is a summary offence which can result in a fine of up to level 5 on the standard scale. Also of relevance in ***J. Crim. L. 369** this case is s. 49 of the Act, which provides for automatic restrictions, in similar terms to those imposed by s. 39, in relation to proceedings in a youth court, appeals from a youth court or any other youth court related hearings. A breach of s. 49 is also a summary offence carrying a maximum penalty of a level 5 fine.

By the time of MP's retrial, he, JC and RT had reached the age of 18. There were no longer any grounds for protecting MT's identity because he was now an 18-year-old defendant facing a criminal trial.

JC's and RT's involvement with MP was relevant to MP's retrial. JC and RT sought judicial review of the Recorder of London's interpretation of s. 39 when he held that the order would expire on their 18th birthdays, arguing that the order should protect them indefinitely. Just for Kids Law, a charity which provides advocacy, support and assistance to young people, intervened in the proceedings supporting the claimants. The Crown Prosecution Service raised concerns with the Recorder's decision and its implications for future victims or witnesses and was represented as an interested party. The British Broadcasting Corporation (BBC) also appeared as an interested party (representing the broadcast media) opposing the claim.

HELD, REJECTING THE CLAIMANT'S APPLICATION FOR JUDICIAL REVIEW, the Recorder had been correct in ruling that a s. 39 order will automatically expire once the subject has attained the age of 18. Consequently, any proceedings after the subject has reached the age of adulthood can be reported without restrictions under the Act.

COMMENTARY

The Children and Young Persons Act 1933 does not specifically state when an order made under s. 39 will expire. Counsel for the claimants argued that, due to the Act's silence on this matter, any such order should be indefinite unless set aside or discharged.

Giving the judgment of the court, Sir Brian Leveson, President of the Queen's Bench Division, referred to *R v Central Criminal Court, ex p. W, B and C* [2001] 1 Cr App R 2, in which Rose LJ considered granting a s. 39 order in relation to a 17-year-old defendant and stated: 'He is 18 next week. If the court were to make an order preserving his anonymity, it could only last, in effect, for a week' (*W, B and C* at [38]). Leveson LJ also considered the decision in *T v DPP and North East Press* [2003] EWHC 2408 (Admin), which examined the expiry of automatic restrictions in the youth court under s. 49 of the Act. *T v DPP* concerned a 17-year-old defendant who pushed an usher in the magistrates' court resulting in broken bones in his foot. T was charged with an offence contrary to s. 18 of the Offences Against the Person Act 1861 and pleaded not guilty based on a lack of intent. T reached the age of 18, but jurisdiction was retained by the youth court under s. 29 of the Children and Young Persons Act 1933. At trial, T pleaded guilty to the lesser charge under s. 20 of the Offences Against the Person Act 1861. After sentencing, North East Press made an application to the court submitting that restrictions under s. 49 were no longer applicable since the defendant had reached the age of 18. The magistrates agreed with this submission and T appealed. On appeal, Sullivan J stated:

***J. Crim. L. 370** The purpose underlying section 49 is not, in my judgment, to protect the interests of young persons once they have ceased to be such and have become adults. A purposive interpretation of section 49(1) would therefore lead one to the conclusion that any restriction on reporting applies only for so long as the person concerned in the proceedings continues to be a young person as defined in the Act. (*T v DPP* at [40])

The claimants argued that Rose LJ's statement in *W, B and C* was *obiter* and, therefore, not binding on any court. They also argued that since *T v DPP* was a decision of the Divisional Court (Queen's Bench Division), it would not be binding on another Divisional Court. Leveson LJ observed that this issue had been dealt with in *R v Greater Manchester Coroner, ex p. Tal* [1985] QB 67:

Goff LJ ... concluded that, in judicial review, as in the High Court, the principle of stare decisis required that, although not bound to do so, the court would follow a decision of a judge of equal jurisdiction unless the decision appeared to be clearly wrong. As for the divisional court, he went on (at 81C) that it would only be 'in rare cases that a divisional court will think it fit to depart from a decision of another divisional court exercising this jurisdiction'. I have no doubt that this approach is correct. (at [22])

Leveson LJ considered the purpose of s. 39 and agreed with the conclusion of Sullivan J in *T v DPP*, 'that the purpose of the 1933 Act was to protect young people from publicity during the currency of their youth, and not into adulthood' (at [28]). His Lordship pointed out that there was no expectation that previous convictions of adult offenders (or witnesses) recorded prior to their 18th birthdays

should be subjected to restriction under the Act (at [28]).

It was submitted by counsel for the claimants, and also counsel for the intervening party, that the purpose of the 1933 Act was to support the rehabilitation of youth offenders and to balance Article 8 and Article 10 rights under the European Convention on Human Rights. The only other avenue available to a young offender was to apply for a civil injunction. Concerns were raised by the claimants regarding the burden on young people of having to apply for injunctions in front of unfamiliar judges, opposed by wealthy media corporations. Counsel for the intervener suggested that s. 39 should be construed according to the purposive maxim 'once a child concerned in proceedings, always a child concerned in proceedings' (at [24]). Leveson LJ rejected these arguments on the basis that s. 39 orders are available to protect offenders, victims and witnesses. His Lordship held that although it may be beneficial for an offender to leave his past behind him for rehabilitation purposes, this is not the case for victims and witnesses. His Lordship also rejected arguments that this interpretation of the Act would be incompatible with the claimant's Convention rights and concluded that Article 8 and Article 10 rights were balanced by the exercise of the judge's discretion in each case when deciding whether to grant a s. 39 order.

His Lordship held:

An order made by any court under section 39 of the Children & Young Persons Act 1933 cannot extend to reports of the proceedings after the subject of the **J. Crim. L. 371* order has reached the age of majority at 18. The Recorder of London was correct so to rule and did not make an error of law. Accordingly, this claim for judicial review fails. (at [38])

Although the arguments put forward by the claimants and the interveners had merit, his Lordship's decision was unsurprising, particularly as he had prior precedent on his side. Furthermore, it was suggested by counsel for the BBC that any interpretation of s. 39 which resulted in such orders remaining in force indefinitely would cause serious practical difficulties for the courts. His Lordship asked, 'would a media organisation who published the name of an adult who used to be a child or young person concerned in the proceedings be in contravention of a s. 39(1) order, and so commit a criminal offence?' (at [26]). There is a general principle that, where a statute which creates a criminal offence is ambiguous, it should be construed in favour of the defendant. The BBC argued that, applying this principle, s. 39 had to be interpreted narrowly and, accordingly, a s. 39 order must expire when its subject reaches the age of 18.

What is of concern, however, is the lacuna which has been left in the law as a result of this decision. Under s. 46 of the Youth Justice and Criminal Evidence Act 1999 lifetime reporting restrictions can be granted in relation to a witness over the age of 18 and in need of protection. Likewise, lifetime restrictions are granted in relation to the victim of a sexual offence, whether he or she is an adult or under the age of 18, by virtue of s. 1 of the Sexual Offences (Amendment) Act 1992. The Crown Prosecution Service raised concerns in the instant case as to the distinct lack of any such power for the granting of lifetime reporting restrictions in favour of those under 18 who are ineligible under s. 1 of the Sexual Offences (Amendment) Act 1992 and are in need of protection. Leveson LJ, acknowledging this loophole, pointed to s. 45 of the Youth Justice and Criminal Evidence Act 1999 which was designed to replace s. 39, but is yet to come into force. Section 45 would give the court powers to grant reporting restrictions in relation to anyone under the age of 18. His Lordship stated (at [13]) that, '[w]hat is significant about this provision, however, is that, even if it was brought into force, it is beyond argument that this protection only extends to those under the age of 18 and not beyond'. His Lordship outlined his dismay with this position suggesting:

It is truly remarkable that Parliament was prepared to make provision for lifetime protection available to adult witnesses in appropriate circumstances (because the witness has to be over the age of 18: s. 46(1) of the 1999 Act) but not to extend that protection to those under 18 once they had reached the age of majority even if the same qualifying conditions were satisfied. (at [12])

His Lordship observed that there was no reason for there not to be similar lifelong protection in place for victims and witnesses who are under 18 as there is afforded to adults under s. 46 of the 1999 Act. His Lordship added that s. 45 is unsatisfactory as, if brought into force, there would be no restriction available 'beyond contemporaneous reporting of proceedings by newspapers or broadcasters' (at [34]). Victims or witnesses could apply for an injunction but his Lordship acknowledged that the cost and burden of such an action would be very difficult to bear and this solution was **J. Crim. L. 372* unrealistic. His Lordship, however, refused to interpret s. 39 in such a way as to remedy the lacuna, instead suggesting:

Victims and witnesses need individual and tailor-made protection within the criminal justice system: an example of such a need relates to the victims of female genital mutilation, recently the subject of calls for anonymity. In my judgment, it would be wrong to seek to create a solution out of legislation that was simply not designed to have regard to what is now understood of their needs and to the primacy attached to their legitimate interests. Therefore, it is for Parliament to fashion a solution: the problem requires to be addressed as a matter of real urgency, (at [38])

Whether Parliament will recognise the urgency required and put in place the necessary protection for those who desperately need it is another matter.

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