

6/94

## SUPREME COURT OF VICTORIA

***HEALTH and COMMUNITY SERVICES v THE HERALD & WEEKLY TIMES LTD AND ORS******(sub nom Department of Health and Community Services v Popovic and Ors)***

Beach J

15, 30 September 1993 — [1994] VicRp 49; [1994] 1 VR 697

**PROCEDURE – CRIMINAL PROCEEDING – SUPPRESSION ORDER MADE AS TO DEFENDANT'S IDENTITY – APPLICATION BY MEDIA FOR LIFTING OF ORDER – WHETHER MEDIA ENTITLED TO BE HEARD ON THE MAKING OF THE ORDER – SUB-POENA ISSUED BY MEDIA FOR PRODUCTION OF DOCUMENTATION IN RELATION TO DEFENDANT – WHETHER MEDIA A PARTY TO THE PROCEEDING – WHETHER ENTITLED TO ISSUE SUB-POENA – WHETHER SUB-POENA SHOULD HAVE BEEN SET ASIDE: MAGISTRATES' COURT ACT 1989, SS25, 100(1); HEALTH ACT 1958, S129(1).**

Whilst hearing criminal charges, a magistrate made an order suppressing publication of particulars which might identify the defendant. Subsequently, The Herald and Weekly Times Ltd ('the media') applied to have the order lifted and issued and served on the Secretary of Health and Community Services a witness summons calling for production of documentation held by the Secretary in relation to the defendant. When the matter came on for hearing, the magistrate refused an application by the Secretary to have the witness summons set aside. Upon application to set aside the magistrate's refusal—

**HELD: Application granted. Refusal set aside. Witness summons set aside.**

**The charges were criminal proceedings between the Police and the defendant. The media were not a party and could not be joined as a party to the proceedings. Whilst the media may have had a right of audience in relation to the making of the suppression order, the media was not entitled to issue a Witness Summons against the Secretary. Accordingly, the summons should have been set aside.**

**BEACH J:** [1] SS is a male transvestite who engages in prostitution. It is said that SS is infected with the human immuno-deficiency virus (HIV). In June 1993 SS was charged on the information of three police officers with three separate offences of loitering in a public place for the purposes of prostitution. The charges first came before the Magistrates' Court at Prahran on 23 June 1993. On that day counsel for SS made an application to the court for an order prohibiting publication of any report of the proceeding. The application was made pursuant to the provisions of s129(1) of the *Health Act* 1958 which reads:

"129. Closure of Court or tribunal

(1) If in a matter before a Court or Tribunal evidence is proposed to be given of any matter relating to HIV, the court or tribunal in addition to any other powers the Court or tribunal may have, if it is of the opinion that it is necessary to do so because of the social or economic consequences to a person if the information is disclosed may:

- (a) order that the whole or any part of the proceedings be heard in closed session or
- (b) order that only persons specified by it may be present during the whole or any part of the proceedings or
- (c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings".

The Magistrate acceded to the application and made the following order in the matter:

"Order pursuant to s129(1)(c) of the *Health Act*. In the matter of Police versus SS, Mr Braun, Magistrate, upon application from counsel for the defendant hereby orders, under s129(1)(c) of the *Health Act* that any publication of any part of these proceedings or of any information derived from these proceedings which identifies the defendant or of information by which the identity of the defendant may be ascertained is hereby prohibited until a final determination of these proceedings. Dated [2] this 23rd of June 1993".

Following the making of that order, a solicitor acting for the Herald and Weekly Times Limited sought leave of the Magistrate to appear on behalf of the Herald & Weekly Times Limited to make submissions in relation to what I shall describe hereafter as the suppression order. The Magistrate granted the application, heard certain submissions in relation to the suppression order, and then adjourned the further hearing of the matter to the following day.

On 24 June 1993 counsel for SS called as witnesses before the Magistrate two psychiatric nurses who gave evidence that SS would suffer stress if his identity was revealed, that that could lead to a deterioration in his condition from HIV positive to AIDS and thus hasten his death. Both those witnesses were cross-examined by the solicitor appearing for the Herald & Weekly Times Limited without any challenge by counsel for SS or the informants. At the conclusion of the hearing that day the Magistrate ordered that the proceedings could be reported by the media so long as the identity of SS was not revealed in any such report. The charges against SS were then adjourned for hearing at a later date.

What occurred thereafter is set out in paragraph 7 of the affidavit of the Herald & Weekly Times' solicitor sworn 14 September 1993, which reads;

"7. I was again contacted by my client on the morning of 27 July 1993. My client informed me that the defendant would be appearing in the Prahran Magistrates' Court that morning in respect of three charges of loitering with intent. Apparently the defendant intended to plead guilty to all three charges. I appeared at the Prahran Magistrates' Court. The presiding Magistrate was Ms J Popovic. [3] I sought leave to appear on behalf of the Herald & Weekly Times Limited and was granted leave to appear. Ms Osborne of Counsel appeared on behalf of the defendant. The right of my client to appear was not challenged and Ms Popovic M. granted leave for the Herald to appear. I informed Ms Popovic M. that the Herald & Weekly Times did not oppose the order made by Mr Braun M. being continued providing that the Herald & Weekly Times Limited was granted leave to make a further application concerning the suppression of the identity of the defendant to these proceedings and being able to call evidence in that regard".

The Magistrate then made the following order in the matter:

"ORDER. In the matters of case number F1317108, F1375159 and F1375159, in which the informants are Tanya Marshall, Carl Van Der Hilst and Duncan Parkin and the defendant is SS, which is listed for hearing at the Magistrates' Court at Prahran on 27th of July 1993.

1. Until further order it is hereby ordered that publication of any part of these proceedings or of any information derived from these proceedings which identifies the defendant or from which the identity of the defendant may be ascertained is prohibited.
2. That pursuant to s129 of the *Health Act*, this Court is closed to all persons other than the defendant, defendant's legal representatives, court staff, prosecutors, police officers and media representatives.
3. Liberty is reserved to any party to this application to apply upon 48 hours notice being given."

Following the making of that order the Magistrate convicted SS of the three charges. The Magistrate then sentenced SS to a term of imprisonment in respect of two of the charges and further adjourned the hearing of the third charge for a period of 12 months', conditional upon SS complying with certain conditions, including conditions that he attend counselling and treatment at the Smith Street Clinic and comply with the lawful directions of the Director of Health and Community Services or his nominees. [4] I should perhaps state that the effect of the other orders made by the Magistrate that day was such that SS was immediately released from custody.

On 1 September 1993 the solicitors for the Herald and Weekly Times Limited gave notice to the informants and SS that they intended to make an application to the Magistrates' Court for an order that the Herald & Weekly Times Limited be at liberty to identify SS. The notices are in substantially similar terms. The notice to SS's solicitor reads;

"We refer to our recent telephone conversation and confirm that we act for the Herald & Weekly Times Limited. Our Client intends to make application on Thursday 9 September 1993. We enclose a copy of the order made by Magistrate Popovic in this matter. Pursuant to clause 3 thereof liberty was reserved to any party to this application to apply upon forty eight hours notice being given. Our client, as you are aware, was granted leave to appear in these proceedings. Accordingly, our client gives you notice that he intends to apply on Thursday 9 September 1993 at the Prahran Magistrates' Court for a lifting of the order specified in paragraph 1 of the enclosed order. In other words, our

client will seek an order that the identity of the defendant can be revealed. If you have any inquiries please contact the writer".

On 6 September 1993 the solicitors acting for the Herald & Weekly Times Limited issued and served on the Secretary of the Department of Health and Community Services a Witness Summons for production and to give evidence, requiring the Secretary to attend the hearing on 9 September and to produce the following material:

"All documentation held by the Department of Health and Community Services relating to any person known as SS or any other pseudonym and in particular any documentation relating to the assessment by the Health Department's HIV/AIDS Assessment Panel in respect of the person known as SS or any other [5] pseudonym between 1 July 1990 and the date hereof".

The application came before the Magistrates' Court on 9 September. The Secretary of the Department of Health and Community Services was represented by counsel, as were the Herald & Weekly Times Limited and SS. At the hearing Counsel for the Secretary made application to the Magistrate for an order setting aside the Witness Summons. Having heard submissions in relation to the matter from all counsel, the Magistrate refused the application.

Later that same day Counsel for the Secretary appeared before me in the Practice Court seeking interim relief in the matter. On Counsel for the Secretary giving an undertaking that he would as soon as practicable institute proceedings in this Court seeking to challenge the decision of the Magistrates' Court at Prahran, I ordered that the Magistrates' Court at Prahran "be restrained from further hearing and determining the proceedings numbered F1317108, F1274230 and F1375159 wherein Tanya Marshall, Carl Van Der Hilst and Duncan Parkin are informants (which proceedings are consolidated into Court proceeding No. 199303110) or any proceeding relating to, or ancillary to, such proceedings until further order".

In due course the solicitor for the Secretary issued the appropriate originating motion in the proceeding and on 16 September last the matter came before me for hearing. The relief sought on behalf of the Secretary is set out in paragraphs 1 and 2 of the originating motion which read:

- "1. The plaintiff seeks an order that the decision of the firstnamed defendant given on 9 [6] September 1993 wherein she dismissed an application by the plaintiff to set aside the Witness Summons issued by the secondnamed defendant on 6 September 1993 directed to the plaintiff be set aside on the following grounds:
  - (a) the firstnamed defendant erred in law in finding that the secondnamed defendant was 'a party' to a criminal proceeding in the Court for the purposes of s43(2) *Magistrates' Court Act 1989*;
  - (b) alternatively, the firstnamed defendant erred in law in finding the second defendant was a party to 'a criminal proceeding in the Court' for the purpose of s43(2) *Magistrates' Court Act 1989*;
  - (c) alternatively, the firstnamed defendant erred in law in failing to set aside the Witness Summons as not relating to any issue for determination by the firstnamed defendant;
  - (d) alternatively, the firstnamed defendant erred in law in not setting the Witness Summons aside as an abuse of process.
2. The plaintiff seeks an order that:
  - (a) The decision of the firstnamed defendant of 9 September 1993 be set aside and in lieu thereof order that the purported Witness Summons to the plaintiff dated 6 September 1993 issued by the secondnamed defendant be set aside with costs."

The principal argument advanced on behalf of the Secretary and SS was that the Herald & Weekly Times Limited was not a party to the proceeding before the Magistrate and therefore had no standing to be heard in the proceeding, nor any standing to issue a Witness Summons in the proceeding. For the Herald & Weekly Times Limited it was contended that once the solicitor for the Herald & Weekly Times Limited was given leave to appear and make submissions to the court at the hearing of the application for the suppression order, the Herald & Weekly Times Limited became a party to that application and as such was [7] entitled to apply to the court pursuant to the reservation of liberty to apply to have the suppression order lifted. In that regard it was argued that the proceeding in so far as it related to the suppression order was not a criminal proceeding, in which case the right to issue a Witness Summons would be restricted to the informant and the defendant, but was simply a proceeding ancillary to the criminal proceeding to which the Herald & Weekly Times Limited was a party and in respect of which it was competent for the Herald & Weekly Times Limited to issue a Witness Summons.

It would seem to me that the first matter to be determined is the nature of the proceeding before the Magistrates' Court and in respect of which the Magistrates made their orders. Were the applications for the suppression orders criminal proceedings or were they civil proceedings?

The extent of the jurisdiction of the Magistrates' Court is spelled out in ss25 and 100(1) of the *Magistrates' Court Act* 1989. Section 25 reads:

- "1. The Court has jurisdiction:
- (a) to hear and determine all summary offences and,
  - (b) to hear and determine all indictable offences which may be heard and determined summarily and,
  - (c) to conduct committal proceedings into indictable offences and either:
    - (i) direct the defendant to be tried and order that the defendant be remanded in custody until trial or grant bail or
    - (ii) discharge the defendant and,
  - (d) to make orders to enforce the payment of all fines which are by any Act directed to be recovered in the Court or for the recovery of which no provision is made.
2. The jurisdiction given by sub-s(1) is [8] additional to any other jurisdiction given to the Court with respect to a criminal proceeding by or under any Act other than this Act."

Section 26 of the *Magistrates' Court Act* sets out the means by which a criminal proceeding is commenced. It reads:

- "(1) a criminal proceeding must be commenced by filing a charge
- (a) with the appropriate Registrar or
  - (b) if the defendant is arrested without a warrant and is released on bail with a bail justice.
- (2) A charge must be on a charge sheet signed by the informant.
- (3) A charge need not be on oath except where otherwise provided by this or any other Act.
- (4) A proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed except where otherwise provided by or under any other Act."

Section 100(1) of the Act reads:

- "(1) The Court has jurisdiction subject to sub-s(2)
- (a) to hear and determine any cause of action for damages or a debt or a liquidated demand if the amount claimed is within the jurisdictional limit, and
  - (b) to hear and determine any claim for equitable relief if the value of the relief sought is within the jurisdictional limit, and
  - (c) to hear and determine with the consent in writing of the parties
    - (1) any cause of action for damages or a debt or a liquidated demand irrespective of the amount claimed, and
    - (2) any claim for equitable relief irrespective of the value of the relief sought, and
  - (d) to hear and determine any other cause of action if the Court is given jurisdiction to do so by or under any Act other than this Act.

Clearly the applications in relation to the [9] suppression orders were not civil proceedings or applications which could be described as ancillary to civil proceedings. There was no cause of action for damages or debt before the Magistrates' Court, nor was there any claim for equitable relief before the Court. The only proceedings before the Magistrates' Court on 23 and 24 June and 27 July 1993 were the criminal proceedings between the three informants and SS. The application in respect of the suppression orders can only have been applications made either in the course of the hearing of those criminal proceedings or as part of those criminal proceedings.

[10] It was argued by counsel for the Herald & Weekly Times Ltd that an application for an order under s129 of the *Health Act* could not be a criminal proceeding because on the hearing

of such an application the court is not asked to determine the guilt or innocence of an accused person or to determine an appropriate sentence, there is no prosecutor to prove the case or to rebut the case, and the standard of proof is not a standard of proof beyond reasonable doubt.

In my opinion that submission overlooks this fundamental aspect of the case. There was only one proceeding before the Magistrates' Court and that was the criminal proceeding constituted by the three informations laid by the informants against SS. By virtue of the provisions of s129 of the *Health Act* the Magistrates' Court had the power to make a suppression order during the course of the hearing of the proceeding.

The applications made pursuant to s129 were not independent of the criminal proceeding but were an integral part of it. It was the very existence of the criminal proceeding which gave the Magistrates' Court its power to make the suppression order. Without there being a matter before the court, in this case the criminal proceeding between the informants and SS., the Magistrates' Court had no power to entertain such an application. In that situation did the Herald & Weekly Times Ltd have the right or entitlement to issue a witness summons against the Secretary of the Department? The short answer to the question posed is No.

**[11]** Sec.43(2) of the *Magistrates' Court Act* provides that any party to a criminal proceeding in the court may apply for the issue of a witness summons. The Herald & Weekly Times Ltd was not and in the circumstances of this case never could be a party to the criminal proceeding before the court. In that situation it had no right or entitlement to issue the witness summons in question and the witness summons should have been set aside.

During the course of the hearing before me much was made of the fact that each Magistrate had given leave first to the solicitor and then to counsel for the Herald & Weekly Times Ltd to appear and make submissions in relation to the application. It was argued that, having been granted that leave, the Herald & Weekly Times Ltd thereby became a party to the applications. In my opinion that cannot be so. A Magistrate simply has no power to make an order joining the press or any other media organisation as a party to a criminal proceeding or, for that matter, a civil proceeding simply because it is contended that the press or other media organisation has a special interest in the proceeding.

Whilst the courts recognise that in certain circumstances the media does have a special interest in a proceeding, particularly in cases involving suppression orders and restraints upon the publication of court proceedings, and that where that special interest is established the media may have a standing to challenge the decision in question by way of prerogative writ, that special interest can never justify the joinder of the **[12]** media as a party to the proceeding. At most it gives the media a right of audience to be heard in relation to the suppression order or the restraining order. That is done as a matter of courtesy and convenience because it is recognised that the media may have the ultimate capacity to question the order made. But the grant of the right of audience, which is discretionary in nature, does not have the effect of making the media a party to the proceeding, nor does it give it the power to issue a witness summons in the proceeding.

After I prepared my reasons for judgment in this matter I received from counsel for the Herald & Weekly Times Ltd a copy of the unreported decision of the West Australian Full Court in *Carter v Malleon Stephen Jaques* ((1993) 11 WAR 159, delivered 15th July 1993) and from counsel for the Secretary a copy of the unreported decision of the Full Court of Australia Capital Territory in *R v Scott* (delivered 23rd August 1993). In my opinion each of those decisions supports the proposition that the suppression orders in the present case were made in the criminal proceeding between the informants and SS. The underlying proceeding before the Magistrates' Court was the criminal proceeding. The suppression orders were made in that proceeding. I make the following orders in the matter:

I order that the decision of the first-named defendant made on 9th September 1993, whereby the first-named defendant dismissed the application by the plaintiff to set aside the witness summons issued by the second-named defendant on 6th September 1993 and directed to the plaintiff, be set aside. **[13]** I order that the witness summons dated 6th September 1993 and directed to the plaintiff be set aside. I order that the costs of the plaintiff of this proceeding and the costs of the plaintiff's appearance before the Magistrates' Court at Prahran, including any reserved costs, be taxed and, when taxed, paid by the second-named defendant.

Solicitor for the plaintiff: RC Beazley, Victorian Government Solicitor.  
Solicitors for the second defendant: Corrs Chambers Westgarth.  
Solicitors for the third defendant: Legal Aid Commission.

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