41/11; [2011] VSC 593

SUPREME COURT OF VICTORIA

DPP (CTH) v MAGISTRATES' COURT of VICTORIA

T Forrest J

17, 22 November 2011

SUPPRESSION ORDERS – APPLICATION FOR SUPPRESSION ORDER – COMMITTAL PROCEEDINGS – WITNESSES ALREADY AT RISK – FACTS IN THE PUBLIC DOMAIN INDEPENDENTLY OF THE COMMITTAL PROCEEDINGS – FINDING BY MAGISTRATE THAT THERE WAS NO NEED TO PROHIBIT PUBLICATION OF THE EVIDENCE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989 (VIC), S126.

Prior to the commencement of committal proceedings, a suppression was made by a Magistrate prohibiting publication of the whole of the committal proceedings or any information derived from that proceeding. When the committal proceedings commenced, an application was made to the presiding Magistrate to vacate the suppression order. The application was granted and the media was thereby free to publish the evidence of the committal in full. Upon an application to quash and to continue the suppression order—

HELD: Appeal refused.

1. Section 126(1) of the *Magistrates' Court Act* 1989 ('Act') makes it clear that a Magistrate can set aside a suppression order if he or she was of the opinion that the order was no longer necessary to achieve the purpose originally contemplated.

2. Section 126(1)(c) of the Act involves a consideration of both the necessity to make a suppression order and whether in fact a person's physical safety is endangered.

3. The suppression order sought by the prosecution sought to prohibit publication of evidence and information derived from the committal proceeding about a fact that the main witness had been in the public domain for at least 18 months. Suppression orders of this type are creatures of statute with defined capacities. They enable a court to close civil or criminal proceedings in various ways to the public. The power of the Court to suppress the reporting of facts is confined to reportage of facts from those proceedings. If the facts are in the public domain independently of those proceedings, then the Court has no power (under s126) to prohibit further publication of those facts.

4. Accordingly, the finding by the Magistrate that the main witness was already at extreme risk and that further disclosure of her activities did not escalate that risk was reasonably open and it was reasonably open to the Magistrate to vacate the suppression order previously made.

T FORREST J:

1. Paul Dale was charged with twenty four offences under the Australian Crime Commission Act 2002 (Cth). On 11 November 2011, he was committed for trial on 13 of those charges.

2. On 1 March 2011, Magistrate Capell made a suppression order prohibiting publication of the whole of the committal proceeding or any information derived from that proceeding. On 24 May 2011, Magistrate Bakos extended the original order to operate until the end of the committal proceedings ("the Bakos order").

3. These orders were made pursuant to s126(1)(c) and s126(2) of the *Magistrates' Court Act* 1989 (Vic) ("the Act"). The committal commenced before Magistrate Reardon on 7 November 2011. On that day his Honour heard an application by The Herald and Weekly Times Pty Ltd ("the Herald and Weekly Times") and the Australian Broadcasting Commission ("ABC") to vacate the Bakos order. He acceded to that application. The prosecution, who had opposed the vacation of the Bakos order, indicated a desire to seek judicial review of his Honour's decision. Magistrate Reardon, in order to preserve the status quo, made a fresh suppression order prohibiting publication of the whole of the committal proceeding until further order ("the Reardon order").

4. On 8 November 2011, an originating motion was listed before me seeking relief in the

nature of *certiorari* and mandamus of Magistrate Reardon's decision to vacate the Bakos order. I declined to hear argument seeking such relief in the absence of a transcript of the Magistrate's reasons and adjourned the hearing until that transcript was available.

5. The committal proceeded on until 10 November 2011. Publication of the proceedings was prohibited pursuant to the Reardon order. At the conclusion of the committal a further application was made by the Herald and Weekly Times and the ABC to have the Reardon order vacated. The prosecution[1] opposed the application[2] and proposed a less restrictive variation of the suppression order, namely to only prohibit publication of any information that would reveal Nicola Gobbo's role in the investigation and/or any information that would identify or tend to identify George Williams and Thomas Ivanovic.

6. Magistrate Reardon vacated his earlier order. The media, therefore, were free to publish the evidence from the committal in full. Again the prosecution indicated a desire to seek judicial review of this decision and it is this review that comes before me by way of originating motion. Again his Honour made an interim order preserving the status quo until this proceeding is complete.

7. This slightly turgid history is necessary in order to understand the ambit of the proceedings before me. The plaintiff is the Commonwealth Director of Public Prosecutions. I have granted leave to Mr Lewenberg, who acts for Nicola Gobbo, to appear. He supports the plaintiff's arguments. I have also granted leave to Mr Cashen, who acts for the Herald and Weekly Times and ABC, to appear as a contravenor. The defendant does not seek to be heard.

8. By way of originating motion the plaintiff seeks two types of relief:

> (a) an order in the nature of *certiorari* bringing up and quashing the decision of his Honour Magistrate Reardon on 10.11.11 vacating the suppression order made by him on 7.11.11 in the committal proceeding of Paul Dale, which order prohibited publication of a report of the whole or any part of the committal proceedings or any information derived from those proceedings until further order.
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> (b) an order in the nature of mandamus directing Magistrate Reardon to vary the suppression order he made on 7.11.11 so as to prohibit publication of any information which would reveal Nicola Gobbo's role in the investigation of the offences the subject of the committal proceeding and also to prohibit publication of any information which would identify or tend to identify George Williams and Tommy Ivanovic as witnesses in respect of that committal proceeding.

9. Thus the plaintiff seeks that the vacation of the Reardon order be quashed and that Magistrate Reardon be directed to vary the Reardon order in line with its proposed order, which I have outlined above at paragraph 5.

10. My jurisdiction in this type of proceeding is supervisory. It is limited to ensuring that his Honour did not exceed his jurisdiction and that he acted in accordance with law. I am not concerned with whether I would reach the same decision as his Honour, nor do I sit as an appellate court conducting a general review of the order.[3]

11. In substance, the plaintiff argues that the Magistrate exceeded his jurisdiction and/or erred in law by:

> (a) applying the wrong test. Instead of applying the statutory test provided by s126(1)(c) of the Act, his Honour applied a different and less restrictive test; and
>
> (b) reaching material conclusions that were not reasonably open on the evidence before him.

The Wrong Test?

12. Relevantly, s126(1)(c) of the Act reads:

> (1) The Court may make an order under this section if in its opinion it is necessary to do so in order not to—
> ...
> (c) endanger the physical safety of any person.

Thus the section gave Magistrate Reardon a discretion to make a suppression order if he formed

the opinion that it was necessary to do so to avoid endangering the physical safety of Ms Gobbo and/or Mr Ivanovic and/or Mr Williams.

Section 126(5) of the Act contemplates the Magistrates' Court setting aside an existing order made under s 126(1)(c). It is clear that a magistrate could set aside an order made under s126(1)(c) if he or she was of the opinion that the order was no longer necessary to achieve the purpose originally contemplated.

13. A transcript of Magistrate Reardon's reasons of 10 November 2011 for vacating the order has been tendered by the plaintiff. His Honour referred in those reasons back to his original vacation order on 7 November 2011 and a copy of the transcript of those reasons has also been tendered. Insofar as Nicola Gobbo is concerned, his Honour expressed the view that any danger to which she was exposed was a pre-existing danger and that events at the committal did not escalate that danger:

> I have no doubt that she is potentially at extreme risk but I don't see how it's added to by these proceedings...

14. Mr Beale, who appeared for the plaintiff, supported by Mr Lewenberg, submitted that in assessing the application of s126(1)(c) as it relates to Ms Gobbo, his Honour misdirected himself. Counsel argued that the statutory test simply requires of a magistrate that he form an opinion as to whether a suppression order is necessary so as to avoid endangering the physical safety of a person. The argument proceeded that by formulating a test that involved a consideration of whether risk to a witness was increased (or significantly increased) his Honour departed from the statutory formula.

15. I am not satisfied that Magistrate Reardon did misdirect himself in the way the plaintiff contends. Section 126(1)(c) involves a consideration of both the necessity to make an order and whether in fact a person's physical safety is endangered. I consider that when his Honour examined the question of an increase in risk to Ms Gobbo he was doing no more than considering the necessity of making an order. I consider that a fair reading of his Honour's *ex tempore* judgment demonstrates the following process of reasoning:

> (a) Ms Gobbo is in significant danger if there is no suppression order;
>
> (b) It is not necessary to make the order because that level of danger is not advanced in the absence of such an order.

I consider that this process of reasoning is logically sound and consistent with a correct application of s126(1)(c). I note that this approach was taken by Teague J in *R v Pomeroy*[4] when considering the identically worded s19(c) of the *Supreme Court Act* 1986 (Vic). His Honour in that case considered the necessity of a suppression order in circumstances where a person was in high pre-existing danger, and it was argued publication of a certain fact may elevate that danger. At paragraph 13 his Honour considered whether there was a "clear risk of extra danger." Magistrate Reardon referred to *Pomeroy's case* in his reasons.

16. Insofar as Messrs Ivanovic and Williams are concerned, I consider that his Honour applied the correct test. He considered that "the necessity tests..(have not)...been met at all in relation to those...witnesses." This is obviously a reference to s126(1) and all his Honour was saying was that he was not satisfied that it was necessary to make the order sought. I can discern no error in this approach.

17. In reply to Mr Cashen's very able submissions, Mr Beale pointed to a passage in the Magistrate's reasons for vacation:

> ...the argument is does the publication of these matters increase that situation (extreme risk) and that's the problem I have...

Mr Beale submitted that even accepting the *Pomeroy* approach his Honour posed the wrong question. The word 'does' ought be replaced with the word 'could'.

18. As I have observed earlier, these were *ex tempore* reasons. They were delivered by a busy and experienced magistrate at the end of a difficult committal. I consider it unhelpful to engage in a microscopic examination of the language employed by his Honour as if his reasons were a statute. I am comfortably satisfied that his Honour applied the correct test. It follows that I am not satisfied on this issue that the plaintiff has demonstrated that his Honour exceeded his jurisdiction or failed to observe the law.

Conclusions not open on the evidence?

19. The plaintiff submits that it was not reasonably open to his Honour to conclude that it was not necessary for the safety of Nicola Gobbo, George Williams and/or Tommy Ivanovic to vary the order in the manner suggested by the prosecution.

20. In simpler terms the plaintiff submitted that on the evidence his Honour could not reasonably have vacated the existing suppression order unless he replaced it with the less restrictive order it proposed.[5] Almost all of Mr Beale's submissions on this aspect dealt with Ms Gobbo's position.

21. The evidence available to his Honour established beyond doubt that Ms Gobbo is currently at a very significant risk of physical harm. This risk predates the committal and stems from publicity in 2010 and 2011 about her participating in a covertly recorded conversation with Paul Dale. It has been widely publicised that Ms Gobbo wore a wire, at the request of police officers, during that conversation.

22. The suppression order sought by the prosecution in relation to Ms Gobbo seeks to prohibit publication of evidence and information derived from the committal proceeding about this very fact – a fact that has been in the public domain for at least a year and a half already. Mr Beale submitted both to his Honour and to me that repetition of that fact will inform some and remind others of Ms Gobbo's activities and thus escalate the risk. The flaw in this reasoning is, I consider, reasonably clear. Suppression orders of this type are creatures of statute with defined capacities. They enable a court to close civil or criminal proceedings in various ways to the public. The power of the Court to suppress the reporting of facts is confined to reportage of facts from those proceedings. If the facts are in the public domain independently of those proceedings, then the Court has no power (under s126) to prohibit further publication of those facts.

23. The last time the fact of Ms Gobbo's activities was reported, independently of the committal proceedings, was on 17 September 2011. Those activities were widely reported in May 2010, after Ms Gobbo issued a writ in this Court claiming damages from the State Government and others. Mr Beale properly informed me that a Google search discloses many articles which contain reference to the relevant activities. Even if a suppression order were made in the terms sought by the plaintiff there would be nothing to prevent the press regurgitating, if they wished, the stories of May 2010 through to September 2011 which were based on information derived from Ms Gobbo's publicly issued writ and not from the committal proceedings. I consider that it was reasonably open to his Honour to find that Ms Gobbo was already at "extreme risk" and that further disclosure of her activities did not escalate that risk.

24. In an affidavit tendered before Magistrate Reardon on 7 November 2011, Det Snr Sgt Buick expressed the belief that George Williams is presently "at threat" for supporting his son Carl Williams and for providing police with a statement and agreeing to give prosecution evidence (presumably in the current prosecution of Paul Dale). Mr Buick also expressed the belief that Tommy Ivanovic was registered as a police informer by Mr Dale and that he has been incarcerated in protection for a lengthy period because he is believed by other prisoners to be an informer. Mr Buick contended that by agreeing to be witnesses for the prosecution this exacerbates the underlying risk to these men.

25. No argument was addressed to me by Mr Beale as to why it was not reasonably open to his Honour to conclude that Messrs Ivanovic and Williams ought not be the subject of the proposed suppression order. His Honour's *ex tempore* remarks are reasonably cryptic in this regard.

26. On 7 November 2011 his Honour stated that he could discern no increase in risk for all three witnesses in the context of considering the *Pomeroy* approach set out earlier. His Honour

remarked that "material in these particular cases has been floating around with lawyers, police, courts, jails for a number of years." His Honour remarked that it was fanciful to suggest that what was sought to be suppressed was not already public. On 10 November 2011 his Honour referred back to his earlier reasons and remarked that George Williams gave evidence publicly for the prosecution in the trial of Matthew Johnson and that Tommy Ivanovic had already been listed to appear as a witness in other proceedings. Ultimately, his Honour was of the opinion in relation to all three witnesses that their activities "were all so public" that the "necessity test" could not be met.

27. I consider that it was open to his Honour to make these findings, and from them it was reasonably open for his Honour to vacate the suppression order of 7 November 2011.

28. It follows that I decline to provide the relief/remedy sought in the plaintiff's originating motion.

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[1] The Commonwealth Director of Public Prosecutions.
[2] They were joined in this opposition by the Australian Crime Commission and Nicola Gobbo.
[3] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[4] [2002] VSC 178 (20 May 2002) ("*Pomeroy*").
[5] See paragraph 5 above.

APPEARANCES: For the plaintiff DPP (Cth): Mr C Beale, counsel. Office of Commonwealth Director of Public Prosecutions. For Ms Nicola Gobbo: Mr A Lewenberg, counsel. Lewenberg & Lewenberg, solicitors.
