

Innocent until proven guilty? Sexual offences and the anonymity of defendants

Recent high-profile acquittals have ignited 40-year debate once again. The experiences of those accused but not charged, or charged but subsequently acquitted of sexual offences has exposed once more the intensity of media scrutiny for alleged sexual offences, the damage it causes to private lives, to reputation and to the right to be presumed innocent. Complainants in sexual offence cases are assured of lifetime anonymity; no protection is available to defendants. Debates on reform have focused on the utility and morality of extending anonymity to defendants. Less attention has been given to the proposed scope of reform, how the Common Law might offer protection already and why limited reform is necessary in consideration of the provisions on sexual misconduct in other areas of law.

I. BRIEF HISTORY OF ANONYMITY IN SEXUAL OFFENCE CASES

The principle of anonymity in cases of sexual offence was introduced by the Heilbron Report in 1975 which proposed lifetime anonymity for complainants. The Report recognised that publicity for the offence may be ‘extremely distressing and even positively harmful’, and that anonymity might incentivise complainants to seek legal redress.¹ Those arguments did not apply to defendants. Despite this, the Sexual Offences (Amendment) Act 1976 introduced anonymity for defendants as a concessionary amendment. The measure was reversed in 1988 after a Criminal Law Revision Committee Report had argued that the posited principle of equality between complainant and defendant was a false comparison – against defendants in other criminal cases, the report found no reason for exception.² The present law in the Sexual Offences (Amendment) Act 1992 s 1(1) therefore provides only that:

(1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, neither the

¹ Report of the Advisory Group on the Law of Rape, Cmnd 6352, December 1975, paragraphs 153, 163-174, 177

² Criminal Law Revision Committee, Fifteenth Report, Sexual Offences, Cmnd 9312, April 1984, paragraphs 177, 2.92

name nor address, and no still or moving picture, of that person shall during that person's lifetime—

(a) be published in England and Wales in a written publication available to the public; or

(b) be included in a relevant programme for reception in England and Wales...if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed

Debate on the issue arose during the passage of the 2003 Sexual Offences (Amendment) Bill when the Lords moved to extend anonymity to defendants.³ The motion was defeated but in the same year a Home Affairs Committee report proposed anonymity be granted between allegation and charge to protect ‘potentially innocent suspects from damaging publicity’ yet safeguarding the ‘public interest in full and free reporting of criminal proceedings’⁴ a call repeated in 2015.⁵ As a topic of social and legal debate the issue has polarised opinion, but there appears a growing political and public consensus that reform is due.⁶

II. THE MORAL CASE FOR REFORM

Arguments for reform

... sex crimes do fall ‘within an entirely different order’ to most other crimes. In our view, the stigma that attaches to sexual offences—

³ HL Deb 2 June 2003 cols.1084-86

⁴ Home Affairs Committee, *Sexual Offences Bill*, 10 July 2003, HC 639, para.80

⁵ Home Affairs Committee, *Police Bail*, 17 March 2015, s.2

⁶ See for example, in favour of reform: J. Agate, ‘Anonymity and Exoneration – Balancing Open Justice with Reputation’, *Entertainment Law Review*, 2014 Vol 25:1; Lord Leveson’s Report, Volume 2, Pt G, Ch.4, para.2.39; Cautious views: Clare McGlynn, ‘Rape, Defendant Anonymity and Human Rights: Adopting a “Wider Perspective”’, *Criminal Law Review* (2011) 3; Against reform: Liberty, ‘Response to the Home Affairs Committee consultation on anonymity for those accused of sexual crimes’ February 2003

*particularly those involving children—is enormous and the accusation alone can be devastating. If the accused is never charged, there is no possibility of the individual being publicly vindicated by an acquittal.*⁷

So concluded the 2003 Home Affairs Committee Report and there is a general political consensus on the extraordinary stigma attached to sexual crimes.⁸

The experiences of public figures attest to the devastation of private life caused by media scrutiny. Among prominent cases are those of Sir Cliff Richard, who was accused of committing an historic child sex offence and whose home was subsequently raided by police on live television despite his never being charged or arrested. Paul Gambaccini, radio presenter, was recently acquitted without charge after being kept on bail for a year under relentless media speculation.

Public scrutiny also threatens to undermine the right to be thought of as innocent until proven guilty. Former Deputy Speaker, Nigel Evans MP, faced persistent headlines over his one-year case which appeared highly incriminating. Not untypical was: “Nigel Evans put his hand down my trousers twice... but it was drunken lechery, not criminal sexual assault, court told”⁹ No less incriminating are media reports concerning those not ordinarily in the public eye. A cursory internet search of local newspaper reporting for example yielded the case of a Newport man who was accused, charged and acquitted for rape and sexual assault. Over the course of his trial, local headlines were uniformly designed to emphasise the accusation and to spin an incredulous edge to the indignant arguments of defendants.¹⁰

⁷ Ibid at [4], para.76

⁸ See *Hansard*, HC cols.154-55, 7th June 2010

⁹ Daily Mail, 11th March 2014

¹⁰ See for example, “Man raped and sexually assaulted teen after getting girlfriend pregnant, court hears”, Wales Online, 22nd June 2015; “Newport man accused of raping teenager tells court it was him saying 'stop' not her”, Wales Online, 23rd June 2015

Acquittal offers little prospect of public vindication: ‘The damage to his reputation stalked him throughout the general election’, wrote the Spectator in an interview with Evans.¹¹ Evans himself remarks, ‘No one can ever recover from being wrongly accused of sexual assault’.¹²

These effects are felt by defendants especially keenly in the pre-charge period when there is no formal case to answer and no legal process has been instigated.

Opposing arguments

Opponents of reform argue that publicising the identities of defendants encourages other victims to come forward, citing Stuart Hall and Rolf Harris as examples of men who might never otherwise have been brought to justice.¹³ Yet can it be right that for the sake of *mere suspicion*, details of individuals’ private lives are held up and subjected to public scrutiny for the possibility of attracting other accusers? It is not permitted in English law to apply the same rationale in the field of retaining evidence; The Police and Criminal Evidence Act 1984 Code B 7(c) allows for retention only for use at trials, to facilitate related proceedings or in connection with an offence, and strict limitations on DNA and fingerprint evidence are imposed by section 3 of The Protection of Freedoms Act 2012. To effectively advertise the identity and details of a suspect in a sexual offence allegation before the level of evidence required to establish a charge is in place is effectively a fishing expedition, a ‘flypaper’ investigation,¹⁴ and does not accord with established legal principles.

Others argue that defendant anonymity ‘might give the impression that there exists a presumption of doubt about the credibility of the complainant.’¹⁵ There is little evidence to support this argument but even if there was, it would appear to concede that publicising the name of a defendant will testify to

¹¹ ‘Nigel Evans interview: why we need anonymity for rape suspects’, *The Spectator*, 17th September 2015

¹² ‘The coalition should have extended anonymity on rape cases’ *The Spectator*, 5th May 2013

¹³ See, for example, J. Smith, ‘Men wrongly accused of rape mustn’t be granted anonymity’ *The Daily Telegraph*, 7th January 2015

¹⁴ *Ibid* at [5] p.12

¹⁵ Lord Falconer, HL Deb 2 June, 2003 col.1091

the complainant's authenticity, and so to the defendant's guilt, contrary to the fundamental presumption of justice.

A third argument urges against granting exceptions to the principle of open justice, a principle Lord Diplock explains as:

*If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice.*¹⁶

The principle is revisited below and though important, should nevertheless be balanced against individual rights lest the substance of justice become subsumed beneath mere scandal and sensation.

III. WHOLESALE REFORM? THE UNDERUSE OF EXISTING LAW

The 2003 Lords' proposal for reform considered 'extending' anonymity in sexual offence cases to defendants. The proposal was not confined to the pre or post-charge period and focused on anonymity. However, wholesale reform may not be required: precedent for imposing various reporting restrictions already exists, albeit mainly in the post-charge period.

The "ultimate test" and powers of the court

In deciding whether to order reporting restrictions, courts apply what Lord Rodger has referred to as the "ultimate test":¹⁷ balancing on the one hand, Articles 6 and 8 of the European Convention on Human Rights and on the other, Article 10, the 'public interest' and the principle of open justice.

Article 8 (right to respect of private life) has been defined as broadly as the 'personal space' in which the individual is free to be itself¹⁸, as including reputational damage¹⁹ and as suffering infringement if

¹⁶ *Att-Gen v Leveller Magazine Ltd* [1979] AC 440, 449-50

¹⁷ *Re Guardian News and Media Ltd and others* [2010] UKSC 1 2 WLR at [76]

a ‘reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive,’²⁰ all definitions engaged in sexual offence cases. Article 6 (right to a fair and public hearing) includes provision to exclude press or public from the court to safeguard the private lives of the parties.

On the other hand, Article 10 guarantees the right to freedom of expression of, in these cases, the media. The ‘public interest’ may be broadly understood as something that contributes to public debate about matters whose effects are felt widely.²¹

The powers available to courts to impose reporting restrictions, including anonymity orders, derive directly from the Convention itself and require no further justification.²² Their powers can be enforced *contra mundum*, that is, ‘even in the sphere of the relations of individuals between themselves...’²³

The test applied

Courts rarely find in favour of imposing reporting restrictions.²⁴ Yet although recent cases have seen applications quashed, their exceptional circumstances have presented a strong case for public interest: cases involving suspected terrorists and terrorism legislation²⁵, or controversial laws on DNA retention leading to surprising acquittals.²⁶ In other cases, the application related to parties or information not directly at issue in the proceedings.²⁷

However, judges admit a growing public policy concern that ‘the identity of those arrested or suspected of a crime should not be released to the public save in exceptional and clearly defined

¹⁸ *R v Broadcasting Standards Commission, Ex p BBC* [2001] QB 885 at [48] as per Lord Mustill

¹⁹ *Karakó v Hungary* [2009] ECHR 712 at [22]

²⁰ *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 at [10(2)]

²¹ See *R v Sussex Confirming Authority, ex p Tamplin & Sons' Brewery (Brighton) Ltd* [1937] 4 All ER 106 at [112]

²² *Re S (A Child)* [2004] UKHL 1AC 593 at [23]

²³ *Von Hannover v Germany* (2005) EHRR 1 25 at [57]; *Re Guardian* (no.18) at [29]

²⁴ For an example of positive treatment, see *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42

²⁵ See for example *Re Guardian* (no.18), though the court also noted that the applicants had been outspoken in their criticism of government legislation and their experiences during trial as a factor lobbying against anonymization, [70-71]

²⁶ See for example *Attorney-General's Reference (No. 3 of 1999): Application by the British Broadcasting Corporation to set aside or vary a Reporting Restriction Order* [2009] UKHL 34 at [22]

²⁷ Applicant not a party: *Re S* (no.22); Information not at issue: *BBC v Roden*, UKEAT/0385/14/DA, though the wider point made by Mrs Justice Simler was that the courts would not order anonymity for the sake of merely ‘embarrassing or damaging material’ at [50]

circumstances.²⁸ This policy is already part of both police and media guidance but its evident lack of effectiveness strongly suggests there should be a role for the courts in this matter.²⁹

Further, courts may use the flexibility of powers in their possession to ensure that competing interests can be balanced. They might trade off anonymity for detailed reporting or order postponement of reporting during trials – the time when reporting would be most newsworthy.

Judges have also acknowledged that the outcome of the test is particular to the facts of every case. In fact, their degree of discretion is much more useful than a blanket reform that would prevent the identities of potentially serial offenders or details of particularly serious crimes from being reported.

IV. THE CASE FOR STATUTORY REFORM: PRE-CHARGE ANONYMITY

Existing tools and precedents may offer protection in the post-charge period, but statutory reform is desirable to grant that protection before there is a case to answer and to bring the law on sexual offences into line with provisions in other areas of law.

The law for schoolteachers

The publication of matters leading to the discovery of the identity of schoolteachers accused of sexually assaulting a child at their school is an offence under the Education Act 2011 s.13.³⁰

Parliamentary debates introducing the provision acknowledged that false allegations ‘can destroy their [schoolteachers’] career, even their marriage and family relationships...’, arguments identical to those advanced by suspects in sexual offence cases.³¹ Arguments to repeal s.13 mirror those opposed to reform.³² When asked why, given the coincidence of arguments, the teaching profession had been singled out for anonymity, the Government response was that the measure was intended to ‘back

²⁸ *PNM v Times Newspapers Ltd and others* [2014] EWCA Civ 1132 [2014] at [37] as per Sharp LJ

²⁹ College of Policing, *Guidance on Relationships with the Media*, May 2013; Editors’ Code of Practice, accessed at: www.pcc.org.uk/assets/696/Code_of_Practice_2012_A4.pdf

³⁰ Restriction in fact applies to all criminal allegations (s 13 141F (2))

³¹ HL Deb 14 June 2011 col.692

³² Encouraging other victims: HL Deb 6 June 2011 col.151, 161-8; damaging open justice: HL Deb 6 June 2011 col.GC147-149

teachers' authority in the classroom'³³ and that teachers were especially vulnerable to false allegations.

Even admitting the latter assertion, it is not at all clear why justice would favour conferring protection on one profession, as opposed to more widely, owing merely to the number of allegations made against its members that transpire to be unfounded.

The law in Employment Tribunals

The Employment Tribunals Act 1996 s.11 empowers tribunals to anonymize documents and decisions or impose reporting restrictions for the duration of trials for alleged sexual misconduct. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 Schedule 1 Rule 50 explains this can be ordered 'in the interests of justice or in order to protect the Convention rights of any person' and extends powers to hold hearings in private.

Family Law

Section 1(1)(b) of the Judicial Proceedings (Regulations of Reports) Act 1926 makes it unlawful to publish details of proceedings in divorce and other family cases. Although the preamble of the Act makes clear it was intended to 'regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals', the courts have recognised wider rights with respect to spheres of private life. Thorpe, LJ in *Lykiardopulo v Lykiardopulo* stated:

The practice of privacy has grown up in the Family Division to protect the welfare of children, to *deny an inspection that is only prurient* and to respect the fact that the financial affairs of any family are essentially private and not a matter of legitimate public interest.³⁴
(emphasis added)

³³ HC Deb 14 Nov 2011 col.583

³⁴ [2010] EWCA Civ 1315 at [30-1]; also *A v A* [2012] EWHC 4226 (Fam) at [22],[27]

If details of a highly private, sexual, even prurient character (or not sexual at all) are withheld from publication in matrimonial cases, is the absence of a matrimonial relationship between the parties in sexual offence cases reason enough to deny one of those parties similar protection - even if protection was limited to the pre-charge period? Furthermore, if courts have been willing to extend their interpretation of legislation in accordance with the Convention, then the law on sexual offences seems both out of step and anachronistic.³⁵

V. THE PROPOSED REFORM

Accordingly, the following amendment should be made to the Sexual Offences (Amendment) Act 1992 to extend a degree of statutory anonymity to defendants:

To insert after section 1(2) a new subsection 1(3):

(3) —(1) Where a person is accused of an offence to which this Act applies, neither the name nor address, and no still or moving picture, of that person shall -

(a) be published in England and Wales in a written publication available to the public; or

(b) be included in a relevant programme for reception in England and Wales,

if it is likely to lead members of the public to identify that person as the person against whom the accusation of committing the alleged offence has been made.

—(2) Subsection 3(1) shall apply only up until the time that a charge is brought upon the person identified in subsection 3(1) for

³⁵ *ibid*

the offence that is the subject of the allegation identified in subsection 3(1)

This will help alleviate the intense stigma associated with accusations of sexual offence, will protect private lives at the time they would be most newsworthy, will relieve individuals of lingering public disapprobation in the absence of any charge and close the gap between this and other areas of law.

Once a charge is brought, greater use should be made of the Common Law in pursuance of the Convention Articles. Discretion on the part of judges with regard both to the facts of each case and the flexible powers at their disposal will help to ensure competing interests are balanced.

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