The price of open justice

PNM demonstrates that the competing principles of suspects' privacy and the freedom to report public court proceedings have yet to be comfortably reconciled, writes **Richard Easton**

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Should a person merely arrested for, but never charged with, an offence be publicly named? Current police guidance, issued in response to the Leveson Inquiry, suggests that, without a clear policing reason, those arrested ought not to be publicly named by officers. What if, however, a hapless former suspect is later identified because his name is blurted out by witnesses in open court? Is the destruction of a former suspect's reputation an acceptable level of 'collateral damage' to ensure that court hearings remain fully open to public scrutiny through the media?

'Yes', said a five-strong majority in the Supreme Court in July's *PNM v Times Newspaper Limited* [2017] UKSC 49 who concluded that ex-suspects should be identified if they are named during their co-suspects' later trials. However, the dissenting joint decision of Lords Kerr and Wilson suggests that the two competing legal interests raised in *PNM* – open justice versus privacy – have yet to be comfortably reconciled.

PNM concerned a suspect arrested during Operation Bullfinch, the investigation into the now infamous Oxford grooming gang. PNM's (common) forename had been ascribed by a complainant to one of her alleged abusers. The same complainant later failed to pick PNM out during an identity parade.

PNM, unlike his co-suspects, was never charged with an offence. His name cropped up, however, in the testimony of witnesses during his co-suspects' trial for child sex grooming and child prostitution offences. In the Old Bailey, PNM successfully applied for his name not to be published (despite his being identified in open court) on the grounds that to do so might prejudice pending proceedings against him. That injunction under section 4(2) of the Contempt of Court Act 1981 became otiose, however, when police informed PNM that, following his co-suspects' conviction, he would not be prosecuted. Without 'pending proceedings' to be prejudiced, PNM could then be named.

With no grounds to continue to be shielded by the Contempt of Court Act 1981, PNM applied to the High Court for an interim injunction to prohibit publication of his name. PNM argued that the media's naming of him would amount to a misuse of private information, the devastating reputational effect of which would represent a violation of his and his relatives' rights to privacy and family life.

The High Court, and later the Court of Appeal, refused, however, to grant him anonymity. Justice needed to be open, and a corollary of public hearings is publicity. PNM's concerns that his reputation would be tainted by association with a notorious trial were, in the High Court's and Court of Appeal's view, answered by Lord Rodger of Earlsferry's observation in *In re Guardian News and Media Ltd* [2010] 2 AC 697 that "the law proceeds on the basis that most members of the public understand that, even when charged with an offence, [a suspect is] innocent unless and until proved guilty in a court of law".

The Supreme Court went on to uphold the High Court's and Court of Appeal's decisions. Delivering the majority decision in *PNM*, Lord Sumption concluded that the appellant could not have a reasonable expectation of privacy after being named in criminal proceedings. Referring to the leading authority on publications and privacy, *Campbell v MGN Ltd* [2004] UKHL 22, Lord Sumption held that the difference between PNM's case and that of a celebrity outed for attending a drug rehabilitation clinic "could hardly be more stark".

In his review of English and Scottish case authorities concerning the reporting of criminal and quasi-criminal court proceedings, Lord Sumption could find no positive support for PNM's assertion that the open justice principle should yield to his reputational and family rights. The impact on PNM and his family was "no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial". The effect on PNM of publicising his association with an infamous case (an association that was likely already known to many in the Oxford area) was a "collateral impact" that represented "part of the price to be paid for open justice and the freedom of the press". And, if the direct effect on PNM was insufficient to block publication, it would, Lord Sumption reasoned, be "incoherent" to go on to rule that the indirect effect on PNM's family should lead to his anonymisation.

Although Lord Sumption was unwilling to rule out the possibility that pre-emptive injunctions might be appropriate in cases where information was private or there was no sufficiently substantial public interest in publication, he concluded that restrictions on the reporting of public court proceedings would be "likely to be rare". And it was in the public interest for PNM to be named because the public had a right to be informed about a trial concerning the organised sexual abuse of children. The decision to name PNM ought, Lord Sumption held, to be left ultimately to the editorial discretion of the press, with newspapers' desire to increase the interest of the story by giving it a human face (and name) being an entirely legitimate consideration.

Pre-charge anonymity

In their dissenting decision, Lords Kerr and Wilson shifted the focus away from open justice and onto the

developing public policy that those arrested but never charged with an offence ought not generally to be named. The 2012 Leveson report, the 2013 response to the Law Commission consultation paper on contempt of court (co-authored by Mr Justice Tugendhat, who ironically had refused PNM's application in the High Court), and Sir Richard Henriques's 2016 report on the Metropolitan Police's investigation into alleged VIP paedophile rings, had all recommended that pre-charge anonymity should prevail.

Lord Kerr and Wilson also doubted what they saw as Lord Rodgers's empirically baseless assumption in *In re Guardian* that members of the public themselves presumed the innocence of those suspected of committing offences. Would it not be better to restrict the naming of suspects "to make the presumption [of innocence] as effective in the street as it would be in the courtroom"?

Canadian case authorities demonstrated that a fellow Commonwealth jurisdiction was prepared to limit open justice by requiring the anonymisation of those named in legal proceedings as being the perpetrators of unproven allegations of sexual offending (see *R v Henry* (2009) BCCA 86). And within this jurisdiction, the naming of men allegedly involved in the grooming of a child in Rotherham had been prohibited (albeit in the context of a private hearing), in part, on the grounds that the allegations against the men had not been proven on balance of probabilities (see *Rotherham Metropolitan Borough Council v M* [2016] EWHC 2660, and compare with *Birmingham City Council v Riaz* [2014] EWHC 4247 and *Armes v Nottinghamshire County Council* [2016] EWHC 2864).

Lords Kerr and Wilson could perhaps be criticised for applying the recommendations of Leveson et al regarding the police's disclosure of suspects' names to the qualitatively different area of press reporting of open legal proceedings in a public court. Their dissenting decision underlines how difficult it is, however, to reconcile the emerging norm (at least for state investigators) that suspects should remain anonymous with the publication of the names of those alleged to have committed heinous acts but who are not a party to legal proceedings (and, therefore, have had no way of defending themselves in court). Lord Sumption's decision conspicuously made no mention of post-Leveson police practice and the possibility that changes in police policy might indicate a developing strand of privacy law.

A possible solution

Significantly, Lord Sumption did, however, point to an alternative to restraining publication of what is mentioned in open court. If one were simply referred to as 'Mr X' during an open court hearing, one's name would not be available for the press to publish. Lord Sumption noted that PNM's case may have been different had he been challenging a decision to name him in open court: had it been so "the considerations urged by Lord Kerr and Lord Wilson [...] might have had considerable force". "If there is a solution to the problem of collateral damage to those not directly involved in criminal proceedings", Lord Sumption continued, applications for anonymity during rather than after a trial are "where it is to be found".

Lord Sumption introduced here perhaps a supersubtle distinction between being anonymised by the court (which effectively determines pre-emptively what the press is able to print by depriving journalists of that all-important name) and restraining the press from publishing more widely an individual's name after it has been uttered in open court.

PNM nevertheless suggests that suspects against whom no prosecution is ever commenced might in the future be successful in attempts to prevent their names being mentioned in open court at all and thus never face publication of their identities.

PNM might quickly become an outdated statement of the law, however, if a bill currently wending its way through parliament and sponsored by former deputy assistant commissioner Lord Paddick is enacted. The Anonymity (Arrested Persons) Bill proposes that the publication of the name, address, and still or moving pictures of any person arrested but not charged with an offence should itself be a crime. No exception is made in the bill for the fair and accurate reporting of court proceedings, although draft provisions are in place that would permit a Crown Court judge to lift reporting restrictions if required to do so by the Human Rights Act 1998 (i.e. if press freedom outweighed privacy rights), the interests of justice, or the public interest.

It may be parliament, then, that resolves the tensions exposed within *PNM* between privacy for suspects and the open justice principle. **SJ**

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