45/01; [2001] VSC 439

SUPREME COURT OF VICTORIA

HERALD & WEEKLY TIMES LTD and ORS v JOHNSTON and ORS

Beach J

30 October, 20 November 2001

PRACTICE AND PROCEDURE – SUPPRESSION ORDER – BLANKET SUPPRESSION ORDER MADE – SEVERAL PERSONS CHARGED WITH OFFENCES OF BURGLARY, CRIMINAL DAMAGE AND RIOT – ARREST AND CHARGING RECEIVED PRESS COVERAGE INCLUDING PUBLICATION OF THE NAMES OF THOSE CHARGED – ORDER MADE BY MAGISTRATE PROHIBITING PUBLICATION OF A REPORT OF THE WHOLE OF COMMITTAL MENTION PROCEEDING – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S126(2)(c).

J. and others were charged with a number of offences arising out of an incident where a number of persons unlawfully entered business premises, terrified the staff and caused substantial damage to the premises. The arrest and charging of the six officials received a deal of press coverage including the publication of their names. When the charges came on for committal mention the magistrate granted an application for suppression orders prohibiting the publication of the names, offices, addresses or other details which could identify the defendants or any of them. When the matter was referred back to the same magistrate some time later, the magistrate made an order prohibiting publication of a report of the whole or any part of the proceeding or of any information derived from the proceeding. Upon the return of an originating motion seeking an order to quash—

HELD: Order quashed.
It was not open to the magistrate to find that publication of any report of the proceedings before the Magistrates' Court would be prejudicial to the administration of justice. The issue at the trial of the defendants would not be concerned with the identity of the defendants but rather the identification of those persons who entered the premises and caused the damage. The identity of the persons charged was already a matter of public record. Accordingly, there was no justification for making an order suppressing the identity of the defendants.

BEACH J:

1. This is the return of an originating motion filed in the Court on behalf of The Herald and Weekly Times Limited, the Age Company Ltd. and Nationwide News Pty. Ltd., whereby the plaintiffs seek orders in the nature of *certiorari* quashing the orders of the Magistrates' Court of Victoria made on 29 October 2001 in proceedings numbered P01498272, P01496865, P01498523, P01497982, P01497676, P01497392, and P02369530 that pursuant to s126(2)(c) of the *Magistrates' Court Act* publication of a report of the whole or of any part of the proceedings or of any information derived from the proceedings is prohibited.

2. The background to the application may be summarised as follows.

3. It would appear that for some time prior to 15 June 2001 a company called Skilled Engineering had been involved in an industrial dispute with the Australian Manufacturing Workers Union (the union).

4. On 15 June 2001 a number of persons unlawfully entered the premises of Skilled Engineering at Box Hill, terrified the staff of Skilled Engineering, and caused substantial damage to the premises. The police allege that those persons were members of the union.

5. On 6 July 2001 six officials of the union were arrested by police and were charged with a number of offences arising out of the incident including aggravated burglary, criminal damage and riot. The six officials were then released on bail.

6. Needless to say the arrest and charging of the six officials received a deal of press coverage including the publication of their names.

7. On 10 July 2001 the six officials appeared before the Melbourne Magistrates' Court. On the

application of their counsel, the presiding Magistrate Mr Muling DCM made an order prohibiting publication of any photographic material that might identify the officials. As I understand the situation the reason the Magistrate made the order he did was that as the identity of those persons who entered the premises of Skilled Engineering and rampaged through the premises would be hotly contested by the six defendants, the evidence of eye witnesses to the incident may be tainted by the publication of such photos.

8. On 12 October 2001 the six defendants again appeared before the Melbourne Magistrates' Court at a committal mention hearing. On this occasion the Court was constituted by Mr Alsop M.

9. During the course of the hearing the defendants' counsel made application for suppression orders prohibiting the publication of any material which could identify the defendants.

10. In acceding to the application the Magistrate said:

> "S126 refers to: 'Prejudice the administration of justice'. The cornerstone of the extremely serious criminal charges faced by the defendant is the question of identity. That issue will in all probability be the subject of the committal mention and the committal hearing. It is hard to imagine a more destructive way to prejudice the administration of justice than by allowing publicity of any details likely to identify these particular persons when that issue is crucial to their unassailable right to defend criminal charges. It is the order of this court that pursuant to s126 of the *Magistrates' Court Act* the publication of any names, offices, addresses or other details which could identify the defendants or any of them is prohibited. This order will operate in conjunction with the order of Deputy Chief Magistrate Muling previously referred to. That is the order of the court."

11. The Magistrate then adjourned the committal mention to 23 November 2001.

12. On 15 October 2001 the plaintiffs filed an originating motion in the Court naming the six officials and the Magistrates' Court of Victoria as defendants and seeking the following orders:

> "Orders in the nature of *certiorari* quashing the orders of the Magistrates' Court of Victoria constituted by Mr Alsop M made on 12 October 2001 that any publication of any details as to the identity or other detail which could identify the first to sixth defendants to the proceedings in the Magistrates' Court is prohibited."

13. The plaintiffs' originating motion came before Ashley J on 17 October 2001. The hearing continued into the following day.

14. At that time his Honour had before him certified extracts of the suppression orders made in respect of each of the six officials.

15. During the course of the hearing on 18 October it became apparent to his Honour that there were certain discrepancies in the certified extracts.

16. Following a short adjournment his Honour delivered a ruling in relation to the matter. The passages in his Honour's ruling relevant for present purposes read:

> "In my opinion it is entirely unsatisfactory that the proceeding commenced by originating motion now before me should proceed as the circumstances presently exist unless that is absolutely unavoidable. At the moment I am not satisfied that it is absolutely unavoidable and for that reason I intend to adjourn the proceeding to a date to be fixed. ... The first of the extracts, referring to one of the defendants below, was in the form relevantly:
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> 'The publication of any material which could identify the defendant is prohibited.'
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> In the course of submissions made yesterday, it was agreed, I think rightly, by Mr Houghton and by Mr Dreyfus for four of the defendants that the effect of s18 of the *Magistrates' Court Act* is that the certified extract of the authenticated order represents the order of the Magistrates' Court. It is, of course, the order made by the Magistrates' Court which in the case of each defendant the plaintiffs seek to have quashed in the proceeding now before me. It emerged today that in fact the certified extracts show that orders were made in five different forms. Thus, form 1, 'the publication of any material which could identify the defendant is prohibited'. Form 2, 'the publication of any information

> which could identify the defendant is prohibited'. Form 3, 'the publication of any information which may identify the defendant is prohibited'. Form 4, 'the publication of any information or details which could identify the defendant is prohibited'. Form 5, 'any publication of any details as to the identity or other details which could identify the defendant is prohibited'. The forms in which the orders were authenticated, in circumstances where it seems clear that only one form of order was ever intended, raises multiple problems. One of them is to understand the nature of the orders made by reference to s126(2) of the Act. According to the extracts, it seems possible that the magistrate made orders under one or other of sub-s(2) paragraphs (c) or (d). If he made orders under the latter provision, then sub-ss(5), (6) and (7) would be relevant. Again, it seems quite wrong that this Court should be asked to deal with and quash a variety of orders made in different language where, on the face of it, orders in only one form were intended. It is, I must say, extremely unsatisfactory that close analysis has shown the extracts to vary so considerably that one cannot be confident just what the magistrate intended. ... What I have said explains why in my opinion it has become necessary to adjourn this matter. I anticipate that someone will approach the Magistrates' Court seeking to have the anomalies resolved. If the Magistrates' Court is persuaded that it has power to rectify the orders, or some or most of them, to coincide with its intention, and if it does so, then there will be a basis for the plaintiffs returning to this Court and seeking to amend their originating motion suitably so that the substance of the matter can be disposed of."

17. His Honour then adjourned the application *sine die*.

18. On 26 October 2001 a seventh union official was charged with offences similar to those brought against the six officials.

19. On that same day McDonald J made an order restraining the plaintiffs from publishing any information which might identify the seventh official. The order was expressed to run until 4.00 pm on 29 October.

20. On 29 October counsel for the parties appeared again before the Melbourne Magistrates' Court. They drew to the attention of the Magistrate the discrepancies in respect of the six orders made on 12 October and sought rectification of the orders. Counsel for the seventh official also sought the making of a similar order to the one pronounced orally on 12 October in respect of his client.

21. Without hearing further debate in relation to the matter the Magistrate made the following orders in respect of each of the seven officials:

> "Pursuant to section 126(2)(c) of the *Magistrates' Court Act* publication of a report of the whole or of any part of this proceeding or of any information derived from the proceeding is prohibited."

22. On 30 October the plaintiffs' originating motion came before me for hearing.

23. At the outset of the hearing I gave the plaintiffs leave to add the seventh official as a defendant to the proceeding and gave them leave to amend the originating motion to seek the orders to which I first referred.

24. Thus far, when referring to the defendants, I have, of course, been referring to the union officials against whom the police have brought charges. Although the Magistrates' Court of Victoria is a defendant to the proceeding it did not seek to be heard in the matter indicating by letter to the Prothonotary that it would abide the order of the Court.

25. It is convenient now to have regard to the sub-sections of s126 of the *Magistrates' Court Act* 1989 which are relevant for present purposes. They 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— (a) 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; or (d) make an order prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the court."

26. In my opinion the order made by the Deputy Chief Magistrate on 10 July prohibiting publication of any photographic material that might identify the then defendants was an order

properly made under s126(1)(a) and 2(d). Clearly the issue of identification of those involved in the incident on 15 June will be a central issue at the trial of the proceeding. The publication of a photograph of one or more of the defendants would carry a real risk, therefore, of contaminating identification evidence at the trial.

27. The matter of the pre-trial publication of photos of an accused was dealt with by Gleeson, CJ in *Attorney-General for the State of New South Wales v Time Inc Magazine Co Pty Ltd and Another*, unreported, 15 September 1994 (BC 9402993).

28. At p3 his Honour said:

> "The reason why the publication of photographs of accused persons has attracted the attention of the courts, and is regarded as risky, is related to the notorious difficulty, and potential for giving rise to miscarriages of justice, that surrounds the subject of identification. Such is the concern of courts about the risks involved in identification evidence that trial judges are bound by authority to give appropriate warnings and directions drawing the attention of juries to these risks. One of the particular problems about identification evidence is that the most honest of witnesses, completely confident in their own beliefs, can be mistaken. Another problem is that of suggestibility. People can honestly believe they recognise somebody because of ideas that have been suggested to them, and human nature is such that it is difficult, and sometimes impossible, for people to distinguish between what they know, and what they believe, or between the various sources from which their beliefs have come to be made up. One of the particular problems about identification evidence is the difficulty that exists where a person, before performing an act of identification of an accused, has been shown a photograph of the accused. If, for example, prior to identifying an accused person in a police line-up, a witness had been shown by a police officer a photograph of the accused, then it would be strongly argued that the identification in the line-up was useless, or at least of very limited value. It would be argued that, because of what is sometimes described as the displacement effect, there was a high risk that at the time of the line-up the witness was performing an act of recognition, not of a person who had been seen by the witness on some previous occasion, but of the person in the photograph. It is for much the same reason that in-court identifications are usually regarded as of little value. Some trial judges do not permit them. Other judges take the view that juries would think it extraordinary if a witness were not asked to identify an accused person in court, and they permit such in-court identification, but follow it, immediately, with a warning to the jury of its limited value. One of the reasons for its limited value relates to the matter of suggestibility. A witness who identifies an accused person at a criminal trial is identifying someone who, by that time, is known to be the person alleged by the Crown to be the same as the person the witness had seen on some previous occasion. Mistaken identification is such a common problem, and honest error about identity is so easy to make, that courts administering criminal justice take special care about this issue. Similarly, police and prosecuting authorities need to take precautions. Police need to be careful that their processes of investigation do not contaminate evidence and destroy its usefulness at a trial. For that reason police need to exercise care about showing photographs, or making suggestions, to potential witnesses, who will, in due course, be cross-examined about the circumstances in which they came to identify an accused person. As was noted above, it is not only a question of fairness to the accused. The strength of a Crown case can be diminished by incautious police conduct in this regard. The problems involved in the use of photographs shown to a person who may later become a witness as to the identification of a suspected person are examined in the judgment of Stephen J in *Alexander v R* ([1981] HCA 17; (1981) 145 CLR 395 at 416-418; (1981) 34 ALR 289; (1981) 55 ALJR 355).

29. At p4 his Honour said:

> "The leading authority in New South Wales on the pre-trial publication of photographs of accused persons is *Ex parte Auld re Consolidated Press Ltd* ((1936) 36 SR (NSW) 696; 53 WN (NSW) 206). Jordan CJ said, at SR 597, that the question whether the publication of such a photograph constitutes a contempt depends upon whether it has a tendency to interfere substantially with a fair trial. His Honour said, at SR 598-9: "The test to be applied in order to determine whether the publication of the photograph of an accused person, in such a way as to state or suggest that it is he who is accused, is a contempt of court calling for summary action, is to see whether, as at the time when the photograph was published, there was a likelihood that the identity of the accused would come in question in some aspect of the case, so that publication of the photograph would be likely to prejudice a fair trial. If the court is satisfied beyond reasonable doubt that there was such a likelihood – and the nature of the offence charged and the stage at which the publication takes place may supply ample evidence of this – a case for intervention is made out. The question is not whether, on the facts then known, a defence based on identity is likely to be successful or likely to be set up, it is whether it is not reasonably probable that identity may come in question'."

30. At p7 his Honour said:

> "Notwithstanding the considerations so forcefully advanced by Mr Callinan I would conclude, for the reasons explained above, that, in the circumstances that existed at the time of the publication of the photograph, the clear tendency of the publication was, as a matter of practical reality, to interfere with the due course of justice. Identity was the central issue in the case. There is a real and definite possibility that the evidence of people who might come forward as witnesses for the Crown, or the defence, will be contaminated by their having seen the photograph of Mr Milat before performing an act of identification."

31. In this case of course, it is unnecessary to consider that aspect further as there is no challenge by the plaintiffs to the orders made on 10 July, their counsel conceding that in the circumstances of this case the orders were properly made.

32. Strictly speaking it is unnecessary for me to determine the validity of the orders pronounced by the Magistrate on 12 October because those orders have been superseded by the orders made on 29 October.

33. However, it was strongly urged on me by counsel for the defendants that if I was of the view that the orders of 29 October should be quashed I should not make an order to that effect but should remit the matter to Mr Alsop M to further consider the matter in the light of my findings and in particular to give consideration to re-making orders in the terms of the orders pronounced by him on 12 October. See *Re Robins SM: Ex parte West Australian Newspapers Ltd*[1]

34. In the circumstances of this case that is a course I do not propose to adopt.

35. In my opinion there was no justification for making an order suppressing the identity of the defendants. The issue at the trial of the criminal proceedings against the defendants will not be concerned with the identity of the defendants, it will be concerned with the identification of those persons who entered the premises of Skilled Engineering on 15 June and rampaged through the premises.

36. The identity of the persons against whom the police have laid charges arising from the events of 15 June is already a matter of public record. A prospective witness could find out that information if he or she were so minded, by simply searching the register at the Melbourne Magistrates' Court. I fail to see how knowing the identity of the persons charged will assist such witness to identify one or more of the defendants as the person or persons who caused the damage at the premises of Skilled Engineering.

37. As Kirby P (as he then was) said in *John Fairfax Group Pty Ltd v Local Court of New South Wales*[2]:

> "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 without fear of prosecution for contempt or action for defamation 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."

38. I turn then to the orders of 29 October.

39. Was it necessary in the interests of justice that a blanket suppression order be made in respect of the proceedings?

40. The answer in my opinion is No.

41. As the High Court pointed out in *R v Tait*[3]: "To deny the public any part of the proceedings of a court is a matter of gravity, especially where the court is exercising criminal jurisdiction."

42. In my opinion there were no circumstances in this case which warranted the making of a blanket suppression order.

43. The order already made prohibiting publication of any photographic material that might identify any of the six union officials then covered by the order was sufficient to ensure that the evidence of eye witnesses to the behaviour which occurred on 15 June 2001 at the premises of Skilled Engineering would not be contaminated.

44. In my opinion it was simply not open to the Magistrate to find that publication of any report of the proceedings before the Magistrates' Court relating to the seven defendants would be prejudicial to the administration of justice and in so finding as he must have on 29 October, the Magistrate made an error of law in the matter.

45. I order that the orders of the Magistrates' Court made at Melbourne on 29 October 2001 in proceedings numbered P01498272, P01496865, P01498523, P01497982, P01497676, P01497392 and P02369530 that pursuant to s126(2)(c) of the *Magistrates' Court Act* 1989 publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings is prohibited be quashed.

46. As the matter stands there is presently no order forbidding publication of any photographic material that might identify the seventh official.

47. During the course of the hearing before me counsel for the plaintiffs gave an undertaking to the Court on behalf of the plaintiffs that they would not publish any photographic material which might identify the seventh defendant.

48. Whilst recognising the strength of such an undertaking I do not consider it is sufficient in the circumstances of this case. I say that for the reason that some party other than the plaintiffs may be minded to publish a photograph of the eighth defendant.

49. Accordingly I order that until further order publication of any photographic material that might identify the eighth defendant Terry Bradley is prohibited.

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[1] [1999] WASCA 16; (1999) 20 WAR 511; (1999) 105 A Crim R 554.
[2] (1991) 26 NSWLR 131 at 140; 26 ALD 471.
[3] (1979) 46 FLR 386 at 401; (1979) 24 ALR 473.

APPEARANCES: For the Plaintiffs Herald & Weekly Times Ltd and Ors: Mr WT Houghton QC with Mr SA O'Meara, counsel. Corrs Chambers Westgarth, solicitors. For the first, seventh and eighth defendants: Mr MA Dreyfus QC with Mr G Mullaly, counsel. Stary Myall, solicitors. For the DPP: Mrs V Prapas, counsel. Office of Public Prosecutions.
