9/99; [1999] VSC 232

SUPREME COURT OF VICTORIA

THE HERALD AND WEEKLY TIMES LTD v MAGISTRATES' COURT OF VICTORIA & ORS

Beach J

16 June, 29 July 1999 — [1999] 2 VR 672

PRACTICE AND PROCEDURE – SUPPRESSION ORDER – CASE INVOLVING STALKING, BREACH OF INTERVENTION ORDER AND USING A TELECOMMUNICATIONS DEVICE TO HARASS – AFTER PARTIES GAVE EVIDENCE APPLICATIONS MADE FOR SUPPRESSION ORDER IN RELATION TO PARTIES – ORDER MADE – WHETHER MAGISTRATE IN ERROR IN MAKING SUPPRESSION ORDER: *MAGISTRATES' COURT ACT* 1989, S126(1)(b).

Section 126(1) of the *Magistrates' Court Act* 1989 ('Act') provides (so far as relevant)—

> "The Court may make an order under this section if in its opinion it is necessary to do so in order not to—
> (b) prejudice the administration of justice."

After the parties had given their evidence in a case involving allegations of stalking, breach of an intervention order and using a telecommunications device to harass, applications were made for the making of a suppression order in relation to the identity of the parties. In making the suppression order the magistrate said that:

- The order was necessary to ensure that the administration of justice was not prejudiced
- S126(1)(b) of the Act ought to be read widely
- The names of the parties to a proceeding are not that important
- The parties would suffer embarrassment if their identities were disclosed.

Upon an originating motion to quash the suppression order—

HELD: Order that the suppression order be quashed.

1. The expression "administration of justice" in relation to suppression orders is not limited to securing the administration of justice in the proceeding in which the suppression order is made. For example, in cases of blackmail or those involving informers it is well established that the identity of the victim be suppressed in order to secure the administration of justice not only in the particular case but also to secure the administration of justice in later cases.

***John Fairfax Group Ltd v Local Court of NSW* (1991) 26 NSWLR 131; 26 ALD 471, referred to.**

2. However, the considerations which apply to cases of blackmail and those involving informers do not apply to cases of stalking, breach of intervention orders or using telecommunication devices to harass. Having regard to the fact that that the suppression order was made after the evidence in the case had concluded and a final determination had been made, the magistrate was in error in deciding that it was necessary to make the suppression order to ensure that the administration of justice was not prejudiced.

3. The open administration of justice is the rule. There is no warrant for interpreting s126(1)(b) of the Act widely. Having regard to the fact that the statutory provision is designed to derogate from the open administration of justice it is to be construed narrowly. Accordingly, the magistrate was in error in determining otherwise.

***Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, applied.**

4. The normal rule of courts is that justice is administered in a court open to the public where the names of the parties are openly revealed. It is clear that the names of the parties are important. Accordingly, the magistrate was in error in finding that the names of the parties to the proceeding were not that important and was one of the factors for making a suppression order.

5. Embarrassment is not a factor to be taken into account when determining whether a suppression order should be made. Accordingly, the magistrate was in error in making the suppression order by taking into account the embarrassment the parties would suffer if their identities were disclosed.

***John Fairfax Group Ltd v Local Court of NSW supra*;**

Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria & Anor **[1999] 1 VR 267, applied.**

BEACH J:

1. This is the return of a summons filed upon an originating motion whereby the plaintiff The Herald & Weekly Times Ltd seeks the following order and declaration

> "1. An order in the nature of *certiorari* quashing the order of the first defendant constituted by a Magistrate made on 4 June 1999 that publication of the names, addresses and occupations of the third and fourth defendants or any witnesses in the proceeding, being an information laid by the second defendant against the third defendant in case No. M01193736 ('the proceeding'), or any other facts or material which may disclose their identity should be wholly prohibited.
>
> 2. A declaration that the Magistrate had no jurisdiction or power to order that publication of the names, addresses and occupations of the third and fourth defendants or any witnesses in the proceeding or any other facts or material which may disclose their identity should be wholly prohibited."

2. The background to the proceeding and summons may be summarised as follows.

3. The third named defendant to whom I shall refer as "X" was charged with one count of stalking, one count of breach of an intervention order and one count of using a telecommunications device to harass.

4. X is a young woman. She has a daughter now aged 7.

5. The victim in each case is the fourth named defendant to whom I shall refer as "Y".

6. Y is a male medical practitioner who carries on practice in the City of Geelong.

7. The charges came before the Magistrates' Court at Geelong on 4 June 1999. The informant was the second named defendant Senior Constable Carrol Ann Lockett.

8. The principal evidence given before the Court that day was that of Y and X.

9. Y's evidence was to the effect that X had telephoned him on some 1,700 occasions between 1 and 5 May 1999. The substance of the conversations is not relevant for present purposes.

10. X swore that between December 1995 and May 1998 she had had a sexual relationship with Y. She admitted that she had made the telephone calls to Y but stated that she had made them because of her mental anguish towards him and had not intended to cause Y any harm.

11. Y denied that he had ever had any sexual relationship with X.

12. At the conclusion of the evidence the Magistrate found that the three charges had been proved.

13. During the course of his findings the Magistrate rejected X's evidence that she had had a sexual relationship with Y describing her evidence in that regard as a total figment of her imagination and a flight of fancy.

14. The affidavit evidence relied upon by the plaintiff in support of its applications is to the effect that after the Magistrate had stated his findings in the matter and that the charges had been proved, the prosecutor made application for a suppression order in respect of Y's identity on the ground that publicity of his identity in association with the case would tarnish his name and would be detrimental to his professional reputation.

15. I have made specific reference to the affidavit material in this regard because although the transcript of the proceedings that day makes it clear that such an application was made it is not clear from the transcript when it was first made.

16. It is clear, however, that it must have been made after both X and Y had given their evidence.

17. After the prosecutor had made his application in the matter counsel for X made a similar application on behalf of X on the ground that to disclose X's identity would adversely affect her mental well-being and would also be detrimental to her 7 year old daughter.

18. The applications for suppression orders were made pursuant to the provisions of s126 of the *Magistrates' Court Act* 1989 the relevant sub-sections of which read:

> "126(1) The Court may make an order under this section if in its opinion it is necessary to do so in order not to—
> (b) prejudice the administration of justice
>
> (2) The Court may in the circumstances mentioned in sub-section (1)—
> (c) make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding."

19. Having heard submissions from the prosecutor, counsel for X, counsel for Y and the solicitor for the plaintiff, the Magistrate acceded to the applications and made the following order:

> "That the publication of the names, addresses and occupations of the defendant or any witnesses in these proceedings or any other facts or materials which may disclose their identity is wholly prohibited."

20. During the course of his decision in the matter the Magistrate said:

> 1. "It is my view that paragraph (b) of the provision which says 'prejudice the administration of justice' is a provision that ought to be read widely. The administration of justice is something that continues, as I have said, at all times, even after a particular decision might be given in a case."
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> 2. "All courts should in this country be open to the public, to the media in the fullest way ... but in the great majority of cases I suppose it is fair to say that, whilst the facts generally and the principles and the law applied and the penalties and the judgments are important, so far as the community at large is concerned, so far as the public is concerned, the names are not that important ... I have not heard any argument here today to say that it is specifically in the public interest to actually report individuals' specific names. I have not heard any argument to say that it is in the public interest that Y's name should be reported, or X's name should be, or the fact that she's got a seven year old child."
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> 3. "You've got the effect on the defendant, who is not well. If she is identified and wherever she might move in the surrounds of Geelong be questioned about these matters or be adversely affected herself, her genuine well-being and psyche might be adversely affected by the fact that she has been embroiled in this case.
>
> You've got her seven year old child, who I expect is at school, and who likewise, if identified as the daughter of a mother who has made these claims that the court has rejected, will only be adversely affected. I accept totally that the fact that a particular person, it might be a doctor or a professional person, does not entitle him or her to any sort of special treatment by a court and in that regard Dr Carroll should be treated no differently to anybody who has been subject to, or who has been the victim of such crimes as these ones.
>
> But there is no doubt that the effect on him will be indeed substantial if these matters are reported. That is, if his name is reported – I refer to them as these matters, but we're only talking suppressing names, will not only affect him, but will affect any other people in business with him, it will affect his clients' confidence in him, it will adversely affect them. It will no doubt have an effect upon him personally, mentally and on his family and loved ones, and taking that harm, taking that evil, that injustice, together with the injustice that might be perpetrated against the defendant herself and the effect that it might have on her well-being and psyche and the effect on a seven year old child, it is my view that the paramount interests of justice in this case require my discretion to be exercised in favour of granting a suppression order because it is my view, and I hold it clearly, that there is more harm to be done in this case by publishing those names, more harm indeed to the people involved, than there would be benefit to the public in allowing the names to be published.
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> Finally, it is my view that the courts need to adopt an approach to protect victims, because if the court doesn't do that in appropriate cases where it can, and it can't always, and sometimes perhaps on balance it should, but if it doesn't take that action in appropriate cases, then they might not come forward and complain and these matters mightn't be prosecuted and offenders not brought to book. If we don't adopt that approach then in a sense, I suppose, we're aiding and abetting such crimes."

21. Before considering further these aspects of the Magistrate's reasons it is important to note the grounds upon which an order in the nature of *certiorari* can be made.

22. That matter was the subject of the decision of the High Court in *Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359. At CLR p175 the Court said:

> "Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing [The early form of *certiorari* to remove and hear, while of historical relevance to the nature and scope of *certiorari*, would now seem to be obsolete.] of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error [see below], failure to observe some applicable requirement of procedural fairness [see, eg. *Stollery v Greyhound Racing Control Board* [1972] HCA 53; (1972) 128 CLR 509; [1972-73] ALR 645; 46 ALJR 602; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 939], fraud [see, eg. *R v Wolverhampton Crown Court; Ex parte Crofts* [1983] 1 WLR 204 at 206; [1982] 3 All ER 702 at 704; (1982) 76 Cr App R 8. And note that 'fraud', in this context, is used in a broad sense which encompasses 'bad faith': see, eg. *Anisminic Ltd. v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147 at 171; [1969] 1 All ER 208; [1969] 2 WLR 163] and 'error of law on the face of the record' [see below]. Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it [see, eg. *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at 167; 55 WN (NSW) 63; *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951] EWCA Civ 1; [1952] 1 KB 338 at 353; [1952] 1 All ER 122; [1952] 1 TLR 161. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the 'record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record."

23. It is clear in the present case that the Magistrate did not fail to observe some applicable requirements of procedural fairness nor were the applications made to him or the orders he made tainted by fraud.

24. For the plaintiff to succeed therefore it is necessary that it demonstrate jurisdictional error or error of law on the face of the record. In this instance the record includes not only the court record of the order his Worship made but also his Worship's reasons (see s10 of the *Administrative Law Act* 1978).

25. It was argued on behalf of the plaintiff that in the present case not only did the Magistrate fall into jurisdictional error there are also clear errors of law on the face of the record.

26. For convenience I shall deal first with what are said to be the errors of law. For reasons which will become apparent, in doing so it is not necessary to distinguish between his Worship's order as it related to X and his Worship's order as it related to Y.

27. In the first place it was said that there was no evidence before the Magistrate which demonstrated the need for the suppression order so as to avoid prejudice to the administration of justice.

28. That argument was founded upon the proposition that the expression "administration of justice" in relation to suppression orders is limited to securing the administration of justice in the proceeding in which the suppression order is made.

29. If that proposition is accurate, I agree that the Magistrate made an error of law in the matter. I say that for the following reasons.

30. At the time the suppression orders were made the evidence in the case had concluded and the Magistrate had made a final determination in the matter.

31. The hearing had been in open court and the parties and witnesses had been identified by

their own names. In that situation the administration of justice so far as the case was concerned could not be prejudiced by a failure to suppress the identity of X and/or Y. The substance of the case was over. All that remained was for the Magistrate to impose the appropriate penalty upon X.

32. But is such a general proposition accurate?

33. In my opinion it is doubtful that it is. I say that for this reason.

34. When one is dealing with cases of blackmail it is well established that the identity of the victim be suppressed. Similar considerations apply in the case of informers.

35. The point was made by Kirby P, as he then was, in *John Fairfax Group Ltd. v Local Court of New South Wales* (1991) 26 NSWLR 131; 26 ALD 471. At NSWLR p141 his Honour said:

> "The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society generally and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in a particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case."

36. And so it may well be that it is strictly incorrect to say that a suppression order is limited to securing the administration of justice in the proceeding in which the suppression order is made. It may also be made, for example, in a case of blackmail, not only to secure the administration of justice in the particular case but also to secure the administration of justice in later cases of blackmail, in that by the making of the order in the particular case, persons who are later the victims of blackmail will be encouraged to come forward and report the matter to the appropriate authorities.

37. But can cases of stalking, breach of intervention orders or using telecommunications devices to harass be equated with cases of blackmail?

38. In my opinion they cannot. Blackmail by its very nature is in a category of its own.

39. The reason a person can be blackmailed successfully is usually because he or she has committed some indiscretion which would bring him or her into public odium were such indiscretion revealed. Without a guarantee of anonymity such a person may well endure the blackmail in silence. It is with a view to encouraging such people to come forward and reveal the blackmail that their anonymity is guaranteed.

40. But such considerations do not apply to cases of the category under consideration.

41. It is clear that Y made his complaint without any guarantee of anonymity. As his Worship specifically found – he had committed no indiscretion.

42. My conclusion therefore is that in making the suppression orders at the time he did the Magistrate did make an error of law in the matters in that such orders were not necessary to ensure that the administration of justice was not prejudiced.

43. In the second place it was said that the Magistrate's statement that the provision of s126(1)(b) ought to be read widely was a mis-statement of the law in relation to the interpretation of the sub-section and as such constituted an error of law on the face of the record.

44. The question as to how such a section should be construed was considered by Kirby P in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47. At p55 his Honour said:

> "Many cases report the scrutiny by courts of statutory provisions designed to derogate from the open administration of justice. Running through these decisions is a common theme. It is that, by our tradition, the open administration of justice is the rule. Statutory derogation from openness is the

> exception. In defence of the rule, such statutes will usually be strictly and narrowly construed. Unless the derogation is specifically provided for, courts are loathe to expand the field of secret justice."

45. I respectfully agree with his Honour's observations.

46. In my opinion there is no warrant for interpreting s126(1)(b) widely. Having regard to the fact that it is designed to derogate from the open administration of justice it is to be construed narrowly and his Worship was in error in determining otherwise.

47. The third error of law is said to be the Magistrate's finding that the names of parties to a proceeding are not that important.

48. If what the Magistrate was saying was that the names of parties to a proceeding are not that important and for that reason can be suppressed - and a reading of the whole of his Worship's reasons would lead one to conclude that that was one of the factors which induced him to make the orders he did – then in my opinion his Worship fell into error.

49. In *John Fairfax Group Ltd*, supra, Kirby P said at p140:

> "The normal rule of our courts is that justice is administered in a court open to the public where the names of the parties are openly revealed and may be the subject of fair and accurate reports or other civil wrong. This rule, which we have inherited from the common law of England, has been described as an 'inveterate' rule of our system of justice: see Earl Loreburn in *Scott v Scott* [1913] AC 417 at 445; [1911-1913] All ER 1; 29 TLR 520."

50. A similar view was taken by Brooking J as he then was in *Re a Former Officer of the Australian Security Intelligence Organisation* [1987] VicRp 70; [1987] VR 875; 85 FLR 364. At VLR p879 *et seq* his Honour said:

> "I suppose that, generally speaking at all events, the first thing anyone would want to know about litigation is who the parties are. Should I be satisfied that the principle that there be publicity in the administration of justice should be impinged upon to the extent of allowing the applicant to bring this action while masking his identity?
>
> Although I am not persuaded by the material put forward of the need for the order sought, I propose, in deference to the applicant's desire for confidentiality, to make no reference to that material, except in the broadest terms. This means that I cannot state, save in an extremely general way, why I must refuse the application ... The applicant's material seeks to make no case from the standpoint of national security and so I need to say nothing about the relevance of this consideration. He relies on suggested danger to himself and his family and to other former officers of ASIO and their families. I have given anxious consideration to the applicant's expressed apprehension, but he has failed to satisfy me that departure from 'the general principle of open justice' (*Attorney-General v Leveller Magazine Ltd* [1979] AC 440, at p453; [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342, per Lord Diplock) is necessary in this case, and his application must be refused."

51. In *TK v Australian Red Cross Society* (1989) 1 WAR 335 Malcolm CJ said:

> "Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done. As Lord Donaldson MR said [in *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227] (at 235); [1984] 2 All ER 27; [1984] 2 WLR 370:
>
> 'It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice'."

52. And finally in *J v L & A Services Pty Ltd (No. 2)* (1995) 2 Qd R 10 Fitzgerald P and Lee J when dealing with the dangers in suppressing parties' and witnesses' names said at p45:

> "Further, public scrutiny is a strong disincentive to false allegations and a powerful incentive to honest evidence, and publicity may attract the attention of persons with material information who are unaware of the proceeding. As again was pointed out by McHugh JA In *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*, if information is suppressed 'proceedings would inevitably become the subject of rumours, misunderstandings, exaggerations and falsehoods ...': cf *Raybos Australia Pty Ltd v Jones* at 59 per Kirby P, citing McPherson J in *Ex parte The Queensland Law Society*

> *Incorporated* [1984] 1 Qd R 166, 177. A particularly unsatisfactory manifestation of this difficulty occurs when uncertainty as to the particular person concerned leads to speculation concerning other members of a relevant group."

53. It is clear therefore that the names of parties are important and in taking the view that the identities of X and Y were not important and for that reason should be suppressed, I consider that his Worship fell into error of law.

54. The final error of law said to have been made by the Magistrate was that in making the decision to suppress the identities of X and Y, his Worship took into account the embarrassment they would suffer if their identities were disclosed.

55. It is clear from the third passage of his Worship's reasons which I have incorporated in my judgment, that a significant factor behind his Worship's order was the embarrassment which his Worship believed X and Y would suffer if their identities were not suppressed.

56. In my opinion embarrassment is not a factor to be taken into account when determining whether a suppression order should be made.

57. In J*ohn Fairfax Group Ltd, supra,* Kirby P said at p142:

> "It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: see, eg. *David Syme & Co Ltd v General Motors-Holden's Ltd* (at 307); *Raybos Australia Pty Ltd v Jones* (at 58); *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227 at 235; [1984] 2 All ER 27; [1984] 2 WLR 370; *R v Bromfield*, Malcolm CJ (at 22); *Rockett v Smith* [1992] 1 Qd R 660; (1991) 55 A Crim R 79, per Derrington J (at 7). A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open justice system. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported."

58. In *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria and Another* (unreported 10 June 1998) Hedigan J said at p42 *et seq*:

> "It also appears to me that even if the principles applicable to the courts were deemed to apply to this panel, there was no evidence put before the panel that it was necessary for the due administration of a just hearing to require that the medical practitioner be referred to by a pseudonym or initials. The only argument advanced was wholly connected with the impact on the doctor's reputation and practice, the embarrassment to him and the family. ... These considerations are not exceptions to the general rule against closing the courts or suppression of the evidence, even in the superior courts."

At p44 his Honour continued:

> "Unless some considerations broadly within the range of the exceptions are made to appear, the cases do not support damage to reputation or fear of loss, embarrassment and related matters as being sufficient to justify the making of suppression orders. Persons charged with breaches of the law in the ordinary courts must live with the exposure of their names on a daily basis."

59. My conclusion therefore is that the Magistrate did make errors of law in determining to suppress the identities of X and Y and that his orders in that regard cannot stand. In that situation it is unnecessary for me to determine whether his Worship made a jurisdictional error in the matter.

60. I order therefore that the orders of the Magistrates' Court made at Geelong on 4 June 1999 that publication of the names and addresses and occupations of the defendant or any witnesses in the proceedings then before that Court being Case No. MO1193736 in which Carolyn Ann Lockett was informant and Karen Galbally was defendant or any other facts or materials which may disclose their identity is wholly prohibited be quashed.

61. In the circumstances I consider it is not appropriate to make the declaration sought by the plaintiff and I decline to do so.

APPEARANCES: For the plaintiff The Herald & Weekly Times Ltd: Mr WT Houghton QC and Mr M Harvey, counsel. Corrs Chambers Westgarth, solicitors. For the second defendant police informant: Mr J Ruddle, counsel. Victorian Government Solicitor. For the fourth defendant "Y": Mr B Bongiorno QC and Ms J Campton, counsel.
