36/06; [2006] VSC 362

SUPREME COURT OF VICTORIA

D'ALO v NOLAN & ANOR

Osborn J

14 September, 4 October 2006

STATUTORY INTERPRETATION – BOOK AUTHORED BY POLICE OFFICER – BOOK MANUSCRIPT SUBMITTED TO PUBLISHER – LICENCE AGREEMENT ENTERED INTO BETWEEN PUBLISHER AND AUTHOR – BOOK SUBSEQUENTLY PUBLISHED BY PUBLISHER – BOOK CONTAINED UNAUTHORISED CONFIDENTIAL INFORMATION – SUCH UNAUTHORIZED DISCLOSURE AN OFFENCE – MEANING OF "PUBLISHES" – WHETHER POLICE OFFICER PUBLISHED CONFIDENTIAL INFORMATION – CHARGE FOUND PROVED – WHETHER COURT IN ERROR: *POLICE REGULATION ACT* 1958, S127A.

D'A., a police officer was a member of the Task Force set up by the Victoria Police to investigate two police operations including the murders of two police officers Sergeant Gary Silk and Senior Constable Rodney Miller. The book disclosed information relating to police informers which the author was bound to keep confidential. Also, the book was published in a form which emphasised the inside knowledge of the author as a police officer. D'A. was later charged with offence under s127A of the *Police Regulation Act* 1958 ('Act') alleging that D'A had published information which came to his knowledge and which it was his duty not to disclose. D'A. was convicted of the charge in the Magistrates' Court and again on appeal in the County Court.

On the appeal D'A. submitted that he was not guilty of the charges that although he relevantly published facts at the date he provided the manuscript to the publisher, he had not published such facts on the date alleged in the information, being the date on which the publisher subsequently published the book. Upon appeal—

HELD: Appeal dismissed.

1. The verb "publishes" is used in s127A of the Act in its ordinary meaning. The word derives from the Latin "publicare" meaning to "make public" and continues to have this fundamental meaning. Whether circumstances fit within the ordinary meaning of a word is a question of fact not of law. The word "publish" in its ordinary meaning embraces publication by both an author and a book publisher on the date a book is released to the public. As a matter of ordinary language, the author can properly be said to have published the facts contained in the manuscript together with the book publisher to the public by way of the issue of the book.

2. In the present case the evidence demonstrated that the publication of the book occurred with the continuing authority of the author given by licence agreement. The process of publication of the book by the author and the publisher was commenced at an earlier date but crystallised on the date charged.

3. Accordingly, the judge of the County Court made no error of law in finding the charge proved.

OSBORN J:

1. The plaintiff, a police officer, seeks an order in the nature of *certiorari* setting aside the decision of his Honour Judge Ross in the County Court made on appeal from a Magistrates' Court, convicting the plaintiff of a "rolled up" charge pursuant to s127A of the *Police Regulation Act* 1958 ("the Act") and imposing a fine of $1,500.

2. Section 127A of the *Act* provides:

> "**127A Unauthorized disclosure of information and documents**
> (1) Any member of the police force who publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge or into his possession by virtue of his office and which it is his duty not to disclose shall be guilty of an offence against this Act and liable to a fine of not more than 20 penalty units."

3. The charge arose out of the publication of a book entitled "*One Down, One Missing*" of which the plaintiff was the author. The book disclosed information was disclosed relating to some seven police informers which it is admitted the plaintiff was bound to keep confidential.

4. The book provides extensive details of two police operations. Operation Hamada was set up to investigate a series of 11 armed robberies generally involving take-away food stores and restaurants. The first of the "Hamada" armed robberies occurred in March 1998 and the last occurred in July 1998. On 15 August 1998 two police officers, Sergeant Gary Silk and Senior Constable Rodney Miller, were required to conduct surveillance as part of Operation Hamada. Shortly after midnight on 16 August 1998 Silk and Miller intercepted a suspect vehicle in Cochranes Road, Moorabbin and in the course of that interception were shot and killed.

5. The Lorimer Task Force was established to investigate the murders of Silk and Miller. The investigation resulted in the arrest, charging and subsequent conviction of Bandali Debs and Jason Roberts for the murders.

6. The book was published in a form which emphasised the inside knowledge of the plaintiff as a police officer. The rear cover states in part:

> "*One Down, One Missing* is a vivid in-house account of the Lorimer Task Force, the elite team assembled to investigate the men's murders, and the twisted path that lead to the killer's door. A member of that team, Detective Senior Constable Joe D'Alo, has collaborated with writer David Astle to give readers a rare chance to enter a dramatic chapter of Australian police history.
>
> Join the largest manhunt ever mounted in Victorian police history. Meet the remarkable men who cracked the case, and get an insider's perspective on the pressure under which they work. Enter the realm of ballistics, forensics and high pressure politics. See the underworld up close, and follow the Task Force's tactics and personal sacrifices made in pursuit of justice. Hear the chilling words of the killers and associates on hidden tapes. If you think you know all the facts of the Silk and Miller case, think again."

7. The identity and circumstances of police informers associated with both operations were regarded by senior police as matters of substantial sensitivity, first, because of the need to protect the ongoing use of such persons by police and secondly, because of the risk of retaliatory conduct toward such persons.

8. The plaintiff was originally brought before the Magistrates' Court on 7 February 2005 with respect to some 12 informations.

9. By agreement with the informant, however, a plea of guilty was entered to a single amended "rolled up" charge and the other 11 charges were struck out.

10. Somewhat surprisingly the plaintiff then appealed against both conviction and sentence to the County Court. The general ground of appeal stated was:

> "That the punishment is excessive."[1]

11. On appeal[2] it was submitted on behalf of the plaintiff that although the plaintiff had relevantly published facts at the date he provided his manuscript to the publisher, the plaintiff had not published such facts on the date alleged in the information, being the date on which the publisher subsequently published the book. Further, because the date of such publication preceded the laying of the relevant information by more than 12 months, it was submitted the information could not be amended.

12. The offence created by s127A(1) of the Act is a summary offence by virtue of the provisions of s112(2) of the *Sentencing Act* 1991. In turn, s26(4) of the *Magistrates' Court Act* 1989 provides:

> "(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."

13. His Honour Judge Ross nevertheless found as a fact that the plaintiff had published the relevant material on the date charged.

14. The plaintiff seeks to quash this decision on a series of grounds which seek to ventilate the underlying contention that the decision discloses an error of law on the face of the record, in that it was not open to find the charge proved.[3]

The Record

15. The learned Judge's reasons constitute part of the Court's record by virtue of s10 of the *Administrative Law Act* 1978. It is submitted that they were inadequate in that they did not disclose a basis for the finding made.

16. The affidavit sworn in support of the application states his Honour made a finding that:

> "... as a matter of fact that (the plaintiff) published the relevant material on 19 May 2003."

17. It is at least arguable that his Honour's finding was inadequate because its basis was not disclosed[4], but in the absence of a transcript disclosing the full context in which his Honour made such finding, I would have some hesitation in accepting this submission.

18. Ultimately, however, counsel for the plaintiff accepted that his client did not seek further reasons or a rehearing by way of relief in this Court. The plaintiff's case is that the County Court was bound to dismiss the information on the facts before it. Counsel accepted that it would be futile to remit the matter for further reasons or hearing if this submission were rejected.

The Plea of Guilty

19. The first difficulty confronting the plaintiff with respect to the submission that there was no evidence upon which the County Court could find the offence proven, is that the Court had before it the plea of guilty at first instance. The Plea was made by a police officer who was legally represented. As Winneke P said in *R v D'Orta-Ekenaike*[5] "evidence of an earlier plea of guilty amounts to a formal confession of the existence of every ingredient necessary to constitute the offence" [6]. It simply cannot be said there was no evidence upon which his Honour could convict. Indeed, counsel for the plaintiff ultimately conceded this was so during the course of the hearing before me. On one view this is the short answer to this proceeding, but although I am of the view that properly characterised, the plaintiff's attack was directed to the weight of the evidence (a course not open in a proceeding of the present kind) nevertheless I shall seek to address the principal argument put with respect to the decision on the facts.

The Decision on the Facts

20. The affidavit of the plaintiff's former solicitor sworn in support of the application states in part that facts were agreed before the County Court as follows:

> "At the commencement of the hearing on 30 May 2005 counsel for the first defendant led the agreed facts before his Honour Judge Ross and the hearing commenced based on those agreed facts. Those facts led before his Honour Judge Ross were:
> (a) The plaintiff is and was at all relevant times a member of the Victoria Police Force;
> (b) The plaintiff co-authored a book called '*One Down, One Missing*' ('the book');
> (c) The book was published by Hardie Grant (Books) Pty Ltd ("Hardie Grant") ... on or about 19 May 2003;
> (d) '... *Persons of Interest*, Nos. 5, 25, 26, 28, 31, 41 and 42 provided information to the Victoria Police ...'; and
> (e) The information contained in sub-para. (d) above:
> (i) came into the plaintiff's possession; and
> (ii) was contained in the book."

21. It was submitted on behalf of the plaintiff that the agreed facts themselves form part of the "record" for the purposes of this proceeding. I do not accept that this is necessarily so, but even if it were the case, it is apparent that the evidence before his Honour went beyond the agreed facts and they could not be regarded in themselves as conclusive of the relevant evidence.[7] Accordingly it is difficult to treat them as founding an argument that the County Court's conclusion was not open to it.

22. Following closure of the prosecution case counsel for the plaintiff submitted that the evidence before the Court established that:

> (a) The book was published on or about 19 May 2003 pursuant to a licence agreement between Hardie Grant and the plaintiff;
>
> (b) Prior to 7 April 2003, the plaintiff submitted to Hardie Grant a manuscript containing the entire

book (save for minor typographical amendments);

(c) On or about March 2003, Hardie Grant made an independent decision to publish the book;

(d) The plaintiff had no input into the decision to publish;

(e) Hardie Grant is not a member of the Victoria Police Force and is thereby precluded by virtue of its status from being capable of committing the offence of contravening s127A of the *Police Regulation Act* 1958;

(f) There was no evidence that the plaintiff had committed any relevant act on or about 19 May 2003 or indeed any date on or after 7 April 2003; and

(g) As a consequence, the first defendant's case was fatally flawed.

23. Assuming submissions (a) to (f) to be correct for present purposes, the question before his Honour was whether the author could be said to have "published" the relevant facts on the date which it was agreed the book was published, 19 May 2003.

24. In my view the verb "publishes" is used in s127A in its ordinary meaning. Whether circumstances fit within the ordinary meaning of a word is a question of fact not of law.[8] Accordingly, the plaintiff must show it was not open to the County Court to conclude that he published the facts by way of the book on 19 May 2003.

25. In my view the word "publish" in its ordinary meaning does embrace publication by both an author and a book publisher on the date a book is released to the public. This is the sense in which it was used by a senior police officer when he made a diary entry on 13 March 2003 of a communication from the plaintiff:

"Joe D'Alo – intention to publish a book on his experience in the Lorimer Task Force ..."

26. It is submitted on behalf of the plaintiff that as a matter of ordinary language the only publication which involved the plaintiff was that which occurred when the plaintiff communicated the manuscript to the book publisher. I do not accept this is so. In my view as a matter of ordinary language, the author can properly be said to have published the facts contained in the manuscript together with the book publisher to the public by way of the issue of the book. This meaning of publish has a long history. The word is derived from the Latin "publicare" meaning to "make public" and continues to have this fundamental meaning. The third edition of the *Shorter Oxford English Dictionary* gives, among others, the following meaning for publish:

"4. *spec.* to issue or cause to be issued for sale to the public (copies of a book, engraving, etc.); said of an author, editor, or *spec.* of a professional publisher 1529."

27. In the present case the evidence demonstrated that the publication of the book occurred with the continuing authority of the author given by licence agreement. As Mr McArdle submitted, the process of publication of the book by the author and the publisher was commenced at an earlier date but crystallised on the date charged.

28. I am fortified in this conclusion by three considerations. First, the use of the phrase "publishes or communicates" in s127A. Secondly, the potential breadth of the meaning of the term "publish" is reinforced by the sense in which the term has always been understood in the context of the law of libel. Thirdly, the converse view would lead to an absurd result.

29. I will deal with each of these matters in turn. The first relates to the language of s127A read as a whole. If the notion of publication were restricted to direct communication, the word "publishes" would add nothing to the word "communicates". In my view Parliament intended to use both words in their ordinary and complementary meanings and effect should be given to both words.[9]

30. The second matter relates to the law of libel. The submission made on behalf of the plaintiff that he "published" the facts to the book publisher, uses the word publish in the extended sense in which the law of libel uses it, and not in the ordinary sense of the word. In the ordinary sense

of the word the plaintiff communicated the facts to the publisher and then "published" them together with the publisher. If, however, an extended technical meaning is given to the word "publish" and the plaintiff is to be regarded as having published the facts to the publisher, then that same extended technical meaning envisages that an author may be involved in sequential publications.[10]

31. Further, the sense in which the common law of libel uses the word "publish" would embrace the plaintiff's connection with the publication of the book.

32. In *Webb v Bloch & Ors*[11] the High Court considered the joint liability of an author (a solicitor named Norman) and others with respect to the publication of defamatory statements in a circular. Isaacs J stated at 362-363:

> "*Publication.* – One strongly contested question in this case is as to the responsibility of the defendants for the malice of Norman. Much of the difficulty was occasioned, in my opinion, by a misunderstanding as to what is meant by 'publication'. It was urged that, whatever he did or whatever was the state of his mind, the defendants took into their own hands the question of publishing the circular, and as they did that, Norman's malice – if there were malice on his part – in framing and distributing the circular pursuant to express direction, did not affect the defendants. Norman's part in the matter is seen by reference to the evidence. He was employed in general terms to compose 'a form of circular he would advise being sent to each grower and contributor', and at the same time to send 'a full list of names and addresses of growers and contributors'. He was therefore, employed to compose the circular 'for the purpose of publication ...' To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle ... On the facts of this case, Norman in law 'published' the libel on Webb. Even if not he but another had undertaken the actual distribution of the circular, he would still have been one of the principals in relation to Webb.
>
> The meaning of 'publication' is well described in Folkard on *Slander and Libel*, 5th ed. (1891) at p439 in these words:
>
> > 'The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the defendant has been instrumental to such publication; since, *if he has intentionally lent his assistance to its existence for the purpose of being published,* his instrumentality is evidenced to show a publication by him'."
> > (Original emphasis, citations omitted.)

33. His Honour went on to canvas the authorities supporting the above propositions including the following at 364-5:

> "In *Parkes v Prescott*[12] Montague-Smith J says:
> 'If a man gives a copy of his speech to another to publish, he is answerable as a *publisher*.'
>
> He quotes with approval the words of Lord Denman CJ in *R v Cooper*[13]. 'If' says the learned judge[14], 'the law were otherwise, it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents.'
> Keating J and Hannen J concurred. In relation to Webb, it is Norman who was the 'real author', the mastermind, and the defendants, for their own independent objects, no doubt, were the 'real intermediate agents' to disseminate the libel." (Original emphasis)

34. It was submitted on behalf of the plaintiff that the meaning of "publish" in the law of defamation was a creature of the law of tort, but this is not strictly correct. Defamatory libel was an offence at common law.[15] It has also been the subject of a series of statutory offences each of which have utilised the word "publish" in the sense referred to above. Thus, s4 of the *Libel Act* 1843 (UK) provided that any person who maliciously published any defamatory libel, knowing it to be false, was liable on conviction to imprisonment or a fine. [16]

35. It follows that the ascription of a technical meaning to the word "publish" by reference to the notion of publication at common law, may enable the provision of the manuscript to the publisher to be regarded as a publication, but it simultaneously embraces publication by authorship of a book.

36. I turn then to the consequences of the construction for which the plaintiff contends. If the plaintiff's submission as to the meaning of the word "publish" in the present case were correct,

then an author would avoid all liability for the summary offence created by s127A, whenever he or she communicated facts to a book publisher, which were not made public by the issue of the book for a further period of 12 months. There are many instances such as the present case where the publication of a book may be delayed by considerations relating to the fair trial of alleged offenders. If the plaintiff's construction were correct it would defeat the obvious purpose of the section in many such cases of delay and would create a situation in which the interposing of an intermediary prevented prosecution for the deliberate publishing by a police officer of confidential material to the world at large. In my view that would be an absurd result and one that Parliament is unlikely to have intended.[17]

37. It was submitted on behalf of the plaintiff that in the context of the present case the author could not be said to have published jointly with the book publisher in circumstances where only the author's actions constituted a criminal offence. I can see no reason in principle why this should be so. The question is simply whether the author, being a police officer, can himself be said to have "published" the facts to the public.

38. Further, to return to the example of the law of libel, it is apparent that in the context of criminal libel, circumstances might arise where malice could be proved against an author but not against a book publisher giving rise to liability on the part of one but not the other pursuant to a relevant statutory offence based on publication.

39. Accordingly, I am of the view that even if the facts are to be regarded as established in the manner the plaintiff submits that the weight of the evidence required, his Honour made no error of law in finding as he did. In consequence the fundamental contention of the plaintiff fails and the proceeding must be dismissed.

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[1] In answer to the proforma inquiry as to the plea entered in the Magistrates' Court the notice of appeal incorrectly asserted that no plea was taken.
[2] The appeal was by way of rehearing pursuant to s110(2) of the *Magistrates' Court Act* 1989.
[3] A further ground stated in the originating motion alleging a want of natural justice was abandoned before me.
[4] See *R v Arnold* [1998] VSCA 34; [1999] 1 VR 179; (1998) 102 A Crim R 535 and *Farrugia v The County Court of Victoria & Anor* [2000] VSC 11.
[5] [1998] 2 VR 140 at 146 - 147; (1997) 99 A Crim R 454.
[6] See also *De Kruiff v Smith* [1971] VicRp 94; [1971] VR 761 at 765; *R v Henry* [1917] VicLawRp 76; [1917] VLR 525 at 526; 23 ALR 298; 39 ALT 41.
[7] As to the nature of the record see *Kuek v Wellens & Anor* [2000] VSC 326 per Gillard J at [24]-[76].
[8] See *Cozens v Brutus* [1972] UKHL 6; [1973] AC 854; [1972] 2 All ER 1297; [1972] 3 WLR 521; (1972) 136 JP 390; *Franceschini v Melbourne & Metropolitan Board of Works* [1980] 1 PABR 276; (1980) 57 LGRA 284; *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262.
[9] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 382; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41 per McHugh, Gummow, Kirby and Hayne JJ; DC Pearce and RS Geddes *Statutory Interpretation in Australia* (2001) 5th Ed. at 36 – 37.
[10] The possibility of sequential publications is well recognised in the law of libel. Gatley on *Libel and Slander*, 9th ed. p139 [6.15] quotes from a Report of the Committee on the Law of Defamation Cmd. 7536 (1948) at p29: "Where defamatory matter is contained in a book, periodical or newspaper, there are normally a series of publications each of which constitutes a separate tort. First there is a publication by the author to the publisher for which the author is solely liable. Secondly, there is the publication by the author and publisher jointly to the printer, for which the author and publisher are jointly liable. Thirdly, there is the publication of the printed work to the trade and the public, for which the author, printer and publisher are jointly liable."
[11] [1928] HCA 50; (1928) 41 CLR 331; (1928) 2 ALJR 282.
[12] [1869] LR 4 Exch 169 at 178; 35 LJEx 105.
[13] (1846) 8 QB 533.
[14] [1869] LR 4 Exch 169 at 179; 35 LJEx 105.
[15] *Halsbury's Laws of England*, 4th ed., vol. 28 at 275.
[16] The *Wrongs Act* 1958 (Vic) s10 now provides: "Publisher of false defamatory libel: (1) Every person who maliciously publishes any defamatory libel knowing the same to be false shall be liable to imprisonment for a term of not more than two years and to pay such fine as the court awards. (2) Every person who maliciously publishes any defamatory libel shall be liable to fine or imprisonment or both as the court may award such imprisonment not to exceed the term of one year."
[17] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 320 - 321; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434 per Mason & Wilson JJ; *Tickle Industries Pty Ltd v Hann* [1974] HCA 5; (1973) 130 CLR 321 at 330 - 332; 2 ALR 281; 48 ALJR 149 per Barwick CJ; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421 - 422; (1988) 12 ACLR 609; 6 ACLC 226 per McHugh JA.

APPEARANCES: For the plaintiff D'Alo: Mr N Hutton, counsel. Mike Wardell & Associates, solicitors. For the first defendant Nolan: Mr J McArdle QC, counsel. Office of Public Prosecutions.
