**19/09; [2009] VSC 325**

**SUPREME COURT OF VICTORIA**

# *DPP v THEOPHANOUS & ORS*

**Osborn J**

**24, 29 July, 10 August 2009 — (2009) 27 VR 295**

**PRACTICE AND PROCEDURE – COMMITTAL PROCEEDINGS – APPLICATION MADE TO MAGISTRATE BY MEDIA REPRESENTATIVES FOR AN ORDER PERMITTING ACCESS TO A RECORDING OF COMPLAINANT'S EVIDENCE IN PROCEEDINGS ALLEGING RAPE – APPLICATION GRANTED SAVE FOR ONE PART OF THE EVIDENCE – WHETHER MAGISTRATE IN ERROR – WHETHER ORDER INCONSISTENT WITH S4 OF THE *JUDICIAL PROCEEDINGS REPORTS ACT* 1958 – NO DEMONSTRATED ERROR IN EXERCISE OF POWER UNDER S126(1) OF THE *MAGISTRATES' COURT ACT* 1989 – CLAUSE 17, SCHEDULE FIVE OF THE *MAGISTRATES' COURT ACT* 1989.**

In a committal proceeding in which T. was charged with rape, the complainant gave evidence over a period of time after which the media representatives applied to the magistrate for an order permitting them access to a recording of the complainant's evidence. In opposing the application, the Prosecutor submitted that it would be contrary to the statutory scheme governing such evidence to allow its release having regard to the provisions of s4 of the *Judicial Proceedings Reports Act* 1958 in that it would inevitably lead to the identification of the complainant and secondly that its release should be restrained pursuant to s126(1)(d) and (e) of the *Magistrates' Court Act* 1989 ('Act') in that it would cause undue distress or embarrassment to the complainant or prejudice the administration of justice. Except for one matter, the magistrate granted the application and ruled that a transcript of the evidence given by the complainant would be released to the representatives of the media. Upon appeal—

**HELD: Appeal dismissed.**

**1. The Schedule Five provisions of the Act did not require a suppression of the material in issue. Clause 17 of Schedule Five does not provide a complete code of exclusion, in that it provides a discretion to the Court as to who may be present during the giving of evidence of the type in issue. Further and more fundamentally the terms of clause 17 are directed to the circumstances in which evidence is to be given. They are not directed to the question of the subsequent publication of such evidence. Clause 17 is not a provision which requires that evidence given in the circumstances provided for may not be the subject of publication thereafter. The Act provides relevantly for suppression of publication of evidence by s126.**

**2. The identity of the complainant was as a result of the committal proceedings (if not for other reasons) already well-known to the media defendants. Accordingly, it was not apparent on the face of the record that a breach of the *Judicial Proceedings Reports Act* would occur if the Magistrate's order was given effect. Further, the disclosure to the media of the transcript in issue, was not one 'likely to lead to the identification of a person against whom a sexual offence ... is alleged to have been committed'. That identification had already occurred insofar as the media defendants were concerned.**

**3. The scheme of s126 of the Act reflects the common law, in that it makes clear that ordinarily the transparency of the criminal justice system (including committal proceedings) is to be given primacy over other considerations. It is only if it is necessary to achieve one of the specifically nominated heads of public interest referred to in s126(1) that this primacy is to be overridden. The media's right to contemporaneously and fully report proceedings in our courts, is properly regarded as a significant element of our legal system.**

**4. In the present case it could not be concluded the Magistrate was bound to form the opinion it was 'necessary' to avoid prejudice to the administration of justice to make the order which was sought. At their highest the factors relied on favoured but did not compel that conclusion.**

**OSBORN J:**

1. On 24 December 2008 a member of the Victoria Police instituted proceedings alleging the first defendant had raped a woman (the 'complainant') at Parliament House on 10 September 1998, some 10 years earlier.

2. A committal hearing commenced on 6 July 2009 before his Honour Magistrate Reardon and proceeded over 15 days.

3. Following an opening and other preliminary steps the complainant was called to give evidence at 3:39 pm on 6 July. She adopted a written statement and a series of documents were tendered through her. Her cross-examination commenced at 3:43 pm.

4. Having been cross-examined for some 30 minutes on 6 July, the complainant was further cross-examined over the course of 7 July, the afternoon of 9 July, the afternoon of 10 July and the morning and afternoon of 13 July.

5. A solicitor employed by the Office of Public Prosecutions has deposed that during the course of that cross-examination the complainant gave evidence in part concerning the following matters:

(i)Her fitness to give evidence;
(ii) The nature of her ailment(s);
(iii) The types of medication prescribed by medical practitioners;
(iv) The dosages prescribed by medical practitioners;
(v) The actual dosages taken by the complainant;
(vi) Her addiction to prescription medication;
(vii) The closeness of the complainant with family members;
(viii) The domestic, business and financial circumstances of her family members;
(ix) Her religious and spiritual beliefs;
(x) Her role as a god-parent to "H";
(xi) The persons in whom she could confide;
(xii) Her participation in counselling services;
(xiii) Her diagnoses by psychiatrists and psychologists;
(xiv) Her sexual relationship with "K";
(xv) The living arrangements with "K" proximate to the time of her relationship with him;
(xvi) Her financial ties to "K";
(xvii) The breakdown of her relationship with "K";
(xviii) Her sexual relationship with "A";
(xix) The breakdown of her relationship with "A";
(xx) Her pregnancy and subsequent miscarriage;
(xxi) The telephone numbers operated by the complainant over the course of several years;
(xxii) The persons with whom she had telephone contact;
(xxiii) The frequency of her telephone contact with various persons;
(xxiv) The email addresses operated by the complainant over the course of several years;
(xxv) The persons with whom she had email contact;
(xxvi) The frequency of her email contact with various persons;
(xxvii) The name and location of her workplace at the time of the alleged offence;
(xxviii) Her employment history;
(xxix) Her international travel movements;
(xxx) The places where she used to socialise;
(xxxi) The frequency of her social outings;
(xxxii) The persons with whom she would socialise;
(xxxiii) The persons who were in her social sphere;
(xxxiv) The breakdown of friendships with people who were in her social sphere;
(xxxv) Her participation in activities and events within the Greek community of Melbourne;
(xxxvi) Her interaction with members of the Greek community of Melbourne;
(xxxvii) The cultural sensitivities in discussing the issue of rape.[1]

6. The complainant's evidence was given pursuant to the regime provided for by clause 17 of Schedule Five of the *Magistrates' Court Act* 1989 (the 'MC Act') which provides:

**17 Special rules applicable to sexual offences**

(1) This clause applies to a committal proceeding relating to a charge for a sexual offence, whether or not the committal proceeding relates to any other charge against the same or any other person and whether or not it is alleged that there are aggravating circumstances.

(2) The informant must be represented by a legal practitioner.

(3) While the complainant is giving evidence or a recording of the evidence of the complainant or of his or her examination under section 56A is being played, only the following may be present—

(a) the informant;
(b) the defendant;
(c) a person whom the complainant wishes to have present for the purpose of providing emotional support to him or her and who is reasonably available and approved by the court to be present;
(d) the legal practitioners and their clerks acting for the prosecution and the defence;

(e) the court officials whose presence is required;
(f) authorized officers within the meaning of the *Court Security Act* 1980 whose presence is required for court security purposes;
(g) any person recording the evidence in accordance with Part VI of the *Evidence Act* 1958;
(h) other persons who have been authorised by the Court to be present.

(4) The Court must give reasons for authorising a person to be present under subclause (3)(h).

7. No persons other than those falling within the categories nominated by the Schedule were authorised to be present under clause 17(3)(h).

8. On 17, 21 and 22 July application was first foreshadowed and then made by legal representatives of the third, fourth, fifth, sixth and seventh defendants (the 'media defendants') for an order permitting access by the media to a recording of the complainant's evidence. The application was supported by senior counsel for the first defendant and opposed by the Senior Crown Prosecutor appearing on behalf of the informant.

9. The Senior Crown Prosecutor submitted first that it would be contrary to the statutory scheme governing such evidence to allow its release having regard in particular to the provisions of s4 of the *Judicial Proceedings Reports Act* 1958 (the 'JPR Act') and secondly that its release should be restrained pursuant to s126(1)(d) and (e) of the MC Act.

10. After hearing the submissions of counsel, his Honour ruled that a transcript of the evidence given by the complainant in partially closed court, would be released to the representatives of the media defendants save for one matter, namely evidence that the complainant had become pregnant as the result of a sexual relationship with a particular individual and had subsequently had a miscarriage.

11. Counsel for the media defendants seeking access to the transcript undertook to the Court that they would personally delete from the transcript evidence concerning this matter, before providing such transcript to their clients.

12. A certified extract of the Court's order states:

*ACCESS FOR MEDIA FOR TRANSCRIPT OF COMPLAINANT'S CROSS EXAMINATION GRANTED SAVE FOR ONE PART OF THE EVIDENCE GRANTED (sic).*
*ALSO INFORMANT'S APPLICATION UNDER SEC 126 OF THE MAGISTRATES COURT ACT FOR PROHIBITING SUCH PUBLICATION REFUSED.*[2]

13. The solicitor for the OPP further deposes by affidavit in this proceeding:

16. From my handwritten notes, I can state that His Honour Magistrate Reardon gave the following reasons for his decision:
(i) That legislation has been put in place to close the court while a complainant in a case alleging sexual offences is giving evidence. This is principally for the comfort of the complainant while she or he is giving evidence.
(ii) That there have been significant recent amendments to how evidence in cases alleging sexual assault can be given, but nothing was altered in relation to the potential publication of evidence. Further, there is nothing to prevent members of the media from attending Court and reporting on the matter generally.
(iii) That the complainant herself previously canvassed the possibility of talking to the media, so it would be difficult to believe that the release of a transcript of her evidence would cause her "undue distress or embarrassment".
(iv) That evidence given by other witnesses in open court touched on matters that were canvassed during the cross-examination of the complainant and such details had already been published. In these circumstances, the release of a transcript of the complainant's cross-examination would not take the matter any further.
(v) In a high profile case such as this, and despite strong objections, a transcript of the cross-examination of the complainant could be released, save and except for the one area indicated in Paragraph 15.[3]

14. The plaintiff (the 'DPP') now makes application for the following relief:

1. An order in the nature of *certiorari* or of mandamus bringing up or quashing the Orders made by His Honour Mr. P. Reardon, Magistrate, of the Magistrates' Court of Victoria (the Second Defendant) sitting at Melbourne on 22 July 2009 wherein the Second Defendant granted the Third, Fourth, Sixth and Seventh Defendants access to the evidence of the complainant in a committal proceeding relating to a charge for a sexual offence, intituled *Smith v Theophanous*, Magistrates' Court Case number X03657222, upon the ground that in granting the application, His Honour committed an error of law which error appears on the face of the record.

2. An Order declaring that it was not open to the Second Defendant to grant access to the evidence of the complainant in a committal proceeding relating to a charge for a sexual offence to other persons who are not directly connected with the proceedings.

3. In the alternative, an Order declaring that the Second Defendant had erred in exercising his discretion by granting access to the evidence of the complainant in a committal proceeding relating to a charge for a sexual offence to other persons who are not directly connected with the proceedings.

15. In Victoria *certiorari* (or an order in the nature of *certiorari*) will not be directed to an examining magistrate in respect of a decision as to committal.[4] On the other hand mandamus (or an order in the nature of mandamus) may be directed in certain circumstances. Declaratory relief may also be available. A committal hearing is a quasi-judicial hearing in the sense that it does not result in a final decision dispositive of the question whether an individual should be presented for trial.[5] The question of the appropriate form of relief (if any) is of course dependent upon the establishment of either an excess of jurisdiction or an error of law.

16. The record which has been brought before the Court in this case is restricted to the extract of the Court's order to which I have referred. The application is made in the absence of either transcript of the Magistrate's reasons or a transcript of the evidence in question.

17. The DPP first came before me on 24 July 2009 and obtained an interim order restraining further publication of the material in issue, pending the final resolution of the application to this Court.[6]

18. On the afternoon of 24 July 2009 the Magistrate ordered the first defendant be discharged on the charge of rape and gave reasons for this decision. Although those reasons have not been placed before me either in summary or any other form, it is apparent from the terms of subsequent submissions made on behalf of the DPP, and by necessary inference having regard to the circumstances of the case, that the Magistrate did not regard the complainant as a credible or reliable witness.

19. Clause 23 of Schedule Five to the MC Act required an order for discharge 'if in [the Magistrate's] opinion the evidence is not of sufficient weight to support a conviction …'.

20. I turn then to the basis of the application before me. It was not contended by the DPP that the Schedule Five provisions of the MC Act required a suppression of the material in issue. Nor could it have been. It is plain that clause 17 does not provide a complete code of exclusion, in that it provides a discretion to the Court as to who may be present during the giving of evidence of the type in issue. Further and more fundamentally the terms of clause 17 are directed to the circumstances in which evidence is to be given. They are not directed to the question of the subsequent publication of such evidence. Clause 17 is not a provision which requires that evidence given in the circumstances provided for may not be the subject of publication thereafter. The MC Act provides relevantly for suppression of publication of evidence by s126 to which I shall return. [7]

21. The DPP submitted however that in the circumstances of the present case the publication to the media of transcript in accordance with the Magistrate's ruling would inevitably lead to the identification of the complainant in breach of s4 of the JPR Act. Section 4(1) and (1A) of the JPR Act provide:

**4 Prohibition of reporting of names**
(1) In this section—
***publish*** means—
(a) insert in a newspaper or other periodical publication; or

(b) disseminate by broadcast, telecast or cinematograph; or
(c) disclose by any means to any other person—
other than for a purpose connected with a judicial proceeding;
***sexual offence*** means an offence under subdivision (8A), (8B), (8C), (8D) or (8E) of Division 1 of Part I of the *Crimes Act* 1958 or under any corresponding previous enactment or an attempt to commit any such offence or an assault with intent to commit any such offence.

(1A) A person who publishes or causes to be published any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence, or an offence where the conduct constituting it consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the *Crimes Act* 1958, is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court.

22. The DPP's contention is advanced in circumstances where it is accepted that the media have hitherto reported the 15 day committal day proceedings without breaching s4.

23. It is also accepted by the DPP that the identity of the complainant is as a result of the committal proceedings (if not for other reasons) already well-known to the media defendants.

24. I do not accept that it is apparent on the face of the record that a breach of the JPR Act will occur if the Magistrate's order is given effect. Nor do I accept that if regard is had to the affidavit material before the Court such a breach has been demonstrated to be probable.

25. The disclosure to the media defendants of the transcript in issue, will not be one 'likely to lead to the identification of a person against whom a sexual offence ... is alleged to have been committed'. That identification has already occurred insofar as the media defendants are concerned.

26. It is only if the media defendants in turn publish material taken from the transcript, that the risk of a further potential identification will arise. Insofar as that risk is concerned, I accept that publication of the names of persons referred to in the solicitor's affidavit could raise a potential risk of consequential identification of the complainant. Such persons include the medical practitioners, family members, a god-child, treating counsellors, psychiatrists and psychologists, sexual partners, financial partners, persons with whom the complainant has had telephone contact, persons with whom the complainant has had email contact, employers, persons with whom the complainant socialised, persons who were the complainant's friends and persons with whom the complainant had contact within the Greek community. I also accept that the identification of the telephone numbers, and email addresses, or the identification of specific events in which the complainant was involved, would carry a real potential risk of the identification of the complainant. Nevertheless acceptance of these probabilities does not lead to the conclusion that material aspects of the complainant's evidence could not be published in the media, without suppression of such matters and without adequate suppression of any other detail which contains particulars likely to lead to the identification of the complainant as the person against whom a sexual offence is alleged to have been committed.

27. I say this for four interrelated reasons:

(a) the substance of the evidence is not before me and the summary does not allow the contrary conclusion;

(b) the media are constantly required to and do observe s4 of the JPR Act in reporting court proceedings relating to alleged sexual offences;

(c) the fact that publication of material of the type I have referred to above, might be regarded as containing 'particulars likely to lead to the identification of [the complainant]' is self-evident and gives rise to sensitivities which it is reasonable to expect the media defendants will recognise;

(d) the media have observed s4 to date in this case in circumstances (as the solicitor's affidavit records) in which the Magistrate stated:
evidence given by other witnesses in open court touched on matters that were canvassed during the cross-examination of the complainant and such details had already been published. In these circumstances, the release of a transcript of the complainant's cross-examination would not take the matter any further.

28. Accordingly, I do not accept the DPP's case insofar as it is premised on s4 of the JPR Act.

29. I turn then to the second aspect of the case. It is submitted on behalf of the DPP that the Magistrate erred in the exercise of his discretion, in making the order that he did, in that he failed to take into account or sufficiently take into account:

(a) the guiding principles set out in s32AB of the *Evidence Act* 1958 (the 'Evidence Act'); and

(b) s6(1) and (14) of the *Victims' Charter Act* 2006 (the 'Victims' Charter Act')[8].

30. Section 126(1) of the MC Act provides:

> (1) The Court may make an order under this section if in its opinion it is necessary to do so in order not to—
>
> (a) endanger the national or international security of Australia; or
>
> (b) prejudice the administration of justice; or
>
> (c) endanger the physical safety of any person; or
>
> (d) cause undue distress or embarrassment to the complainant in a proceeding that relates to a charge for a sexual offence; or
>
> (e) cause undue distress or embarrassment to a witness under examination in a proceeding that relates to a charge for an offence where the conduct constituting the offence consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the *Crimes Act* 1958.

31. Section 126 follows s125 which provides that all proceedings in the Magistrates' Court are to be conducted in open court, except where otherwise provided by the MC Act or the rules made under the MC Act. 'Proceeding' is expressly defined by s3 of the MC Act to include a committal proceeding.

32. It is plain from the solicitor's affidavit that the Magistrate considered the terms of s126 and in particular s126(1)(d). The solicitor notes that the Magistrate referred to the fact that:

> the complainant herself previously canvassed the possibility of talking to the media, so it would be difficult to believe that the release of a transcript of her evidence would cause her "undue distress or embarrassment".

33. Further the terms of the order are plainly intended to suppress evidence on a topic that would cause the complainant specific distress and embarrassment.

34. As I understand it however, it is in effect submitted on behalf of the DPP that the Magistrate was bound to form the opinion that it was necessary to make a full suppression order in order not to 'prejudice the administration of justice'.

35. The DPP's concern is that victims of sexual assault not be deterred from reporting crimes against them by fear that details of their evidence will be published in the media. I should say at the outset that I accept this is a matter bearing on the administration of justice and a matter of legitimate concern on the part of the DPP.

36. Nevertheless it must be evaluated on the basis that any publication in the media of the material in issue will occur in compliance with s4 of the JPR Act, ie in a form which is not likely to lead to identification of the complainant. It will also occur subject to the redaction the Magistrate has required.

37. The scheme of s126 reflects the common law, in that it makes clear that ordinarily the transparency of the criminal justice system (including committal proceedings) is to be given primacy over other considerations. It is only if it is necessary to achieve one of the specifically nominated heads of public interest referred to in s126(1) that this primacy is to be overridden.

38. The media's right to contemporaneously and fully report proceedings in our courts, is properly regarded as a significant element of our legal system. As Street CJ observed in *R v Brady*,[9]

> It is a deeply rooted principle that justice must not be administered behind closed doors – court proceedings must be exposed in their entirety to the cathartic glare of publicity. There are limited exceptions to the observance of this principle but these are well-defined and sparingly allowed. Statutes are made by public processes. They are judicially administered in public proceedings. It is only thus that the right of representation and of due hearing of all legitimate submissions can be seen to have been accorded to parties subjected to the judicial process. Moreover publicity of proceedings is one of the great bastions against the exercise of arbitrary power as well as a reassurance that justice is administered fairly and impartially.

39. The historical and theoretical bases of these principles are addressed by Kirby P in *Raybos Australia Pty Ltd v Jones*.[10]

40. One matter sometimes overlooked, is the view of *Wigmore*[11] that publicity of a judicial proceeding plays an important part as a security for testimonial trustworthiness and that this would exist as an independent rationale for such publicity, even were other grounds wanting. This is because it assists to produce in the witness' mind a disinclination to falsify and also helps secure the presence of those who may be able to furnish testimony to contradict falsifiers and may not have been known beforehand by the parties to possess relevant information.[12] I respectfully agree with this view.

41. In *John Fairfax & Sons Limited v Police Tribunal of New South Wales*,[13] McHugh JA stated:

> The fundamental rule of the common law is that the administration of justice must take place in an open court. A court can only depart from this rule when its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.

42. In *Re Application by Chief Commissioner of Police*,[14] the Court of Appeal comprising Winneke P, Ormiston and Vincent JJA considered an appeal against the limitation of a suppression order granted with respect to evidence of covert police operations and methodology. It cited the above passage in the judgment of McHugh JA and went on to say:

> 28 Little consideration is required to appreciate that this concept of openness applies with particular force to the conduct of criminal trials and the evidence upon which convictions are based. The manner in which that evidence comes into existence and the procedures followed by investigative agencies are themselves matters of considerable public importance. Accordingly, with very few limitations, they have always been exposed to public scrutiny. In each of the circumstances in which the public disclosure of any part of our criminal justice processes has been prohibited, other powerful public policy considerations have militated in this direction. The identities of informers or undercover operatives are normally protected, for example. However, that protection must give way where the fairness of the trial itself is compromised. As Brooking J stated in a case relating to undercover operatives, *Jarvie v The Magistrates' Court of Victoria* [1995] VicRp 5; [1995] 1 VR 84: "No-one would doubt that identity must be disclosed if to refuse to do so would occasion a miscarriage of justice." Special statutory regimes apply to victims of certain offences, young persons, to family law matters, to the obtaining of certain warrants and to aspects of the activities of certain investigative bodies. On occasions an order may be made for the suppression of the evidence adduced in a particular trial to avoid injustice in some related proceeding, but it is normally of limited duration and operates until the related matter has been finalised. Usually, at the trial level, such orders are made to avoid the public disclosure of the identity of the individuals to avoid exposure to danger and, very occasionally, to prevent public embarrassment...
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> 30. On whatever basis the matter is approached, such orders can only be made in circumstances where the ends of justice require the concealment of some part of the process. *Where orders for suppression are authorised only by statute, the provisions ought ordinarily to be strictly construed and utilised only when clearly necessary.* One must be more cautious, therefore, when considering a power to preclude publication which is not founded on the need to avoid prejudicing the administration of justice. *Even in claims seeking to protect the administration of justice, whether they be dependent on a statutory power or not, there will ordinarily be competing public policy considerations*, especially where the order sought is intended to ensure the fair trial of an accused, whether in the instant trial or in some other trial. On the other hand, where the order sought is founded on other considerations, one must be particularly careful not to deny the general principle of an open trial. It is difficult to see in the present case, except in respect of some brief period which is not in issue, that the protection sought is directed to ensuring the fair trial of any individual, at least as we would understand the matter.[15]

43. I turn then to the question of whether the DPP has demonstrated it was clearly necessary for the Magistrate to utilise his powers of suppression in the present case, recognising that that question may raise competing public policy considerations.

44. The DPP's grounds assert errors of law on specific bases relating to the *Evidence Act* and the *Victims' Charter Act*. The solicitor's affidavit makes clear that the Magistrate expressly referred to recent amendments of the law relating to the giving of evidence in cases such as this. Despite the absence of his full reasons, I should first record that I am satisfied on the material before me that the Magistrate did take into account the submissions made on behalf of the DPP by reference to s32AB of the *Evidence Act*.

45. That provision states that certain matters must be taken into account in interpreting and applying the provisions of the Evidence Act, relating to confidential communications, the examination and cross-examination of witnesses and the examination and cross-examination of child witnesses and witnesses with a cognitive impairment.

46. The solicitor's affidavit makes clear the Magistrate's ruling expressly referred to significant recent amendments to the law governing evidence in cases of alleged sexual assault.

47. It is plain that as a matter of law s32AB did not in terms bear on the decision the Magistrate was required to make. It bore on the application of specific provisions of the *Evidence Act*. Accordingly his observations which I only have in summary form concerning amendments to the law governing evidence were justified.

48. As I understand it, the DPP relies on s32AB as requiring the Magistrate to in effect take judicial notice[16] of the following matters:

> **32AB Guiding principles**
> ...
> (a) there is a high incidence of sexual violence within society; and
>
> (b) sexual offences are significantly under-reported; and
>
> (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and ...

49. I should record I am not persuaded by the affidavit material before me, that the Magistrate proceeded on any basis other than that he accepted the general propositions set out in s32AB. They are matters to which he had been required to have regard during the course of the committal and there is no suggestion that he did not so have regard. There is in turn no satisfactory basis for any inference from the material before me, that he rejected these matters as factually correct in exercising his discretion. The summary of his reasons does not enable such a conclusion to be satisfactorily drawn.

50. The DPP's case is however in effect that the Magistrate could not have exercised his discretion properly as he did having regard to these matters (accepting them to be correct) and was clearly bound to exercise his power in the manner the DPP contends for. This is an inherently difficult proposition. The Magistrate was confronted with very significant issues of competing public interest favouring release to the media of the material in issue. First, the first defendant had been charged with a grave crime. In the absence of the material in issue the media and the public will be left with the Magistrate's decision concerning committal, but denied access to a significant part of the evidence upon which such decision was based.

51. Secondly, the proceeding related to allegations made against a parliamentarian of criminal conduct, alleged to have occurred at Parliament House. It was accordingly a matter which raised matters of public interest going beyond allegations of criminal conduct by one private citizen against another.

52. The allegations raised issues of the public interest relating both to the conduct of a parliamentarian and the suitability of the first defendant to hold office.[17]

53. Such matters are properly regarded as legitimate elements of public interest in our

democracy and free debate concerning them, underpins the notion of free choice by the people through the electoral process.

54. The fundamental significance of the concept of free debate and choice about such matters, was referred to by the High Court, in *Lange v Australian Broadcasting Corporation* as follows:[18]

> Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system. As Birch points out, "it is the manner of choice of members of the legislative assembly, rather than their characteristics or their behaviour, which is generally taken to be the criterion of a representative form of government". However, to have a full understanding of the concept of representative government, Birch also states that:
>
> "we need to add that the chamber must occupy a powerful position in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organisation." [19]

55. Thirdly, it was apparent by the time of the Magistrate's decision that there was in fact very substantial media interest and in turn it might be inferred, public interest in the proceeding. This was not a case of hypothetical or theoretical public interest.

56. Fourthly, the utility of committal proceedings is itself a question of the public interest. In November 2008 the DPP stated publicly that committal hearings clog up the courts with very few resulting in dismissal of the case.[20]

57. Prominent criminal lawyers have joined issue with this position and the Law Institute of Victoria president stated in response to the DPP's statement, that the committal system serves an important role ensuring people do not have to go through a gruelling trial if there is insufficient evidence.

58. It is apparent that the present case is one which has the potential capacity to demonstrate precisely those features of the committal system which have been the subject of ongoing public controversy. It is in the public interest that the committal procedure itself face open and independent scrutiny.

59. Ultimately the Magistrate's power to make a suppression order was conditioned upon the requirement that he form the opinion that it was necessary to do so in order not to prejudice the administration of justice. Having regard to the matters I have set out above, I do not accept that the matters referred to in s 32AB could be regarded as self-evidently compelling a decision requiring suppression. In the circumstances they fell to be weighed against competing factors intrinsic to the proper administration of justice and of the highest public interest. It was for the Magistrate to form a view as to whether he was satisfied suppression was necessary in the circumstances of the case. As Brooking JA said in *Ericsson Pty Ltd v Popovski*,[21] it is a strong thing to find that a magistrate was constrained to make a finding of fact, in a case where the burden of proof lay on the party asserting error of law, and who is therefore submitting to this Court not that an affirmative finding had no evidence to support it, but that the evidence was such as to necessitate an affirmative finding which was not made.

60. In the present case it cannot be concluded the Magistrate was bound to form the opinion it was 'necessary' to avoid prejudice to the administration of justice to make the order which is sought. At their highest the factors relied on favoured but did not compel that conclusion.

61. I have addressed the arguments with respect to s32AB on the basis that the DPP's grounds are expressed in the first instance by reference to a failure to take into account matters referred to in them. Insofar as the grounds are expressed by reference to a failure to sufficiently take such matters into account they face the same ultimate difficulty. It cannot be inferred the matters relied on compelled a decision of the type for which the DPP contends. In addition these latter grounds must fail because it is not open in a proceeding by way of judicial review to raise such

grounds. The present proceeding is not an appeal on the facts. It is not an appeal on the weight of the evidence.[22]

62. The DPP also relies on s6(1) and s14 of the *Victims' Charter Act*.

63. Section 6(1) provides:

> (1) All persons adversely affected by crime are to be treated with courtesy, respect and dignity by investigatory agencies, prosecuting agencies and victims' services agencies.

64. It is to be noted that:

> (a) the section is not expressed to bind courts;
> (b) the Magistrate's ruling does not on its face demonstrate any failure to treat the complainant with courtesy, respect or dignity (indeed it is plain he addressed s126(1)(d) of the MC Act);
> (c) having regard to the Magistrate's ultimate decision, it is difficult to conclude the complainant was necessarily to be regarded by the Magistrate as being 'a person adversely affected by crime' in any event.

65. Further, as I understand it (in the absence of transcript) the argument by reference to the Victims' Charter Act was coupled with the argument by reference to s32AB of the *Evidence Act*. In my view it faces the same ultimate problems. It cannot be concluded from the material before the Court that the Magistrate failed to have regard to the principles in issue, nor that he was bound to conclude that the considerations referred to outweighed the public interest in publication of the transcript subject to some redaction and of course to the continuing obligation to comply with the provisions of the JPR Act.

66. The originating motion also refers to s14 of the *Victims' Charter Act*. That section provides as follows:

> **14 Victims' privacy**
> A victim's personal information, including his or her address and telephone number, is not to be disclosed by any person except in accordance with the *Information Privacy Act* 2000.

Note: Section 10 of the *Information Privacy Act* 2000 provides that the Act does not apply in respect of the collection, holding, management, use, disclosure or transfer of personal information by a court, tribunal, judge, magistrate or registry staff in relation to their judicial or quasi-judicial functions.

67. As the note contained in the Act itself indicates s10 of the *Information Privacy Act* 2000 provides that the Act does not restrict the disclosure of information by a magistrate exercising judicial or quasi-judicial functions. In my opinion s14 cannot be said to have rendered the Magistrate's decision invalid.

68. It follows that the DPP's application should be dismissed.

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[1] Affidavit of Kerry Marie Maikousis sworn 28 July 2009, [11].
[2] Exhibit KMM-1 to the Affidavit of Kerry Marie Maikousis sworn 28 July 2009.
[3] Affidavit of Kerry Marie Maikousis sworn 28 July 2009, [16].
[4] *R v The Magistrates' Court at Prahran ex parte Hamilton* (Unreported), Full Court 21 July 1980; *Brygel v Stewart Thornton* [1992] VicRp 70; (1992) 2 VR 387; (1992) 67 A Crim R 243; *Nguyen v Petrovic & Anor* [1997] VSC 4892.
[5] Section 56B of the MC Act provides that nothing in that Act affects the power of the DPP to make presentment of a person on an offence if on a committal proceeding the Court orders the person to be discharged on the charge. Conversely nothing in the MC Act affects the power of the DPP to enter a *nolle prosequi* in relation to a charge on which a person is committed.
[6] The defendants have indicated that they will abide by the Court's decision. The first defendant made a formal appearance on 29 July 2009. The second defendant has not appeared in accordance with accepted practice. The media defendants appeared on the first return of the application but withdrew and did not participate in the substantive argument on 29 July 2009.
[7] Cf the provisions of s35 of the *Major Crime (Investigative Powers) Act* 2004 providing for examinations to be held in private and s43 of that Act providing for restriction on the publication of evidence.
[8] The originating motion also referred to s13 of the *Charter of Human Rights and Responsibilities* 2006, but reliance upon this ground was abandoned before me.

[9] Court of Criminal Appeal, 29 July 1977, quoted in *David Syme & Co Pty Ltd v GMH Limited* (1984) 2 NSWLR 294, 300.
[10] (1985) 2 NSWLR 47, 50-60.
[11] *Wigmore on Evidence* Chadbourn Revision (1976).
[12] *Wigmore on Evidence* Chadbourn Revision (1976) vol 6, 436, [1834].
[13] (1986) 5 NSWLR 465, 476-7.
[14] [2004] VSCA 3; (2004) 9 VR 275, 286 (citations omitted).
[15] Emphasis added.
[16] *Holland v Jones* [1917] HCA 26; (1917) 23 CLR 149, 153; 23 ALR 165, per Isaacs J.
[17] Cf *Theophanous'* case [1994] HCA 46; (1993) 182 CLR 104, 208; (1994) 124 ALR 1; (1994) 68 ALJR 713; [1994] Aust Torts Reports 81-297; 34 ALD 1 in a different context.
[18] [1997] HCA 25; (1997) 189 CLR 520, 559-60; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2.
[19] The protection of discussion of political matters upheld in this case was expressly held to extend to state and territory politics (page 571).
[20] *The Age* newspaper of 15 November 2008 reported him as stating 'It's a costly and inefficient and time wasting process for what you get out of it.'
[21] [2000] VSCA 52; (2000) 1 VR 260, 265, [14]
[22] Cf *Public Transport Corporation v Sartori* [1996] VICSC 33; (1997) 1 VR 168, 177.

**APPEARANCES:** For the Plaintiff DPP: Mr A Castles, Solicitor and others. For the first defendant Theophanous: Mr T Hargreaves, solicitor. Tony Hargreaves & Partners Lawyers.

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