05/10; [2010] VSC 30

SUPREME COURT OF VICTORIA

DPP v RINTOULL & SABATINO

Curtain J

2, 17 February 2010

PRACTICE AND PROCEDURE - SUPPRESSION ORDER - APPLICATION TO VACATE - RELEASE OF VISUAL IMAGES OF PRISONERS - RISK OF PRISONERS IN PROTECTIVE CUSTODY - PRINCIPLE OF OPEN JUSTICE - WHEN SUPPRESSION ORDER CAN BE MADE - TRIAL CONCLUDED - DEFENDANT'S IMAGES PREVIOUSLY PUBLISHED - SUCH IMAGES ALREADY IN THE PUBLIC DOMAIN - NO EVIDENCE THAT PUBLICATION OF THE DEFENDANTS' PHOTOGRAPHS WILL POSE A RISK TO THE DEFENDANTS' FAMILY - WHETHER SUPPRESSION ORDER SHOULD BE VACATED: *SUPREME COURT ACT* 1986, S19(c).

Prior to the imposition of sentences of imprisonment on R. and S., a suppression order prohibiting the publication of any photographs or visual representations of R. and S. was made. After sentencing, an application was made on behalf of the media for the vacation of the suppression order and the release of photographs depicting each of the defendants. It was said on the application that internet searches and a TV program revealed a number of articles pertaining to the defendants and included their sketched images and film of them entering Court. The defendant R. argued that he had been threatened by other prisoners and was fearful for his safety. S. stated that he had been held in protective custody for some time and portrayal by his media that his crime was racially motivated together with the publication of his portrait would impact on his safety.

HELD: Application granted. Suppression order vacated and the relevant photographic exhibits released.

1. The principle of open justice is fundamental to the administration of justice, but it is not absolute. Sections 18 and 19 of the *Supreme Court Act* 1986 permit a derogation from that principle in the circumstances there described. An order prohibiting an aspect of the Court's process is only made in wholly exceptional cases. The Courts have made orders where it is necessary to protect the identity of a witness or an accused, as commonly occurs when other proceedings are pending, so that the administration of justice is not prejudiced. Such orders, although not expressed as such, are for a limited period, that is, so long as is necessary to ensure that the administration of justice is served. Legislation also exists which protects the identity of victims of certain offences and, as a consequence, sometimes the identity of the accused is not published because to do so would identify the victim.

2. Whilst there will always be some risks to the safety of each of the defendants, not only because of the nature of their crimes but also because of their age, the Courts have recognised and proceed on the basis that prison authorities are capable of protecting persons whose safety is at risk; notorious criminals, those who have committed horrendous crimes, sex offenders, youthful offenders, prison informers and former police officers to name but a few. The identity of persons falling within these categories is not suppressed by Court orders, with the possible exception of witnesses held in custody, although there may be much about their offending or their personal circumstances which would excite interest and thereby render them vulnerable in the prison population. There is nothing about the circumstances of the defendants which indicates that their position is any different from others held in protection.

3. If release and publication of the photographs will lead to persons forming an opinion that the killing was racially motivated, so be it. People are entitled to their views, even if formed on a basis different from the material placed before the sentencing judge. Members of the public are not bound by the sentencing remarks and, in a free society, they are free to form their own view of the matters.

4. The defendants' images have been previously published and films of both of them entering Court have been broadcast; therefore images which render them recognisable are already in the public domain. The sketched images are not particularly lifelike representations of either of the defendants, and the photographs taken at the time before the killing are no longer recent photographs and, indeed, as time goes by, the photographs will no longer serve to identify them. In any event, R. has changed his appearance considerably since 2007 and since appearing in Court for sentence in December 2009. In these circumstances, there is little utility in an order prohibiting that which has already been published, and there being no more recent photographs, the effect of vacating the order will not necessarily serve to identify them as they now appear.

5. There is no evidence that by reason of the publication of either of the defendants' photographs or the photograph of the graffiti will pose a risk to the family of either of the defendants. Indeed, one would come to the view that the photographs would pose no greater risk to the family of the defendants and not serve to further identify them as would the publication of the family name.

6. Accordingly, the test of necessity has not been reached in this case and that wholly exceptional circumstances do not exist which warrant the continuation of the suppression order.

CURTAIN J:

1. On 18 December 2009, Clinton Rintoull was sentenced in respect of one count of murder and one count of intentionally damaging property, and Dylan Sabatino was sentenced in respect of one count of manslaughter and one count of intentionally damaging property. Immediately prior to the sentences being imposed, counsel for each of the defendants sought a suppression order in relation to the visual images of their respective clients and of certain photographs relating to their crimes.

2. Mr Georgiou, who appeared on behalf of Mr Rintoull, submitted that his client was then in protective custody and that there were concerns for his physical safety and retribution from other prisoners, as the Crown had alleged that the killing was racially motivated. Mr Johns, on behalf of Mr Sabatino, made a similar submission, but also relied upon the age of his client (21) and the risk to the safety of his client's own family. The Director of Public Prosecutions, represented by Mr Schwartz, opposed both applications. No representative from the media was present at the time the application was made, although similar applications had been made at the plea hearing.

3. Before sentencing the defendants, I articulated an order prohibiting the publication of any sketched image of the defendants and prohibiting the publication of any photographs relating to the crime. Later that day, the order was formally authenticated in the following terms:

> "Subject to further order, the publication of any photographs or visual representation of either of the accused is prohibited."

The order was made pursuant to ss18 and 19(c) of the *Supreme Court Act*.

4. Mr Quill, who, with leave, appears on behalf of the Herald and Weekly Times, having initially sought only a variation of that order so as to permit publication of previously published sketched images of the defendants, after further consideration now seeks the vacation of it and, if successful, also seeks the release of photographs depicting each of the defendants and certain graffiti.

5. Mr Silbert SC, who now appears on behalf of the Director of Public Prosecutions, does not oppose the application, and Mr Johns, on behalf of Mr Sabatino, and Ms Sopworth on behalf of Mr Rintoull, each oppose it.

6. An affidavit sworn by Clinton Rintoull dated 1 February 2010 was tendered on his behalf. In it, he attests to having been threatened by four or five males of African appearance while in mainstream prison and subsequently being held in management and protection units and, while in protection, being recognised by a prisoner of African origin as the person who killed Mr Gony and other prisoners intervening to warn that person away from him. Mr Rintoull expressed himself as fearful for his safety and not satisfied that the prison authorities can guarantee it. He is aware that he can sign up individuals or a class of people to ensure his separation from them, but he states that this may result in his being held in a 23 hour lockdown. Mr Rintoull attested that he has changed his appearance, and this, indeed, was confirmed by his presentation before the Court.

7. An affidavit sworn by solicitor Elizabeth O'Dea was filed on behalf of Mr Sabatino. She attests to Mr Sabatino having been held in protection since April 2008. He has expressed himself as fearful for his safety should his portrait be published, because he is known to fellow inmates only by his first name and has not disclosed the nature of his crimes. Mr Sabatino is held in protection with persons of African descent and also fears violence from them in the yard, and that the portrayal by the media that his crime was racially motivated, together with the publication of his portrait, would impact upon his safety.

8. An affidavit sworn by Mr Quill was filed on behalf of the Herald & Weekly Times Pty Ltd.

In it, he deposed to his searches of the internet, which revealed a number of articles pertaining to the defendants which included their sketched images, and further, that the television program, "Lateline", had also broadcast a program which included the defendants' sketched images and film of the defendants entering Court, all published before the orders were made.

9. Mr Quill relied upon the following submissions in support of his application:
(1) Section 19 of the *Supreme Court Act* permits an order to be made only if it is necessary to do so and that the necessity test places the bar high and will be reached only in wholly exceptional cases. This is not such a case.
(2) That there is no utility in the order as images of each of the defendants have previously been published.
(3) Protective custody adequately addresses the safety concerns of each of the defendants. Their respective affidavits effectively attest to this. They are at no greater risk than sex offenders and informers who are managed within the prison system without the benefit of suppression orders.

10. Mr Silbert SC submitted, relying upon the authority of in *Re applications by Chief Commissioner of Police (Vic)* for leave to appeal[1] that there was no basis for the continuation of the suppression order, the pleas having been made and sentences having been imposed, the administration of justice had been served and the orders have no further utility. Indeed, Mr Silbert SC queried whether the Court had jurisdiction in these circumstances to make a continuing order.

11. Mr Johns, on behalf of Mr Sabatino, submitted –
(1) There may well be circumstances where the courts would make an extended order pursuant to s19(c) of the *Supreme Court Act* and that so much was contemplated in *Re applications by Chief Commissioner of Police (Vic) for leave to appeal*. He conceded that while it was difficult to make a finite order and it would be "odd" to make an order in perpetuity, the matter may be best addressed with liberty to apply when the danger to safety is not so apparent either by reason of changed appearance or diminution of memory.
(2) Although in protection, Mr Sabatino is nonetheless required to mix with the mainstream for the purpose of prison visits, although Mr Johns conceded that such visits are held under supervision.
(3) Publication of visual images would place Mr Sabatino at greater risk, in particular the photograph of Mr Sabatino standing in front of innocuous graffiti and the photograph of the offensive graffiti will lead the viewer to an inference that he is celebrating the offensive graffiti, which is likely to be inflammatory and unfairly represents the basis upon which he was sentenced. On that basis, the photographs elevate the level of danger beyond that posed by the sketched images.
(4) The publication of the images at this time, after sentencing, will inflame public sentiment.
(5) The only purpose in publishing the photographs is to link both of the defendants to the offensive graffiti depicted in the one photograph.

12. Ms Sopworth, on behalf of Mr Rintoull, submitted –
(1) Section 19(c) of the *Supreme Court Act* is not limited in the manner contended by the Crown; the issue is whether it is necessary to continue the order and not the timing of it.
(2) That Mr Rintoull is a young man and in a vulnerable position, serving his sentence in protection, and the fact he remains in protection demonstrates the ongoing risk to his personal safety.
(3) Publication of the sketched images, photographs of Mr Rintoull and the photograph of the graffiti will increase the risk to his safety and renew publicity, hostility and the inflammation of emotions, particularly at a time when there is public debate about racially motivated offences.
(4) Publication will therefore give him greater notoriety.
(5) The sketched images are presently only available on the internet, which is not accessible to prisoners, whereas prisoners do have access to the newspapers and are therefore able to retain the published photographs of the defendants.
(6) Although Mr Rintoull's appearance is now different from how he is drawn in the sketches, there is still potential for him to be recognised by the photographs.

13. The principle of open justice is fundamental to the administration of justice, but it is not absolute. Sections 18 and 19 of the *Supreme Court Act* permit a derogation from that principle in the circumstances there described. An order prohibiting an aspect of the Court's process is only made in wholly exceptional cases.[2] The Courts have made orders where it is necessary to protect the identity of a witness[3] or an accused,[4] as commonly occurs when other proceedings are pending, so that the administration of justice is not prejudiced. Such orders, although not expressed as such, are for a limited period, that is, so long as is necessary to ensure that the administration of justice is served. Legislation also exists which protects the identity of victims of certain offences and, as a consequence, sometimes the identity of the accused is not published because to do so would identify the victim.[5][6]

14. In this case, it is sought not to suppress the identity of each of the defendants, but the photographs taken on 26 September 2007 and the sketched images, because, it is submitted the photographs in particular, will serve to further identify them and associate them with the commission of a killing which the Crown allege was racially motivated. Mr Johns submitted, in essence, that this would not only endanger his client, but unfairly place him at risk because it is inconsistent with the findings upon sentence. No doubt, the same submission could be made on behalf of Mr Rintoull.

15. I accept that Mr Rintoull and Mr Sabatino both hold fears for their safety; indeed, the issue of their safety has been recognised by the authorities because they are being held in protection. While in protection, there has been one potential incident in respect of Mr Rintoull, which was averted by other inmates. There is no other evidence that being held in protective custody will not serve to in fact protect both defendants.

16. There will always be some risks to the safety of each of the defendants, not only because of the nature of their crimes but also because of their age, and these were the initial concerns at the time of sentencing. The Courts have recognised and proceed on the basis that prison authorities are capable of protecting persons whose safety is at risk,[7] notorious criminals, those who have committed horrendous crimes, sex offenders, youthful offenders, prison informers and former police officers to name but a few. The identity of persons falling within these categories are not suppressed by Court orders, with the possible exception of witnesses held in custody, although there may be much about their offending or their personal circumstances which would excite interest and thereby render them vulnerable in the prison population. There is nothing about the circumstances of the defendant which indicates that their position is any different from others held in protection.

17. In this case, there is no evidence that the defendants are at any heightened risk to their safety over and above the risk which has been recognised by the authorities, such that they have been held in protective custody. Nor has there been any evidence that the defendants' safety is at further risk, despite the fact that their crimes and the sentences imposed have received considerable media attention.

18. If release and publication of the photographs will lead to persons forming an opinion that the killing was racially motivated, so be it. People are entitled to their views, even if formed on a basis different from the material placed before the sentencing judge. Members of the public are not bound by the sentencing remarks and, in a free society, they are free to form their own view of the matters.

19. As to the submission that publication of such photographs may add to the current controversy concerning racially motivated crimes, that is speculative and it is not a reason, *per se*, to prohibit their publication. No doubt, the press will use the photographs responsibly and as they wish, but it is no part of the purport of suppression orders to stifle debate. If the publication of the photographs of the graffiti and the publication of the photographs of each of the defendants standing before it does contribute to the controversy surrounding racially motivated crimes, that, of itself, cannot be said to endanger the safety of either of the defendants, even if it be that they become notorious by reason of it, there being no evidence that the prison authorities cannot protect the defendants in such circumstances.

20. The defendants' images have been previously published and films of both of them entering Court have been broadcast, therefore images which render them recognisable are already in the public domain. The sketched images are not particularly lifelike representations of either of the defendants, and the photographs taken at the time before the killing are no longer recent photographs and, indeed, as time goes by, the photographs will no longer serve to identify them. In any event, Mr Rintoull has changed his appearance considerably since 2007 and since appearing in Court for sentence in December 2009. In these circumstances, there is little utility in an order prohibiting that which has already been published, and there being no more recent photographs, the effect of vacating the order will not necessarily serve to identify them as they now appear.

21. There is no evidence that by reason of the publication of either of the defendants' photographs or the photograph of the graffiti will pose a risk to the family of either of the defendants,

as was initially submitted on Mr Sabatino's behalf. Indeed, one would come to the view that the photographs would pose no greater risk to the family of the defendants and not serve to further identify them as would the publication of the family name.

22. I am satisfied for these reasons that the test of necessity has not been reached in this case and that wholly exceptional circumstances do not exist which warrant the continuation of the suppression order.

23. As to the Crown's submission; in *Re applications by Chief Commissioner of Police (Vic)* for leave to appeal, the Court was concerned with suppression orders made pursuant to s19(b) of the *Supreme Court Act* where such an order is necessary so as not to prejudice the administration of justice. In that case, it was sought to suppress the identity of undercover operatives and police methodology known as the Canadian Cold Case scenario. The Court stated that where orders for suppression are authorised only by statute (which is the case here), the provisions ought ordinarily to be strictly construed and utilised only when clearly necessary. In particular, the Court said a judge must be more cautious, therefore, when considering the exercise of power to preclude publication which is not founded on the need to avoid prejudicing the administration of justice (which is the case here) and that particular care must be taken not to deny the general principle of open trial. The Court in that case, while acknowledging that there may be circumstances where a limited order for non-publication may be made to protect persons at risk, held that there was no basis for making orders to suppress indefinitely the matters encompassed by the order.

24. Applying that *dicta* to this case, and given my finding that the circumstances before the Court are not wholly exceptional, it cannot be said that the suppression orders are clearly necessary. When one considers also that it is not feasible to impose an order for a limited period, it being impossible to say when the risk of endangerment will pass, and the undesirability and ineffectiveness of such open-ended orders and the consequent erosion to the principle of open justice that such orders represent, it is apparent, proceeding cautiously and construing the statute strictly, that such orders in this case should not be made. If the case were one where the test of necessity had been met and it were possible to fix a period for operation of the order, then it would appear, based on the authority of the *Re applications by Chief Commissioner of Police (Vic) for leave to appeal case*, that there is jurisdiction to make such an order if a trial is contemplated, but query the applicability of circumstances where a guilty plea has been entered and sentenced imposed;[8] without the benefit of more complete submissions, I do not propose to further decide the matter.

25. Accordingly, I am satisfied that it is appropriate to vacate the suppression order made 18 December 2009 and as to the issue of the release of the exhibited photographs; the photographs are in fact Crown exhibits and, in the normal course of events, they would be, by now, returned to the Crown. Mr Silbert SC has submitted that the Crown does not propose to grant access to the photographs, although it does not oppose my doing so. In those circumstances, it being a matter of the Court's discretion, consistently with the principles of open justice, I propose to release the relevant photographic exhibits.

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[1] [2004] VSCA 3.
[2] *R v Robert Scott Pommeroy and The Herald and Weekly Times Pty Ltd* [2002] VSC 178.
[3] *R v Wayne Geoffrey Strawhorn No. 2* [2006] VSC 433 and *R v Wally White* [2007] VSC 471.
[4] *Mr C* (1993) 67 A Crim R 562.
[5] Section 19(e) and s19(f) of the *Supreme Court Act*.
[6] See also s534(1)(a)(ii) *Children, Youth and Families Act*, which prohibits publication of particulars leading to the identification of a child.
[7] *The Herald and Weekly Times & Anor v Jones* (Unreported 25/3/92, Nathan J).
[8] *R v Wally White*, Whelan J held that a broad suppression order protecting the identity of witnesses in custody could not be maintained after verdict, although he contemplated that circumstances might exist which would justify a suppression order if the administration of justice warranted it.

APPEARANCES: For the DPP: Mr Gavin Silbert QC, counsel. Office of Public Prosecutions. For the accused Rintoull: Ms Helen Spowart, counsel. Victoria Legal Aid. For the accused Sabatino: Mr Scott Johns, counsel. Patrick W Dwyer, Barrister & Solicitor.
