THE COURT OF APPEAL

REDACTED

Neutral Citation Number: [2017] IECA 333

Record No. 2016, 104

Finlay Geoghegan J.
Hogan J.
Edwards J.

IN THE MATTER OF A CONTEMPT OF COURT AND IN THE MATTER OF AN APPLICATION PURSUANT TO ORDER 44 OF THE RULES OF THE SUPERIOR COURTS 1986

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT /

RESPONDENT

- AND -

INDEPENDENT NEWS AND MEDIA PLC, CLAIRE GRADY, STEPHEN RAE AND INTERNET INTERACTIONS LIMTIED

RESPONDENTS /

APPELLANTS

JUDGMENT of Mr. Justice John Edwards delivered the 21st of December 2017

1. This is a redacted version of my full judgment in this matter delivered on the 20th of January 2017. Redaction has been necessary to avoid the creation of potential prejudice to a number of pending criminal trials. Only this redacted judgment may be reported on until further order, which will be made after the trials in question have concluded. While this redacted judgment preserves the general structure of the full judgment, and sets forth the essentials of the legal reasoning underpinning my decision, I acknowledge that the necessary excision of certain details has resulted in some disjointedness. This has been unavoidable.

2. For the avoidance of confusion, I will adopt the convention in this judgment of referring to the applicant/respondent simply as "the DPP", and to the respondents/appellants simply as "the appellants".

3. This is an appeal against the judgment and orders of O'Malley J in the High Court dated the 24th of April 2015 finding the first, third and fourth named appellants, and each of them, guilty of contempt of court in publishing material in a particular issue of the Irish Independent newspaper that was calculated to create a real risk of an unfair trial in the case of an individual who was charged with conspiracy to defraud contrary to common law, and with making gain or causing loss by deception contrary to s.10 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (the Act of 2001), and who had been returned for trial on indictment before the Circuit Criminal Court, which trial was scheduled to commence some months later.

4. The appeal also extends to a concurrent injunction issued by O'Malley J on the 24th of April 2015 restraining the first, third and fourth named appellants from publishing further material calculated to interfere with certain criminal trial processes then in being.

5. It is further an appeal against the judgment and order of O'Malley J dated the 9th of June 2015 sentencing the first and fourth named appellants respectively to each pay within thirty days a fine in the sum of €50,000, with distress in the event of default; and further sentencing the third named appellant to pay within thirty days a fine of €200, with two days' imprisonment in default; in respect of their said contempt of court.

6. In this judgment I propose only to deal in the first instance with the appeal against the conviction for contempt, and to leave over for further consideration, should it be necessary to do so, the appeal against sentence and the appeal against the grant of injunctive relief.

7. I was afforded the opportunity of reading in draft the judgment delivered by Hogan J. While there is much in his judgment with which I agree, and in particular that *Kelly v O'Neill* [2000] 1 I.R. 354 represents the leading authority, I must respectfully dissent with respect to his ultimate conclusion that the published material in controversy did not present any real risk to the fairness and integrity of the trial of the individual concerned. I am *ad idem* with Hogan J that if that were indeed the case the publication of this material was constitutionally protected by the guarantees of Article 40.6.10 of the Constitution. However, it was not the case in my view.

8. The High Court judge was faced with conflicting claims, namely the DPP's assertion that the court's intervention was required, both by way of a finding of contempt and restraint of further publication by injunction, to defend and vindicate the individual concerned's right, guaranteed in Article 38.1 of the Constitution, to be tried in due course of law, one the one hand; and the appellants' claim that the court should uphold their right to freedom of expression guaranteed in Article 40.6.10 of the Constitution, and not intervene in the manner sought by the DPP, on the other hand. In a situation where she was satisfied, and I believe correctly satisfied, that the publications complained of were calculated to interfere with the course of justice by creating a real risk of an unfair trial that could not be adequately ameliorated by other measures, she was justified in the circumstances of the case in taking the action that she did.

9. In arriving at her view the trial judge had regard to Kelly v O'Neill and indeed was influenced by certain passages from the judgment of Denham J in that case (at pp.369/370 of the report), which she cited. Denham J had said:

> *"The jurisprudence of recent years in relation to trials and publicity has been noted: D. v. Director of Public Prosecutions [1994] 2 I.R. 465; Z. v. Director of Public Prosecutions [1994] 2 I.R. 476. Jurors are robust. The test for a court in such a situation is whether there is a real risk that an accused would not receive a fair trial.*
>
> *The community is not in quite the same position as jurors in that it has not the benefit of a judge's direction. However, in a modern society the media is part of everyday life.*
>
> *Media reporting of events in society, including court cases, has increased in this, the "information age." Coverage varies from national broadsheets, tabloids, television and radio to similar publications from organisations which sweep the globe. And then there is the internet! People are exposed to national and international media. Such coverage should be a fair balance between protecting the administration of justice and the right of freedom of expression. If there is a doubt the balance should be tipped in favour of the administration of justice, of a fair trial.*
>
> *The common law offence of contempt of court is largely judge-made. It is to protect the administration of justice for the individual and the community. A balance is sought to support the requirement of a constitutional democratic society wherein there is the rule of law and trials are conducted in court. Such a balance does not preclude criticism of a decision, including sentence, after sentencing. Nor does it preclude such comment after sentence even though there may be an appeal. A key factor is the proximity of the court process."*
>
> *….*
>
> *"Freedom of expression is not an absolute right under the Constitution, however it is a fundamental right of great importance in a democratic society. In striking a balance between that right of the freedom of expression and the administration of justice if there is a real risk of an unfair trial the balance should tip in favour of the administration of justice and the determination of a contempt of court. Also, if there is a doubt the balance should swing behind the protection of the administration of justice. However, if the matter of the perception of the administration of justice is the issue the situation is fraught with complexity.*
>
> *The decision as to whether the article was a contempt of court can only be made by the learned trial judge having regard to all the circumstances of the case. The balancing of interests required may be affected by matters including the burden of proof, mens rea and specific defences which were not argued before this court. Such issues may be important in the necessary reconciliation of the conflicting interests required by the trial judge. The full circumstances and defences should be raised before the learned trial judge to enable him to achieve the necessary balance."*

10. In the present case the High Court judge was not concerned with the perception of the administration of justice but rather with an alleged real risk of an unfair trial, which she found to exist, on the evidence before her.

11. To give better context to Denham J's remarks it should be noted that *Kelly v O'Neill* was a consultative case stated from the High Court to the Supreme Court and the circumstances were that the impugned publication, which was a newspaper article bearing the headline "Gardaí believe Kelly was involved in other major crimes", was published in the interval between the conviction of the accused (Mr Kelly) and his sentencing. It had posed two questions, which were in the following terms:

> "(a) Can it be a contempt of court to publish an article in the terms of that complained of after a criminal trial has passed from the seisin of the jury and where the remainder of the hearing will take place before a judge sitting alone?
>
> (b) Given the constitutional right to freedom of expression of the press, could the publication of the article complained of ever constitute a contempt of court when published after conviction and before sentence?"

12. Denham J, having considered both questions, remarked:

> *"A decision on the issues relating to an alleged contempt of court should not be taken in isolation. A decision on an alleged contempt of court must balance a variety of rights. The first question could not be answered without reference to the constitutional right referred to in the second question. Any answer to the first question would be inconclusive if made without balancing the right to freedom of expression raised in the second question. Ultimately, the issue requires a balance between the due administration of justice and freedom of expression."*

13. As was recently emphasised by the Supreme Court in *Gilchrist v Sunday Newspapers Limited and Ors* [2017] IESC 18 there is no hierarchy of constitutional rights. Though it had previously been suggested in earlier cases, including by Denham J in *Irish Times v Ireland* [1998] 1 I.R. 359, that where more than one constitutional right was engaged, an accused's right to a fair trial might be regarded as being superior to other rights in the balance, O'Donnell J, giving the judgment in *Gilchrist* on behalf of a unanimous five judge Supreme Court bench (which included Denham C.J., as she now was), suggested that the better view was that:

> *"the Constitution should not be too readily interpreted to require any hierarchical ranking of rights with the consequent possibility of subordination of one right to another. The Constitution was intended to function harmoniously, and where there were points of potential conflict between the rights and obligations provided for, that should be sought to be resolved without the subordination or nullification of one provision"*

14. O'Donnell J further expressed reservations in Gilchrist about *"the language of balancing of rights"*, implicitly on the basis that it requires the attribution of a weighting to competing rights and relevant circumstances, in an almost arithmetic or empirical exercise, with a view to seeing if the notional scales are tipped in one direction or the other. He appears to be of the view that issues around competing rights cannot properly be resolved in that way. Though he does not articulate it in exactly these terms, I understand him to be advocating the taking into account of all potentially relevant values, interests and material considerations in a kind of instinctive synthesis (to borrow a phrase from the law of sentencing) and finding the right course of action on the basis of strengthened awareness.

15. Returning to the judgment of O'Malley J, she further noted that Keane J had observed in *Kelly v O'Neill*:

> *"The courts have always considered themselves empowered to treat as contempt of court breaches of the sub judice principle in the case of criminal jury trials. This court has pointed out on a number of occasions in recent times that the courts should not underestimate the capacity of the modern jury to approach its deliberations in a properly impartial manner and to ignore press comment, however unbalanced and even hysterical. But the power to punish such a contempt remains, because of the clear danger that such comment might be seen as being capable of influencing the jury's verdict, not least by the person who is on trial. It is, in short, a common law machinery, essential in the absence of any appropriate legislation, designed to protect the constitutional right of the accused person to a trial in due course of law guaranteed by Article 38.1 of the Constitution."*

16. Earlier in the same judgment Keane J had also stated with reference to the contempt of court jurisdiction more generally (at pp. 374/375 of the report):

> *"Contempt of court is committed, however, when a person publishes material which is calculated to interfere with the course of justice: it is not a necessary ingredient of the offence that it results in such an interference. If an article containing material of this nature had been published during the trial but before the jury had recorded their verdict the trial judge might or might not have acceded to an application that the jury should be discharged. If the article had been published before the trial but at a stage when the applicant had been charged with the relevant offences, the court might have declined to prohibit the continuance of the criminal proceedings if it were satisfied that any risk that the accused might not receive a fair trial could be avoided by giving appropriate directions to the jury to exclude from their consideration any material they might have read concerning the case. But the fact that a trial was allowed to proceed on the basis that the jury, if they read the offending article, would be capable of excluding it from their minds would not of itself be a ground for treating the article other than as a contempt of court.*
>
> *The law adopts this approach because to do otherwise would be to put at risk the public confidence in the administration of justice which it is the very purpose of the contempt of court doctrine to preserve. If the press, television or radio or any one else were free to publish such material with impunity and availed of that freedom in an irresponsible manner, many persons facing criminal charges might well consider that their prospects of a fair trial by an impartial jury had been seriously damaged. But that is not the only relevant consideration. As has been frequently pointed out, the right to a fair trial in due course of law guaranteed under the Constitution is not simply a right vested in those who happen to be accused of particular crimes: it is in the interest of the community as a whole that the right should be protected and vindicated by the State and its organs."*

17. These views mirror in substance the views of Hardiman J in *Director of Public Prosecutions v Independent Newspapers (Ireland) Ltd* [2009] 3 I.R. 598 as expressed in the passages from his judgment in that case which are quoted by Hogan J in his judgment in the present case.

The risk of an unfair trial

18. The High Court judge, having considered the affidavit evidence, and the exhibits thereto, including in particular a copy of the impugned publication, concluded that the appellants were guilty of contempt by publication, and in doing so stated that:.

> *"In the instant case, I find the compelling feature to be the fact that [the individual concerned] stands charged with offences of dishonesty and conspiracy arising from his employment …. . On dates after the bringing of those charges he was featured prominently in a series of articles and videos, a recurring theme of which is dishonesty, cover-up and deceitfulness …. .*
>
> *I do not consider the fact that the concentration of the writers is largely on [another individual] to be particularly relevant in these circumstances, especially given the conspiracy charge." …. "…the articles could just as well have been published without naming [the individual concerned]."*

19. She went on to say:

> *" The fact that the conversations reported upon took place months before the transaction is also of no great moment given that the conspiracy is alleged to have commenced from [a certain time].*
>
> *"In my view, the publication of other material, relevant to the same events, by other authors cannot assist the respondents."*
>
> *"However, the date of publication is obviously a key factor. There could be no contempt before charges were brought. The bringing of the charges could not, clearly, render criminal a publication that was lawful when carried out."*

The High Court judge further concluded:

> *"In the circumstances I find that the respondents [the appellants] have committed the contempt charged. On a date after [the individual concerned] was charged, they set out to associate him with [certain matters] in a way that was capable of having a direct bearing on the crimes of dishonesty and conspiracy … with which he is charged."*

20. The appellants have contended that the High Court (a) was incorrect in coming to the view that the ingredients of contempt were made out; and (b) fell into error in failing to give due weight to the fact that the publication did not relate to the matters the subject of the criminal charge, that a suitable charge to the jury would have prevented any potential prejudice, and that the DPP clearly felt that other publications on sale throughout the prosecution did not constitute a contempt (notwithstanding the fact that they covered exactly the same ground as the criminal prosecution). I have to respectfully disagree with both of these submissions.

Were the ingredients of the offence of contempt by publication made out?

21. Counsel for the appellants stated in arguendo that his clients were not advancing a case that specific or indeed general mens rea is required to establish the species of contempt that we are concerned with here, namely criminal contempt by publication at common law. In my view he was correct in adopting that stance as there is long standing authority that strict liability applied to that, and certain other forms, of common law contempt (See *St James's Evening Post* (1742) 2 Atk 469, 26 E.R. 642 discussed in Arlidge, Eady & Smith on Contempt (2nd ed, 1999) at §1-62 to §1-67 and again at §5-134). In the *St James' Evening Post* case which concerned

the publication of a libel on certain executors and a testator's widow concerned in pending proceedings, Lord Hardwick LC had no doubt that the publication was libellous, but agreed with the Solicitor General that the court itself could do nothing about the matter unless it was also a contempt, in which case it would become possible to invoke its inherent jurisdiction. The court concluded that the libellous publication was also a contempt and Lord Hardwick held that it was no defence that a person publishing matter calculated to prejudice the fair trial of a pending cause had no knowledge of the contents of the publication, stating:

> *"… though it is true, this is a trade, yet they must take care to do it with prudence and caution: for if they print anything that is libellous, it is no excuse, to say, the printer had no knowledge of the contents and was ignorant of its being libellous: and so is the rule at law, and I will always adhere to the strict rules of law in these cases."*

22. As regards the *actus reus* of the offence, it is sufficient to prove publication of material that is "calculated", in the sense of tending to create a real risk of an unfair trial. "Calculated" at common law generally meant no more than "tending" or "likely to": that is to say the act or omission complained of had to create a real risk of prejudice, but not necessarily of serious prejudice. See Arlidge, Eady & Smith on Contempt (2nd ed, 1999) at para 5-7, and also *Attorney General v Times Newspapers Ltd* [1974] A.C. 273.

23. In considering whether the publication in the present case was calculated to create a real risk of an unfair trial, the High Court Judge was obliged to take all relevant circumstances into account including, and perhaps especially, those commended by Denham J in her judgment in Kelly v O'Neill which, it may be recalled, included "*the burden of proof, mens rea, and specific defences* [that might potentially arise]" in the pending trial about which there was a concern.

24. Intrinsic to the charges preferred against the individual concerned was the necessity for the prosecution to establish beyond reasonable doubt that the accused had acted *"dishonestly".* Moreover, the particulars of both offences as charged variously alleged that the accused had *"conspired to defraud"*, that he created *"a false and misleading impression"*, that he had *"furnish[ed] … information"* that was *"misleading, false or deceptive".*

25. Moreover, the mens rea of the common law offence of conspiracy to defraud, discussed at length (from paragraphs 146 to 176 inclusive) in the judgment of this court, delivered by Ryan P, in *Director of Public Prosecutions v Bowe & Casey* [2017] IECA 250, requires proof of the intentional performance of the impugned act, or intentional participation in the impugned scheme, where that act or that participation would attract the value judgment, judged by the standards of ordinary men, that it was *"dishonest".* In that regard we stated in *Bowe & Casey* that:

> *"174. We are satisfied that the trial judge did not fall into error in the manner in which he approached his charge to the jury on the issue of the mens rea for the common law offence of conspiracy to defraud. All of the jurisprudence relating specifically to this offence seems to us to indicate that it is sufficient for a conviction that the prosecution should prove merely that the accused intended to do the impugned act or to participate in the impugned scheme in circumstances where the relevant act or scheme would attract the value judgment, judged by the standards of ordinary reasonable men, that it was dishonest. Accordingly, we are not disposed to uphold the first named appellant's ground of appeal No 16.*
>
> *175. The Court readily understands why it would have suited the defence case if the trial judge could have been persuaded to adopt the Ghosh approach. However, the trial judge would have had no legitimate basis for doing so. The Theft Act 1968 is not law in this country. In the context of conspiracy to defraud the concept of "dishonesty" provides no more than a modern analogue for the language of older case law which referred to conduct which was "wrongful and fraudulent." While the natural and ordinary meaning of "dishonesty" may indeed sometimes import both a state of mind and a value judgment as to conduct, the offence of conspiracy to defraud is long standing and has never been understood as incorporating a specific mens rea of subjective dishonest intent as opposed to a general mens rea requiring intentional participation in whatever act or scheme is said to constitute the conspiracy in circumstances where that act or scheme would be regarded, objectively, as being dishonest. It is the conduct which must be dishonest. The motivation of the relevant actor is irrelevant to liability. Accordingly, "by dishonesty" has never been regarded in the context of the offence under consideration as referring to an individual's state of mind, but rather as referring to an objective characterization of, or value judgment with respect to, the impugned conduct."*

26. "Dishonestly" for the purposes of the Act of 2001 has the meaning set out in s.2 of that Act, namely "without a claim of right made in good faith". This Court concluded in its judgment in *DPP v Bowe and Casey* that this accords with the former common law meaning of the term and represented no material change.

27. In the individual concerned's pending trial it would therefore be for the jury, and the jury alone, to evaluate his impugned conduct during the period covered by the indictment and to reach a value judgment on whether he had acted "dishonestly".

28. The publication of the material in controversy, at a time when the individual concerned was charged, and was known by the appellants to have been charged, for the most part did not deal with the specific conduct the subject matter of the charges against him. However, far from reporting the controversial material in a matter of fact fashion, which could have been done without objection, commentary was offered which arguably impugned the individual concerned's general morality and ethics in matters of corporate governance in his area of responsibility, impugned his ethical standards with respect to the conduct of aspects of his work, and suggested an ostensible willingness on his part to be complicit in the dishonest concealment of critical information from persons entitled to receive that information. The publication of such material in the national newspaper enjoying the widest circulation in Ireland, and on its associated website, represented in effect the judgment of the appellants, commended to its readers, that certain persons, including the individual concerned, were persons without a functioning moral compass, with low ethical standards and who were in effect dishonest.

29. I find myself in the circumstances in complete agreement with the High Court judge that the recurring theme in the commentary is dishonesty, cover up and deceitfulness amongst certain persons including the individual concerned. There was clear evidence on foot of which she could have arrived at that view. I would go further than she expressly did and say that the commentary forming part of the material published suggests, by implication, acceptance by the individual concerned of that culture and his participation in it by being complicit with another in the formulation of a strategy to withhold full information from persons entitled to it, and in the discounting of moral and ethical concerns in the consideration that was given to a particular proposed course of action. I am therefore satisfied that the ingredients of the charge of contempt by publication were indeed fully made out.

Other alleged errors by the High Court Judge

30. I turn next to the complaints that the High Court judge fell into error in failing to give due weight to the fact that the publication

did not relate to the matters the subject of the criminal charge, that a suitable charge to the jury would have prevented any potential prejudice, and that the DPP clearly felt that other publications on sale throughout the prosecution did not constitute a contempt (notwithstanding the fact that they covered exactly the same ground as the criminal prosecution).

31. As I have already indicated I take issue with the premise in the first part of this series of complaints, namely that that the publication did not relate to the matters the subject of the criminal charge for the reasons I have already stated. However, I am prepared to acknowledge that for the most part it did not do so. Did this fact invalidate the High Court judge's finding of contempt? I do not believe that it did for the following reasons.

32. Our criminal justice system is essentially common law based and an adversarial procedure is used in our criminal trials. The fundamental philosophy underpinning the way in which we approach and try allegations of criminal misconduct is that it is better that a guilty person should go free than that an innocent person should be convicted. The focus in our adversarial common law criminal justice system is therefore on fairness of procedures. Accordingly, we have restrictive rules of evidence and only are prepared to admit evidence which is regarded as fair, and we exclude evidence that is regarded as potentially unfair even if to do so may sometimes be truth deflecting.

33. It is perhaps useful to contrast our approach in that regard with the philosophy underpinning the inquisitorial system of criminal justice operated in most civil law systems. In those systems ascertainment of what is perceived to be "the truth with respect to the allegation" represents the premium value. To that end almost all potentially relevant evidence that might contribute to revealing the truth is admitted in evidence, even if it may come at the cost of a degree of unfairness to the accused, and the occasional wrongful conviction.

34. One form of evidence that we routinely exclude in our system is evidence of prior misconduct. We do so out of concern that knowledge of prior misconduct may prejudice the tribunal of fact, particularly where that tribunal is a jury, who may be tempted to rely on evidence of propensity or of previous disposition, as being indicative of guilt – the so-called "forbidden reasoning". (There are of course exceptions to this rule of evidence, as indeed there are for many other rules of evidence, but it is a matter for the trial judge in any trial to adjudicate on whether evidence which ostensibly requires to be excluded as misconduct evidence may nevertheless be admitted in the particular case on foot of a recognised exception. For the purposes of the present discussion, it is unnecessary to discuss the exceptions to the exclusionary rule with respect to misconduct evidence.)

35. The clearest form of prior misconduct evidence that is routinely excluded is evidence of previous convictions, or of previous criminal conduct even if it was not prosecuted. However, the exclusion of evidence of prior misconduct is not confined to criminal misconduct. As Declan McGrath, Senior Counsel, points out in his work entitled *Evidence*, 2nd ed, (Round Hall: 2014) the concept of misconduct evidence "extends to evidence of discreditable acts by an accused the disclosure of which could have a prejudicial effect on the tribunal of fact" and in support of this he cites *B v DPP* [1997] 3 I.R. 140 at 152; *R v Ball* [1911] A.C. 47; *R v Barrington* [1981] 1 All E R 1132; and *R v. Robertson* (1987) 39 DLR 4th 321.

36. As Binnie J said in *R v Handy* [2002] 2 S.C.R. 908, a decision of the Canadian Supreme Court (at para. 72):

> "Proof of general disposition is a prohibited purpose. Bad character is not an offence known to the law. Discreditable disposition or character evidence, at large, creates nothing but 'moral prejudice' and the Crown is not entitled to ease its burden by stigmatising the accused as a bad person"

37. How much more objectionable then would be the introduction in evidence, were it to be attempted, of the subjective opinions of "commentators" even if employed by an organ or organs of the media to offer their opinions.

38. It seems to me that in a case that was going to be all about whether a course of conduct was objectively dishonest, evidence of engagement by the accused in conduct that was capable of being characterised as dishonest, immoral, unethical, deceitful and such like, would require to be treated as being *prima facie* inadmissible as evidence of previous misconduct, unless the party seeking to introduce it could legitimately invoke one of the recognised exceptions to the general rule. Accordingly the jury might well not get to hear about it at the trial, and certainly there could be no decision as to whether or not they should hear of it until the trial.

39. Was is it right then that the jury in the individual concerned's case should potentially have heard about such matters by reading of them in a daily newspaper, or in the course of surfing the internet, and furthermore be exposed to the subjective opinions of commentators as to how the conduct at issue ought to be characterised, in circumstances where the publishers knew about both the fact of that individual having been charged, and the nature of the charges preferred against him? I am satisfied that it was not right, that it was in fact a contempt of court by publication as found by the High Court judge.

40. It is complained that due weight was not given to the fact that a suitable charge to the jury would have prevented any potential prejudice. Such an argument might be relevant to a plea in mitigation at sentencing, but has no bearing on whether or not contempt was in fact committed. The matter is well put by my colleague Hogan J in his judgment in this matter where he acknowledges that:

> *"the fact that the trial can nonetheless fairly and safely proceed, the offending comment notwithstanding, is, as such, irrelevant to the question of whether there has been a contempt of court."*

41. Indeed if authority were needed for this proposition it is necessary to look no further than the judgment of Keane J in *Kelly v O'Neill* (at p. 375 of the report) which I quoted earlier in this judgment.

42. It is further complained that the DPP clearly felt that other publications on sale throughout the prosecution did not constitute a contempt (notwithstanding the fact that they covered exactly the same ground as the intended prosecution). The appellants say that a consideration of the extent of similar material already in the public domain was relevant to assessing the reality of the risk.

43. First, in that regard, I wish to express agreement with the High Court judge's view that the date of publication is a key factor. The other publications referred to were all published before the individual concerned was charged. It is true they have remained on sale after he was charged, and, by recourse to an analogy with the position under the law of copyright, the appellants contend that each further sale represents a further publication and arguably a discrete and individual contempt of court, yet no action has been taken to restrain them or to prosecute the publishers for contempt. I share O'Malley J's reservations as to the appropriateness of the analogy, but even if it is technically correct there were undoubtedly a significant number of the publications at issue already in circulation and in the public domain at the point at which the individual concerned was charged, rendering it of questionable utility to bring contempt proceedings against those publishers or to seek to restrain further sales. The situation in the case of the appellants is different. They first published **after the individual concerned was charged and in the full knowledge of what it was he was**

charged with. It is a much more egregious and blatant contempt. The fact that the DPP neither acted in respect of previous contempt by publication possibly committed by others, nor sought to restrain the publications in question, is irrelevant to whether or not the appellants' publication constituted a contempt of court. At most, it might potentially have been relevant on the issue of sentencing.

44. As regards the reality of the risk, and to borrow an analogy, the fact that a fire may already exist, does not justify the further feeding of that fire, much less the throwing of petrol upon its flames. If left to its own devices it may expire, or at least diminish, of its own accord, reducing the associated risk. Applying the analogy to potentially prejudicial publications this is of course the thinking behind the "fade factor" line of jurisprudence. Notwithstanding that a certain amount of the matters complained of were already in the public domain, I consider that publication of the matters complained of could only have had the effect of significantly adding to any existing potential for prejudice and that the High Court judge was entirely justified in concluding that *"on a date after* [the individual concerned] *was charged, the appellants set out to associate him with aspects of* [a certain culture] *in a way that was capable of having a direct bearing on the crimes of dishonesty and conspiracy with which he is charged."*

45. I am conscious that so far in this judgment, the right to freedom of expression guaranteed in Article 40.6.10 of the Constitution has received but slight attention. I share with my colleague Hogan J the view that it is an extremely important right, that it is indeed the lifeblood of democracy. We are fortunate that we live in a stable democracy and that we are perhaps less dependent on the press to hold our government and institutions of state to account than persons living elsewhere under more volatile and repressive regimes. It would be indeed be regrettable if as a result of the serendipity of our stable political circumstances we were to attribute less value to the right to freedom of expression than it deserves. I am confident that freedom of expression is appropriately cherished as an important fundamental right guaranteed under the Constitution, and that it must be treated as being of equal importance with rights similarly guaranteed, including the right to a trial in due course of law. However, as Keane J points out in *Kelly v O'Neill*, although *"freedom of expression is undoubtedly a value of critical importance in a democratic society, … like every other right guaranteed, either expressly or by implication, by the Constitution it is not an absolute right."* The right must not be exercised to undermine public order or morality or the authority of the State. Keane J further points out that the limitations on freedom of expression required by the machinery of contempt of court were found not to be of themselves in violation of the right of freedom of expression guaranteed by the European Convention on Human Rights in *Times Newspapers Ltd. v. United Kingdom* (1979) 2 E.H.R.R. 245.

46. Nevertheless given the importance of the right to freedom of expression any proposed interference with it for the purpose of vindicating the right to trial in due course of law, has to be proportionate to the risk involved. Clearly, the risk appreciated must be a real one, though not necessarily a serious one. It must in my judgment be real in the sense of representing a reasonable possibility and not a remote or fanciful risk, while at the same time it does not have to represent a probability or likelihood. However, the more serious the perceived risk to the right to a trial in due course of law the stronger the case may be for judicial intervention up to and including a proportionate restriction on the exercise of the conflicting right, in this case the appellants' right to freedom of expression guaranteed in Article 40.6.10 of the Constitution, if it is not possible to uphold both rights.

47. There must also be a pressing need to interfere in the manner proposed, and it must involve no more than is necessary, for the protection of the legitimate interests that it is sought to protect, in this instance the individual concerned's right to a fair trial, and the people of Ireland's right to expect that cases brought in their name can be tried in due course of law. There requires to be a consideration of whether the price of doing so, in terms of restricting the exercise of the appellants' constitutional right to freedom of expression even on a limited and temporary basis until the trial is over, is an acceptable one given the importance in a democratic society of ensuring that the press is in a position to comment upon, criticise and hold different sectors and interests to account in the public interest.

48. In summary, I believe the courts' primary obligation is to uphold both rights and to do so where feasible by a harmonious construction and application of the constitutional guarantees. Where, as here, it is contended that the right to a fair trial in due course of law can only be upheld by an interference with or curtailment of the right to freedom of expression then, as stated by Keane J., the right to freedom of expression should only be interfered with or curtailed *"to the extent necessitated to protect the right to trial in due course of law."* Further, as put by Denham J. in Kelly v. O'Neill *"If there is a doubt the balance should be tipped in favour of the administration of justice, of a fair trial".*

49. The fundamental differences between Hogan J and myself with respect to this case lie, I believe, in our respective views as to the reality of the risk and as to the proportionality of the response. I cannot agree with him that it is unrealistic to say that this publication could have made all the difference, and that the risk of the trial being contaminated by a publication of this kind is so low that the real risk test cannot be said to be satisfied. On the contrary I share O'Malley J's view that the story could have been adequately reported without any need to mention the individual concerned by name at all, and certainly without doing so in the same breath as offering, expressly or by implication, gratuitous judgments as to the ethics, morality and honesty of certain persons without discrimination, and certain emotive suggestions made in the publication in controversy.

50. I must also dissent from his view that the findings of contempt were in any event disproportionate to any risk that might have existed. I do not accept that these findings had the potential to have, or that they have had, the anticipated "chilling effect" on discussion in the media of certain matters of undoubted public importance. I acknowledge that the facts in the present case were markedly different from those in *Kelly v O'Neill*, and in particular that the restraints imposed in the present case were destined to last for a much longer period of time than was the case in *Kelly v O'Neill*, but I remain convinced that, had they chosen to do so, the appellants could have reported the great majority of their story in a matter of fact way and without recourse to the accompanying prejudicial commentary.

51. As this judgment is confined to the appeal against conviction for contempt by publication I express no view at this time on whether the concurrent injunction was proportionate in terms of the scope of the restrictions that it imposed, although I am in no doubt that some form of injunction was indeed required.

Conclusion

52. I would dismiss the appeal against conviction.