09/05; [2005] VSC 70

SUPREME COURT OF VICTORIA

HERALD AND WEEKLY TIMES PTY LTD v THE COUNTY COURT of VICTORIA and ORS

Byrne J

3, 18 March 2005

SUPPRESSION ORDER – ACCUSED CHARGED WITH CERTAIN SEXUAL OFFENCES – VICTIMS OF ALLEGED ASSAULTS LESS THAN 3 YEARS OF AGE – APPLICATION FOR MAKING OF SUPPRESSION ORDER TO AVOID UNDUE DISTRESS AND EMBARRASSMENT TO VICTIMS – ORDER MADE – MATTERS TO BE CONSIDERED WHEN MAKING SUCH AN ORDER – "NECESSARY" – WHETHER COURT IN ERROR IN MAKING ORDER: *COUNTY COURT ACT* 1958, SS80, 80AA.

The accused was before the court charged with certain sexual offences in relation to 2 children aged less than 3 years. An application was made to the judge that a suppression order should be made prohibiting publication of a report of the proceedings in order not to cause undue distress or embarrassment to the victims. In making the order, the judge expressed apprehension that undue distress or embarrassment might later be suffered to the children. Upon application for judicial review—

HELD: Application granted. Suppression order quashed.
1. What the Court is concerned with on an application for the making of a suppression order is whether the order is necessary to avoid an apprehended harm. The word "necessary" imposes a high standard. Parliament has accepted that there is an overriding public policy that justice be dispensed in public. This policy serves interests which are wider than those of the parties to the litigation, victims of the crime or witnesses. Paragraph (e) of S80AA of the *County Court Act* 1958, which carves out an exception to this policy, speaks only of distress to the "complainant" in specified sexual cases and, further, that the harm to be avoided is that of a distress or embarrassment to them which is undue. What is then required before a suppression order may be made in such a case is such a high degree of satisfaction in the Court that the harm will occur that the making of the order is necessary to avoid it and further, when it is appropriate to make such an order, the order must be couched in terms which are no wider than are necessary to avoid that harm.

2. In the present case, the judge appears to have concluded that there was a probability that the children might suffer harm in the future. This was not a sufficient basis as a matter of law to support the opinion which s80AA required the court to have formed.

BYRNE J:
1. This is an application for judicial review of an order of the County Court made on 28 January 2005 pursuant to s80 of the *County Court Act* 1958 that "the publication of a report of the whole of this proceeding or of any information derived from the proceeding be prohibited".

2. The proceeding in question was the trial of a woman for three sexual offences against two very young children who were in her care, and for a number of counts of theft. I have been told that she has pleaded guilty to the assault charges but that she intends to seek to change her plea.

3. The firstnamed defendant, the County Court, as is customary, has not appeared otherwise than to submit to the jurisdiction of the Court. The secondnamed defendant, the Director of Public Prosecutions, appeared to oppose the application and in this regard he was supported by counsel for the accused.

4. The suppression order which, on its face, was made in the exercise of jurisdiction under s 80(1)(c) was said to be warranted by s80AA(e). The plaintiff contends that the decision to make the order is vitiated by jurisdictional error and, further, for error of law on the face of the record.

5. The relevant statutory provisions are as follows:

"**80. Power to close proceedings to the public**
(1) The court may in the circumstances mentioned in section 80AA—
...
(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.

80AA. Circumstances in which order may be made under section 80
The court may make an order under section 80 if in its opinion it is necessary to do so in order not to—
...
(e) cause undue distress or embarrassment to the complainant in a proceeding that relates to a charge for an offence under Subdivision (8A), (8B), (8C), (8D) or (8E) of the Division 1 of Part I of the *Crimes Act* 1958 or under any corresponding previous enactment or for an attempt to commit any such offence or an assault with intent to commit any such offence; or"

6. A suppression order in similar terms had been made by the committing Magistrate on 13 May 2003. When the case was listed for mention in the County Court on 27 October 2003 a like order was made on the application of the prosecution.

7. In October 2004, application was made on behalf of the plaintiff for removal of the suppression order, but this was refused on 7 October 2004. Reasons were published on 22 October. On 13 December 2004, Whelan J quashed the orders of 27 October 2003 and 7 October 2004 and remitted the matter to the judge[1].

8. On the following day, 14 December 2004, a further application for a suppression order was made by the prosecutor and on 28 January 2005 the judge acceded to the application and made the suppression order which is the subject of this application and he published his Reasons.

9. The argument before me was directed to the requirements of s80AA(e). It was put, as to jurisdiction, that his Honour failed to address and therefore to form an opinion that the order was necessary for the avoidance of the harm referred to in paragraph (e); alternatively, as an error of law, that in forming such an opinion he failed to apply the correct legal principles.

10. The case for the suppression order was an unusual one. The offences with which the accused woman is charged include sexual offences of the kind specified in paragraph (e). The two children, who were the victims of the alleged assaults and are therefore the complainants for the purposes of paragraph (e), are very young. They were said in 2003 to be respectively two and a half years and one and a half years of age. Given their age, it was not suggested that they would now suffer undue distress or embarrassment. What was put, and accepted by the judge, was that they might suffer undue distress or embarrassment in the future "at a later stage of their lives if and when they are informed that they were sexually assaulted as an infant".

11. Two affidavits to this effect were filed, one by the mother of each of the two children, each sworn in October 2004. It is apparent from these affidavits that the parents are very distressed by the interference with their children. This is perfectly understandable.

12. The authorities as to the interpretation of this statute speak with one voice. They are conveniently summarised in the judgment of Whelan J[2], and I will not repeat them. It is sufficient that I note that they emphasise that Parliament permits the suppression of publication of legal proceedings only when, and to the extent that, this is necessary to avoid the harm specified in s80AA.

13. Two things must be emphasised. The word "necessary" imposes a high standard. It is not sufficient that it be desirable for the purpose of avoiding the harm. It does not involve weighing the competing interests of the press and the public against that of the complainant.

14. The second is that the harm in paragraph (e) is an apprehended harm. The provision presupposes that the undue distress and embarrassment will not occur unless the publication occurs, and even in such an event, there may be uncertainty that it will occur. What the Court is therefore concerned with is whether the order is necessary to avoid an apprehended harm. In *John Fairfax Publications Pty Ltd v District Court (NSW)*[3], Spigelman CJ, speaking with the concurrence of other members of the New South Wales Court of Appeal, said that the necessity test would not

be satisfied by a conclusion that the apprehended harm "could and most probably would" occur. I leave to one side the question of what further degree of certainty that the apprehended harm would occur is required by the statute. It is clear from this and from decisions in this Court such as *R v Pomeroy*[4] that the circumstances that might warrant the making of an order to avoid the harm mentioned in paragraph (e) are exceptional. Parliament has accepted that there is an overriding public policy that justice be dispensed in public. This policy serves interests which are wider than those of the parties to the litigation, victims of the crime or witnesses. Paragraph (e), which carves out an exception to this policy, speaks only of distress to the "complainant" in specified sexual cases and, further, that the harm to be avoided is that of a distress or embarrassment to them which is undue. What is then required before a suppression order may be made in such a case is such a high degree of satisfaction in the Court that the harm will occur that the making of the order is necessary to avoid it and further, when it is appropriate to make such an order, the order must be couched in terms which are no wider than are necessary to avoid that harm.

15. I turn now to the grounds of relief in this case. The first was that the judge failed to form the required opinion and therefore lacked jurisdiction. His Honour mentioned in his Reasons that he was "mindful that a high degree of necessity be shown for an order prohibiting publication of judicial proceeding"[5] and his final conclusion was expressed in these terms:

> "I am therefore of the opinion that a blanket prohibition is necessary in all the circumstances to protect the innocence of the two children." [6]

16. I read this reference to innocence to be a shorthand reference to their lack of knowledge of the sexual assaults to which they had been subjected and, in the context, to the continuance of this ignorance in the future. Even so, this finding of opinion falls far short of that required by s80AA. This, and indeed, any conclusion made by his Honour must be understood against the background that the victim enjoys the protection of s4(1A) of the *Judicial Proceeding Reports Act* 1958, of which his Honour was also mindful.

17. Indeed, when his Honour's Reasons are read as a whole, his expressed apprehension that undue distress or embarrassment might later be suffered to the children showed that he was aware that this is a matter of speculation. He acknowledged that the conclusion assumes that all of the following events occur, each of which was no more than likely to occur:

> (1) Persons within the society of the children or their families will be able to identify the victims from such press reports as are permitted having regard to the *Judicial Proceeding Reports Act* 1958; not from some other source.
>
> (2) These persons will remember the events or will bring them to mind at some time in the future when the children are older and more vulnerable.
>
> (3) The facts of the assaults will be disclosed to the children directly or indirectly by those persons.
>
> (4) The disclosure will cause the children undue distress or embarrassment.

18. Whatever may be the certainty that any of these events may occur, it is difficult to see that the prospect that all will occur is of such magnitude that the test laid down by s80AA has been satisfied. It is only where the making of the order is necessary to prevent this, that the Court may act.

19. My task for the purposes of this jurisdictional argument is not to form any view as to whether his Honour was correct in concluding that the events are likely to occur without a suppression order. It is to determine whether his Reasons show that his Honour had formed the correct conclusion that the order was necessary to avoid the harm referred to in paragraph (e). Given that he did not in terms say that he formed that opinion, I have considered his Reasons as a whole to determine whether in fact he did. My conclusion is that he did not and, accordingly, the suppression order cannot stand.

20. It is therefore not necessary that I consider the alternative argument based on error of law on the face of the record. Nevertheless, in deference to the submissions put and in case this case may go further, I shall venture my views shortly upon this matter. I start from the proposition

that his Honour's Reasons form part of the record[7]. For the reasons which I have ventured to set out at some length, it seems to me that his Honour's findings do not lead as a matter of law to the conclusion that s80AA requires. As I read his Honour's judgment, he appears to have concluded that there was a probability that the children might suffer harm in the future. This is not a sufficient basis, as a matter of law, to support the opinion which s80AA requires his Honour to have formed. Accordingly, the second ground is also made out.

21. I leave this case with a general reflection. I sympathise with the position of the parents, and it is only with great reluctance that I disturb the order which gives them comfort. It is a very distressing thing to contemplate that one's children have suffered the harm which is here alleged. It is a very distressing thing to contemplate that in the future this harm might revisit them and cause them distress and embarrassment. Nevertheless, it must be borne in mind that this is a concern about a harm which may or may not occur in the future. The law has for centuries had a concern that proceedings in court should be conducted in public. This is based on an important public policy which seeks to avoid the spectacle of the secret trial. The interests of individuals must give way to this overriding concern unless the limited exceptions specified by Parliament have been satisfied. They have not been satisfied in this case.

22. I propose therefore that the order of the County Court of 28 January 2005 be quashed. In case a fresh application may be made to his Honour I will, if asked, stay the operation of this order for 14 days. I will hear counsel further as to the precise orders that need to be made to give effect to these conclusions, and as to costs.

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[1] [2004] VSC 512.
[2] [2004] VSC 512 at [19].
[3] [2004] NSWCA 324; (2004) 61 NSWLR 344; 148 A Crim R 522; 50 ACSR 380 at 398 [96].
[4] [2002] VSC 178 (Teague J).
[5] Reasons, p3.
[6] Reasons, p4.
[7] *Administrative Law Act* 1978, s10.

APPEARANCES: For the Plaintiff Herald & Weekly Times Pty Ltd: Mr WT Houghton QC with Mr DW Bennett, counsel. Corrs Chambers Westgarth, solicitors. For the secondnamed Defendant: Mr PF Tehan QC, counsel. Office of Public Prosecutions. For the thirdnamed Defendant: Ms C Randazzo SC, counsel. Victoria Legal Aid.
