30/88

SUPREME COURT OF VICTORIA

JB and EB v THE DIRECTOR GENERAL of COMMUNITY WELFARE SERVICES and ORS

McGarvie J

16, 22 February 1988

PROCEDURE – CHILDREN'S COURT – IRRECONCILABLE DIFFERENCE APPLICATION – CONFIDENTIAL PRE-SENTENCE REPORTS OBTAINED – ALLEGATIONS IN REPORTS AGAINST PARENTS – ALLEGATIONS NOT DISCLOSED TO PARENTS – YOUNG PERSON ADMITTED TO CARE – WHETHER COURT'S DISCRETION PROPERLY EXERCISED – WHETHER NON-DISCLOSURE BREACHED RULES OF NATURAL JUSTICE: *CHILDREN'S COURT ACT* 1973, SS4B, 18, 20(3)(b), 25(2).

When dealing with an irreconcilable application by a young person ("D.B."), a Children's Court magistrate was provided with four written reports, two from a Doctor at the Children's Court Clinic and two from Social Workers. These reports contained a number of serious allegations and items of information which, if true, could have cast real doubt on D.B.'s parents as being suitable parents. However, the parents were not warned of the allegations and information. Subsequently, D.B. was admitted to the care of the Department of Community Welfare Services. Upon application to set aside the order—

HELD: Application granted. Admission order quashed.

1. The principles of natural justice require that justice be done openly and a decision given only on evidence that is made known to all parties. However, in rare and exceptional circumstances, a court may exercise its discretion not to disclose information contained in a report.
***Official Solicitor v K.* (1965) AC 201, applied.**

2. In the present case, the reports contained allegations against the parents in respect of which they could reasonably want to be heard. Further, there was no warrant for suggesting that disclosure of the allegations would cause substantial harm to D.B. Accordingly, no exceptional circumstances existed to justify the non-disclosure of the allegations, the magistrate failed to comply with the principles of natural justice and the order admitting D.B. to care was invalidly made.

McGARVIE J: *[After setting out the facts of the case, provisions of relevant statutes and matters not calling for report, His Honour continued]* ... **[37]** It is common ground that the four reports which the magistrate had read were never shown to, nor their contents read or conveyed to, Mr and Mrs B. during the hearings. I deal separately with the certificate which was filed after they left on 26 September. **[38]** While there has been strong debate before me whether the reports should have been disclosed to the parents, it is accepted that the practice in the Children's Court is on occasions not to disclose reports to parents. What has to be decided in this case as a matter of law is whether the practice followed in this case was valid.

Unlike some other cases which come before the Children's Court, this case is one of an application by Damian against his parents in which he sought and obtained an order which directly affected their rights. It took from them their rights of guardianship of Damian and his property and rendered them liable to have an order made against them to pay for his maintenance.

In *Commissioner of Police v Tanos* [1958] HCA 6; (1958) 98 CLR 383 at 395-6; [1958] ALR (CN) 1057, Dixon CJ and Webb J stated this basic principle:

> "....it is a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard. ... The general principle has been restated in this Court with a citation of authority in *Delta Properties Pty Ltd v Brisbane City Council* [1955] HCA 51; (1955) 95 CLR 11 at p18; [1955] ALR 869. It **[39]** is hardly necessary to add that its application to proceedings in the established courts is a matter of course. But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must appear from express words of plain intendment."

The other member of the court, Taylor J, agreed with those reasons.

It is obvious that the parents here would not have had an adequate opportunity of being heard, in the sense of answering the case put against them and putting their own case, if they were not aware of allegations and material put against them which were contained in the reports. Likewise, they would not have had adequate notice of the case against them.

The first report of Dr Glaser was before the magistrate on 1 August and he read it before or during the hearing. He told Mr and Mrs B. that he had received the report and that Dr Glaser required further time to consider a number of matters and to conduct further interviews. Before or during the hearing on 5 September the magistrate read a second report from Dr Glaser and a report dated 3 September **[40]** by Kati Krsevan, social worker of Outer Eastern Suburbs Regional Centre, Community Services Victoria. This report from Dr Glaser had attached to it a copy, which Mr and Mrs B. had given him, of a detailed letter dated 23 July 1986 which they had sent to the Ombudsman, giving an account of events, making comments and criticisms of what had occurred and requesting assistance from the Ombudsman.

Mr and Mrs B. obtained copies of Dr Glaser's reports under the *Freedom of Information Act* 1985 after the Children's Court had made its order on 26 September. A copy of Kati Krsevan's report was contained in the file of the Children's Court when produced before me on subpoena. On 26 September a report of John Respini dated 24 September was tendered to the court and read by the magistrate. It was exhibited to Mr Respini's affidavit sworn on 9 June 1987 after the commencement of these proceedings.

It would do no good for me to recite what is in the reports. I infer that the reports were prepared on the assumption that they would be shown only to the magistrate. The report of John Respini is endorsed at the top "This is a confidential report to the Children's Court. Release of the information contained within this report is considered adverse to the interests of the child". Kati Krsevan's report bears the same endorsement except for the word "considered".

[41] The reports comply with s25(1) of the *Children's Court Act*. They are reports which set out an account of the results of investigation into the things mentioned in the section. They are reports of the kind which the magistrate called for and which he was obliged to consider. There can be no valid criticism of the magistrate for calling for the reports or of those who prepared them.

The case presented in the Children's Court in support of Damian's application was a relatively straightforward one. Damian's evidence on 11 July gave a brief account of arguments and disputes with his parents regarding his friends, his church and religious questions. It recounted that he had run away from home several times and gave details. It mentioned that he did not get on with his two younger brothers. The highest point of his allegations against his parents was the statement:

> "I am scared of my parents, especially my mother, and I do not want to return home. There are many arguments between my parents and the children. My mother has a violent temper which can last for days after an argument. I would like to live with another family."

During his father's questioning of him in court after he gave that evidence and during the later hearings there was little additional material which, as far as **[42]** the parents knew, affected the substance of the case against them. When one looks at the evidence before the magistrate when he made his final decision to make an order, the bulk of it was contained in the reports, the contents of which were unknown to the parents. The reports contained a number of serious allegations and items of information which, if true, could have cast real doubt on the suitability of Mr and Mrs B. as parents.

There was nothing which occurred in the proceedings in the Children's Court which warned the parents that these or similar allegations and items of information were contained in the reports. It is enough to say that the allegations and information in the reports were such that no competent counsel appearing for the parents and aware of what was in the reports would have regarded their case as effectively presented without endeavouring to answer the allegations and information by seeking to cross-examine those who had made the assertions and calling

evidence to contradict them or in some other way. I have no doubt that the parents in this case did not have an adequate opportunity to answer the case against them and put their own case. The question is whether particular principles which apply to custody cases, the legislation, or both, deprive them of that opportunity.

[43] The parties commenced from the position that in ordinary cases before courts the principles of natural justice require that justice be done openly and a decision given only on evidence that is made known to all parties. See *Official Solicitor v K* (1965) AC 201 at pp237-8 per Lord Devlin.

I do not consider that s20(3)(b) of the *Children's Court Act* affects this position. It provides that a Children's Court may inform itself on a matter in such a manner as it thinks fit, despite any departure from the rules of evidence, not from the principles of natural justice.

The position finally taken by the parties on the disclosure of the reports was this. For the parents it was put that there is a discretion in rare and exceptional circumstances in a case such as this, in the interests of the young person, not to disclose information contained in a report, but there are no rare and exceptional circumstances in this case. Mr Wren for the Director-General of Community Services and Mr L Thompson for Damian submitted that the *Children's Court Act* on its proper construction gave the magistrate a wide discretion to decline to disclose the reports to the parents, or there was the discretion established for wardship cases in *Official Solicitor v K.* (above), and the Children's Court had this discretion. In this case, they submitted, the magistrate had, in **[44]** the proper exercise of his discretion, decided not to disclose the report to the parents.

For the defendants, reliance was placed upon s25(2) of the *Children's Court Act*. That sub-section, which immediately follows the sub-section which has the effect that before making its final order the court will consider any report tendered, provides:

> "(2) Upon application by or on behalf of a child for a copy of any such report, the court may, unless it considers it adverse to the interests of the child so to do, order that a copy of the report be made available to the child or his counsel or solicitor."

It was argued that the sub-section shows that, even where it would not be adverse to the interests of the child to have a copy of the report made available to the child or his legal representatives, the court has a discretion to decline to do so. Assuming that in this sub-section, enacted before s45 of the *Interpretation of Legislation Act* 1984, the word "may" imports a discretion, such a provision relating to a child should not within the principles stated in *Tanos's case* (above) lead to an interpretation which implies a similar discretion in the case of the other parties who are not mentioned. Compare *J v Lieschke* [1987] HCA 4; (1987) 162 CLR 447; (1987) 69 ALR 647; (1987) 61 ALJR 143; 11 Fam LR 417.

In looking at interpretations which depend on **[45]** implications coming from the nature of the court, it is relevant to bear in mind that legislation which came into operation 10 days before the first hearing of this case changed the court from a closed court to an open court with discretionary powers to exclude persons from it; *Children's Court Act*, s18.

Ultimately the plaintiffs based their argument as to discretion, and the defendants their alternative argument as to discretion, on the principles stated in *Official Solicitor v K.* (above) but differed as to the content of the principle and its application in this case. While s18(2) of the *Children's Court Act* applies to Children's Courts the procedure and practice of Magistrates' Courts, it does so only so far as is consistent with the jurisdiction conferred upon Children's Courts. Section 4B(1)(c) of the *Children's Court Act* provides that in proceedings in the Family division, the court, as far as practicable, must ensure that the welfare and interests of the child are the paramount considerations.

In arguing that a wide ambit is to be given to the discretion not to disclose the contents of a report to a party or parties, the defendants argued that if people who provide the information included in reports knew it would be disclosed to the parties it would not be forthcoming. Confidential reports are frequently provided and **[46]** relied on in the community. Thus, when a person applies for a position and nominates referees, the applicant seeing the advantage of

appointment implicitly agrees that the references will be kept confidential. The position changes completely when it is sought to keep a report confidential but use it as evidence to the detriment of a party in court proceedings. This is quite contrary to usual community practice.

In *Official Solicitor v K.* (1965) AC 201, the House of Lords considered whether the judge exercising wardship jurisdiction in the Chancery Division had a discretion in the interests of the child not to disclose a report to their parents. It was held there was a discretion but one to be exercised only in rare and exceptional circumstances. See per Lord Evershed, p219, Lord Reid agreeing; Lord Hodson, p235, and Lord Devlin, p242.

In this case there are allegations against the parents and information on which they could reasonably want to be heard. Counsel for the defendants were unable to point to substantial harm to Damian as distinct from embarrassment which would have followed the disclosure of these reports to the parents. In my opinion, there are nothing like the exceptional circumstances which could justify non-disclosure of the allegations in the reports.

In any event, there is nothing in the material before me which indicates that the magistrate ever **[47]** exercised a discretion in relation to the non-disclosure of any of the reports as distinct from following a practice followed on occasions in the Children's Court. There is nothing to indicate the basis on which any such discretion may have been exercised.

It was suggested that the parents could not complain regarding the non-disclosure of the reports because they had never applied to see them. I do not regard this as a valid argument, even in respect of the reports they knew the magistrate had received. Section 4B of the *Children's Court Act* provides that in proceedings in the Family division the court, as far as practicable:

> (f) must allow the child, the parents and other interested parties to participate fully in the proceedings;
>
> (g) must ensure that the proceedings are comprehensible to the child, the parents and other interested parties.

In this case, unless the magistrate invited the parents to apply to see the reports and explained to them the principles on which a discretion to refuse disclosure was to be exercised, that aspect of the proceedings would not be comprehensible to them and it could not be said that they were being allowed to participate fully in that aspect of the proceedings. It would be unreal to treat the parents' failure to **[48]** apply as the basic cause of their not seeing what was in the reports.

In my opinion, the parents were entitled to have disclosed to them the allegations and information which they would reasonably desire to make an answer. As this was not done, there was a failure to comply with the requirements of the principles of natural justice, which was a condition of the exercise of the power to make the order. The order was therefore invalidly made.

Cross-Examination

I do not accept Mr Weinberg's further submission that, in addition to the right to disclosure, there was a right to cross-examine those whose assertions were contained in the reports. A Children's Court must conduct its proceedings in an informal manner; s20(2)(a). In the ordinary courts where a report is made on which the court may rely in making its decision it is not usual for the parties to be accorded a right to cross-examine the author or others whose assertions are set out in the report. There is no such right, for example, where a special referee gives a report and opinion on a question in a civil case, or where a pre-sentence report is given in a criminal case. See generally as to pre-sentence reports *R v Webb* [1971] VicRp 16; (1971) VR 147, *R v Carlstrom* [1977] VicRp 44; (1977) VR 366 and regulation 282 of the *Community Welfare Services Regulations* 1985.

[49] Where no Act or rule provides a procedure to satisfy a requirement of natural justice, it is for the court to prescribe and enforce the appropriate procedure in the particular case; *Twist v Randwick Municipal Council* [1976] HCA 58; (1976) 136 CLR 106 at pp109-110; (1976) 12 ALR 379; (1976) 51 ALJR 193; (1976) 36 LGRA 443; *King v Rowlings* [1987] VicRp 2; (1987) VR 20 at p26. It is for the court to decide what is appropriate to give an adequate opportunity of making an answer:

> "The guideline is fairness; in general the party should have an opportunity of dealing in an appropriate way with matters with which he can reasonably be expected to be able to deal, and which might assist his or her case."

Sinnathamby v Minister for Immigration (1986) 66 ALR 502 at p506 per Fox J. Usually it would be appropriate to permit the party to answer by calling evidence to contradict, at least. Sometimes a party may be allowed to question or cross-examine; *Re K. (infants)* (1963) Ch 381 at p390; *City of Brighton v Selpam Pty Ltd* [1987] VicRp 5; (1987) VR 54; (1986) 61 LGRA 167; *Kelk v Pearson* (1871) LR 6 Ch 809; *Broder v Saillard* (1876) 2 Ch D 692; *Rust v Victoria Graving Dock Co* (1887) 36 Ch D 113. *[His Honour dealt with a matter not relevant to this Report and continued]* **[50]** Although it is not a ground of the originating **[51]** motion and relied on as producing invalidity in the order, I consider that Mr Weinberg's submission is correct that the certificate treated as establishing the facts required to be established by s31(2) of the *Community Welfare Services Act* is not capable of doing so. It is an important part of the case to establish that all reasonable steps had been taken by the Director General to provide such services as were necessary to enable Damian to remain in the care of his family. The magistrate needed to be satisfied positively on the evidence that that was so. The certificate dated 26 September 1986 of an officer of the Department of Community Welfare Services on a roneoed form states that the Department has explored the following service arrangements which may have enabled Damian to remain in the care of the family. Then are set out:

> Family Supplementing/Supportive Services; Family Substitute Care Service (Voluntary Placement); Residential Child Care Services; Voluntary Placement & Youth Services; Income Security Services; Information Services.

The certificate then proceeds:

> and accordingly certify that there are no services which are offered by the Department which would preclude the Court **[52]** admitting the child or young person to the care of the Department as being in the best interests of the child or young person in the circumstances.

The information on the certificate did not deal directly with whether the Director-General had taken all reasonable steps to provide the necessary services and did not, in my opinion, enable the magistrate to infer that the Director-General had done so. The only statement, whether all reasonable steps had been taken, was in the report before the magistrate from Mr Respini dated 24 September 1986 which said that he was not convinced that all reasonable steps had been taken.

On the evidence, the magistrate could not have been satisfied on the balance of probabilities of one of the four essential ingredients which needed to be established before the order could be made. This is to be kept in mind in exercising my discretion whether or not to set the order aside.

[His Honour then dealt with another matter and set the order aside.]
