

7/94

SUPREME COURT OF VICTORIA

THE HERALD & WEEKLY TIMES LIMITED v SS and ORS
(sub nom The Herald and Weekly Times Ltd v Braun and Ors)

Beach J

23 December 1993; 13 January 1994 — [1994] VicRp 50; [1994] 1 VR 705

HEALTH – INFECTIOUS DISEASE (HIV) – INFECTED PERSON CHARGED WITH OFFENCES – EVIDENCE RELATING TO HIV PROPOSED TO BE GIVEN – EVIDENCE THAT SUCH DISCLOSURE WILL CAUSE STRESS – "SOCIAL CONSEQUENCES" – MEANING OF – WHETHER STRESS WITHIN MEANING – MEANING OF S119 OF HEALTH ACT 1958 – WHETHER POWER TO MAKE SUPPRESSION ORDER SUBJECT TO S119 – WHETHER RIGHT TO PRIVACY SUBJECT TO PUBLIC INTEREST – WHETHER INTERIM SUPPRESSION ORDER CAN BE MADE: HEALTH ACT 1958, SS119, 129(1).

1. Where a court decides to make a suppression order under s129(1) of the *Health Act 1958* ('Act'), the order cannot be expressed to be an interim or temporary order. It is a final order and operates in perpetuity.

2. The phrase "social consequences" in s129(1) of the Act encompasses such things as the stigma attached to, the stress and/or anxiety caused to (thereby hastening death), and the discrimination against a person if it becomes known that that person is infected with HIV.

3. Accordingly, evidence that a person would suffer stress if his identity was revealed which could lead to a deterioration in his condition thereby hastening his death came within the meaning of "social consequences" thereby justifying the making of a suppression order under s129(1) of the Act.

4. However, the provisions of s129 are to be read and construed subject to the provisions of s119 which provide that a person with an infectious disease must behave responsibly and not infringe on the well-being of others. A failure to behave responsibly will deprive a person of the right of privacy as provided by s129.

5. Where a person pleaded guilty to charges of loitering for prostitution, had numerous similar prior convictions and was likely to practise unsafe sex and share needles, that person had clearly failed to act responsibly and suppression of his identity would infringe on the well-being of others. Accordingly, in those circumstances, a magistrate was in error in making a suppression order under s129(1) of the Act.

BEACH J: *[After referring to a judgment in related proceedings and a preliminary matter not relevant to this report, His Honour continued]* ... [8] I turn then to the substance of the proceeding. It would seem to me that the appropriate way to deal with the proceeding is to consider first the order of the Magistrates' Court made on 27 July. I say that for the reason that the order of 24 June was expressed to be "until a final determination of these proceedings" and, on its face, once the proceedings were finally determined, as they have been, it ceased to have any force or effect. Nevertheless, I shall return to that order in due course.

The following are the grounds upon which it is sought to set aside the order of 27 July:

- "(a) the first defendant was wrong in law in holding that she had power to make an order pursuant to Section 129 of the *Health Act 1958* that was conditional or expressed to apply until further order;
- (b) the first defendant was wrong in law in making the order pursuant to Section 129 of the *Health Act 1958* because there was no evidence or no adequate evidence that SS would suffer any adverse social or economic consequences if his identity was ascertained;
- (c) the first defendant was wrong in law in failing to take into account or give any weight or any adequate weight to the provision of Section 119 of the *Health Act 1958*."

The short argument advanced in relation to ground one is that s129 of the *Health Act* does not give a court or tribunal the power to make an interim or temporary suppression order. Once a

court or tribunal is satisfied that it is necessary to make a suppression order because of the social or economic consequences to a person if the fact that the person is inflicted with the HIV virus is disclosed, then the court has no option in the matter but to grant the suppression order and the order cannot be expressed to be an interim or temporary order. In my opinion that contention is correct. As counsel for SS contended during the course of his submissions, a suppression order operates in perpetuity in the absence of evidence that it was obtained by fraud or by mistake or in circumstances which would otherwise justify setting it aside; it is a final order of the court and not one made on any interim or temporary basis. In that situation I consider the Magistrate was in error in prefacing the order with the words "until further order". But does that mean that the order is a nullity? In my opinion it does not. The words "until further order" are superfluous and should be disregarded.

Ground 2 alleges that there was no evidence or no adequate evidence that SS would suffer any adverse social or economic consequences if his identity was ascertained. I agree that there was no evidence before the Magistrate [10] to the effect that SS would suffer any economic consequences if his identity was ascertained. The evidence of the two psychiatric nurses called on behalf of SS on 24 June 1993 was to the effect that SS would suffer stress if his identity was revealed and that that could lead to a deterioration of his condition from being HIV positive to AIDS and thus hasten his death. Can the risk of such a deterioration in SS's condition be categorized as a social consequence to SS?

Social consequence is nowhere defined in the *Health Act*. One infers that "social" means in the sense of, pertaining, relating, or due to, connected with, *et cetera*, society as a natural or ordinary condition of human life. See the *Oxford English Dictionary* 2nd Edition volume 15 at page 905. As the learned authors point out at that page:

"In this use, social enters into a very large number of collocations, many of which have the quality of set phrases, but have not gained specialized meanings; examples are: social background, barrier, capacity, climate, code, consciousness, contact, context, duty, fabric, grace, group, hierarchy, justice, mix, morality, phenomenon, prejudice, problem, question, reason, scale, sympathy, usefulness, virtue, welfare."

It may be said then that social consequence is but one more collocation which has not gained a specialised meaning. What meaning then is to be given to the expression? In the context in which it is used in the Act, I consider social consequence can be taken to encompass such things as the stigma which may attach to a person if it is known that he or she is infected with HIV, the stress and/or anxiety which may be caused to a person in the fact that he or she is infected with HIV becomes known to the public at large, the fact that the death of [11] such a person may be hastened in the event that that occurs, and the fact that a person infected with HIV may be unlawfully discriminated against if it becomes public knowledge that he or she is so infected.

If my interpretation of the expression "social consequence" is correct, then clearly there was evidence before the Magistrate on 27 July 1993 justifying the Magistrate forming the opinion that it was necessary to make a suppression order because of the social consequences to SS if the information was disclosed, namely, the evidence of the psychiatric nurses given on 24 June 1993. In my opinion Ground 2 is not made out.

Ground 3 requires a consideration of s119 of the *Health Act* which reads:

"119. Interpretation

The following principles apply for the purposes of the application, operation and interpretation of this Part:

- (a) The spread of infectious diseases should be prevented or limited without imposing unnecessary restrictions on personal liberty and privacy;
- (b) A person at risk of contracting or being infected with an infectious disease must take all reasonable precautions to avoid contracting or being infected with the disease;
- (c) A person who suspects that he or she has an infectious disease must ascertain—
 - (i) whether he or she is infected; and
 - (ii) what precautions should be taken to prevent others being infected;
- (d) A person with an infectious disease must take necessary measures to ensure that others are not unknowingly placed at risk of becoming infected;
- (e) A person with an infectious disease or at risk of contracting or being infected with an infectious

disease has a right—

(i) to be protected from unlawful discrimination; and [12]

(ii) to have his or her privacy respected; and

(iii) to retrieve information about the medical and social consequences of the disease and any proposed treatment; and

(iv) to have access to available and appropriate treatment—

so long as those rights do not infringe on the well-being of others."

It is said by counsel for the Herald & Weekly Times that at the hearing on 27 July the Magistrate paid no regard to the provisions of that section, in particular sub-s(e) and the closing words of sub-s.(e), and that had she done so she should not have made the order she did in the matter. It is clear from the material before me that there was no debate before the Magistrate on 27 July 1993 concerning the effect of s119 of the Act, and in particular sub-s(e) of that section.

[13] Am I entitled to infer therefore that the provisions of that sub-section were not present in the mind of the Magistrate at the time she made the order in question? The answer to the question posed is to be determined by considering the purpose and effect of the section and the evidence which was before the Magistrate on 27 July. If the conclusion to be arrived at from that material is that no reasonable Magistrate would have made the order, then it is reasonable to infer that the Magistrate's mind was not directed to the matters referred to in sub-s.(c) and, in that respect, the Magistrate fell into error.

In his second reading speech relating to the *Health (General Amendment) Bill*, the Minister for Health said of Part VI of the Act which contains the provision in question:

"Of particular importance are the provisions on infectious diseases, including AIDS. The Bill places a clear responsibility on infected persons and those at risk to behave responsibly. Those who fail to act responsibly may be prosecuted or may be required to be examined, tested, counselled or, in certain circumstances, isolated. At the same time, the civil liberties of infected persons and those at risk are promoted through new anti-discrimination laws and, in the case of AIDS, through provisions requiring that the privacy of persons with human immuno-deficiency virus — HIV — be preserved and that persons tested for HIV receive adequate information about the nature of the condition and its treatment."

See page 828 of *Hansard's* report of the proceedings before the Legislative Council on 21 April 1989.

It is my opinion, based upon the Minister's statement, that it was the intention of the legislature in enacting Part VI of the Act to place a responsibility on those persons infected with infectious diseases, such as HIV and AIDS, to behave responsibly. If such persons do [14] not behave responsibly, they face prosecution and, if necessary, being placed in isolation away from the general community. On any view of the matter, those are very stringent provisions. At the same time, the legislature was at pains to protect the privacy of persons suffering from HIV and AIDS, hence the provisions of s129.

But which provision of the Act presently under consideration is paramount? Is s119 paramount to s129 or is the reverse the situation? In my opinion, the answer to the question posed is to be found in s119 of the Act itself. The opening words of the section make it clear that the principles enunciated in the section apply for the purposes of the application, operation and interpretation of the whole of part VI of the Act. Sub-section (e) provides that a person with an infectious disease has a right to have his or her privacy respected so long as those rights do not infringe on the well being of others. (The emphasis is mine). There could be no clearer expression of Parliament's intention to strip a person suffering from HIV or AIDS of his or her right to privacy if that person fails to behave responsibly and that failure infringes on the well being of others. In my opinion, s119 of the Act is the paramount section of Part VI, and all other sections of Part VI must be read and construed subject to the provisions of that section.

I return then to the facts in the present case. As I stated in my earlier reasons for judgment, when SS came before the court on 27 July, he pleaded guilty to the three charges of loitering in a public place for the [15] purpose of prostitution. The prosecution then tendered in evidence a list of SS's prior convictions. SS had at least 40 prior convictions for soliciting or loitering for the purposes of prostitution dating back to the year 1985. He also had a conviction for rape, a conviction of indecent assault and several convictions for unlawful possession of drugs and theft. A letter from the Chief Medical Officer of the Department for Health tendered in evidence stated,

inter alia, that SS had been the subject of review by the AIDS-HIV Assessment Panel and that SS was a public health risk, since in a disordered mental state, he was likely to practice unsafe sex and share needles.

In the light of that evidence, it would seem to me that the inescapable conclusion one must draw in this case is that in making the order the Magistrate did on 27 July 1993, the Magistrate did not have regard to the concluding words of sub-s(e) of s119 of the Act. Had the Magistrate been mindful of that provision, I consider it is inconceivable that she would have made the suppression order in question.

By his behaviour, SS has demonstrated a clear failure on his part to act responsibly. The suppression of his identity must infringe on the well being of others, those others being the members of the community misguided enough to have unsafe sexual relations with SS or to share needles with him. Whilst it may be said that one should have little sympathy for such persons, I ask rhetorically what of the persons further down the line who might themselves have sexual relations with such persons and themselves become infected? It would seem to me that in the circumstances of this case, SS poses such a risk to **[16]** the well being of others in the community that so long as he persists in behaving as he did on the three occasions, the subject of the loitering charges, he has forfeited his right to privacy.

It was said by counsel for SS that the object of the power provided for in s129 of the Act is not the public interest but the private interests of the HIV affected person and that the public interest was not a paramount consideration in the exercise of the court's discretion. In my opinion, nothing could be further from the truth. Section 119(e) makes it abundantly clear that the paramount consideration in the exercise of the court's discretion is the well being of the community.

It was also said that the class of persons sought to be protected by invoking notions of the public interest was extremely narrow, being those persons who might engage SS's services as a prostitute and that, in any event, there was no real and sensible likelihood that disclosure of SS's identity would eradicate or greatly reduce the risk to such persons. In my opinion, there are answers to each of those propositions. In the first place, what of the innocent persons who may be infected by those persons infected by SS? In the second place, it would seem to me that if the disclosure of SS's identity has the potential to save a mere handful of persons from infection, then it is justified.

My conclusion therefore is that the Magistrate erred in making the suppression order she did on 27 July 1993 and I now quash that order. It is equally clear to my mind that the Magistrate who made the suppression order on 24 June 1993 also failed **[17]** to have regard to the provisions of s119 of the Act, and the suppression order made that day is also quashed. I am not critical of either Magistrate in that regard. The material before me demonstrates quite clearly that neither Magistrate's attention was drawn to the section. As to the order of the 9 December 1993, I content myself by saying that, in my view, the Magistrate was then *functus officio* and properly dismissed the application made to her that day by the Herald & Weekly Times.

Solicitors for the plaintiff: Corrs Chambers Westgarth. Solicitor for the third defendant: Legal Aid Commission.
