12/98

SUPREME COURT OF VICTORIA

HERALD & WEEKLY TIMES LTD v HASSARD & ANOR

Beach J

8 December 1997; 20 January 1998

PRACTICE AND PROCEDURE – SUPPRESSION ORDER – REQUEST TO BE HEARD ON MAKING OF – TEMPORARY ORDER MADE UNTIL ARRIVAL OF LEGAL PRACTITIONER – PRACTITIONER INFORMED ORDER WAS FINAL – WHETHER PRACTITIONER ENTITLED TO BE HEARD – WHETHER BREACH OF RULES OF NATURAL JUSTICE – CONSEQUENCES OF PUBLICATION OF SCHOOL PRINCIPAL'S NAME – COULD LEAD TO IDENTIFICATION OF VICTIM OF SEXUAL OFFENCE – WHETHER APPROPRIATE TO MAKE SUPPRESSION ORDER: *MAGISTRATES' COURT ACT* 1989, S126(d); *JUDICIAL PROCEEDINGS REPORTS ACT* 1958, S4(1A).

When a magistrate indicated that he proposed to make a suppression order, a court reporter informed the magistrate that a legal practitioner was coming to the court to be heard on the suppression order. The magistrate made the order "for the time being" and said words to the effect: "We will revisit the issue if need be when the time comes." When the practitioner later arrived at court, the magistrate ruled that the practitioner had no right to challenge the suppression order on the basis that it was a final order which could not be varied.

HELD: Originating Motion dismissed.
1. When the practitioner sought to challenge the suppression order, no final order had been made in the matter. The practitioner had every entitlement to make the application and to have it dealt with on the merits. Accordingly, the applicant was denied natural justice and ordinarily, would be entitled to have the decision quashed.
***Herald & Weekly Times Ltd v Braun & Ors* [1994] VicRp 50; [1994] 1 VR 705, distinguished.**

2. In the circumstances of the case, if the identity of the principal was published it would almost certainly lead to the identification of the school, the victim's teacher and highly likely the victim. In those circumstances it was open to the magistrate to make the suppression order in the terms indicated in the order.

BEACH J: [1] On 23 July 1997 the principal of a Melbourne primary school was charged on summons with failing "to report a reasonable belief that a child was in need of protection due to the presence of sexual abuse". The charge came before the Ringwood Magistrates' Court on 4 December 1997. Present at the court that day was a court reporter employed by the plaintiff, the Herald & Weekly Times Ltd. Before any evidence was called in relation to the charge, the magistrate indicated that he proposed to make a suppression order in the matter whereupon the reporter stood up, introduced herself to the magistrate, and asked the magistrate to provide a short adjournment so that she could seek legal advice. The magistrate granted the application and left the Bench. The reporter then contacted the plaintiff's Chief of Staff and its solicitors. Having received certain advice in the matter she returned to the court. Upon his return to the Bench, the magistrate asked the reporter what was happening to which she replied, "A legal representative is calling the court to arrange a suitable time to be heard on the suppression order." The magistrate acknowledged that a legal representative would be attending the court, then said words to the effect: "Well, I propose to make the following order for the time being and we will revisit the issue if need be when the time comes." The magistrate then read the following order:

> "Order prohibiting publication of part of the proceedings in the proceeding of X. The court has made an order that pursuant to s126 *Magistrates' Court Act* 1989 publication in these proceedings be prohibited as follows:
> (i) of the school to be referred to in evidence;
> (ii) of any teacher thereof;
> **[2]** (iii) of the complainant in respect of alleged sexual abuse;
> (iv) of the child or children alleged to be the subject or subjects of sexual abuse;
> (v) of evidence which would be reasonably regarded as tending to identify the above or any of them.
> Magistrate 4/12/97."

The magistrate then commenced to hear evidence in the case. Some short time later the plaintiff's solicitor arrived at the court. After waiting until there was a pause in the hearing, he stood up, announced his appearance for the plaintiff, and informed the magistrate that he wished to make an application concerning the suppression order. At that stage counsel for the principal stated that the plaintiff had no right to challenge the suppression order, that it was a final order which could not be varied. In support of that contention counsel stated that he relied upon my decision in the *Herald & Weekly Times Ltd v Braun & Ors* [1994] VicRp 50; [1994] 1 VR 705. The magistrate accepted counsel's submissions stating that he could not revisit the suppression order as it was a final order only capable of appeal to a superior court.

I now have before me an originating motion filed on behalf of the plaintiff, naming as defendants the magistrate and the principal whereby the plaintiff seeks the following relief.

> 1. An order quashing the decision of the first defendant made 4 December 1997 that the name of
> (a) the second defendant;
> (b) the school of which the second defendant is principal
> **[3]** be suppressed at the hearing of the charges against the second defendant being heard before the first defendant (the "Suppression Order")
>
> 2. An order quashing the decision of the first defendant made 4 December 1997 that:
> (a) the plaintiff had no standing to apply to set aside the Suppression Order; alternatively
> (b) the first defendant had no jurisdiction to vary or rescind the Suppression Order.
>
> 3. Alternatively to paragraphs 1 and 2, an order compelling the first defendant to hear and determine an application by the plaintiff to set aside the Suppression Order."

It is clear from the facts I have recited that the magistrate made two separate decisions in the matter. In the first place he made the decision to make the suppression order; in the second place he made the decision not to set aside or vary the suppression order. As I have indicated, the decision not to set aside the suppression order was made on the basis that the order was a final order and that the magistrate was functus officio in the matter. In my opinion, that is clearly not the case nor is *Braun's case* authority for the proposition that it is. *Braun's case* involved a male transvestite who engaged in prostitution and who was said to be infected with the human immuno-deficiency virus. He was charged with three counts of loitering with intent to engage in prostitution. When the matter came before the court the magistrate made an order pursuant to the provision of s129 of the *Health Act* 1958 suppressing his identity.

[After setting out the provision, his Honour continued] ... **[4]** The magistrate then heard the case, convicted the defendant, and sentenced him to a term of imprisonment in respect of two of the charges and adjourned the hearing of the third charge for a period of 12 months, conditional upon the defendant complying with certain requirements. More than five months after the orders were made, the magistrate dealt with an application by the Herald & Weekly Times Ltd to lift the suppression order. The magistrate ruled that as there was no longer a matter before the court, the court had no power to deal with the application and dismissed it. The matter then came before this court by way of originating motion whereby the plaintiff sought, inter alia, to set aside the suppression order and the order of the Magistrates' Court dismissing the plaintiff's application to lift the suppression order. The view I took of the matter was that by reason of the wording of s129 of the *Health Act* a court or tribunal has no power to make an interim suppression or temporary suppression order. At p711 I said:

> "The short argument advanced in relation to ground 1 is that s129 of the *Health Act* does not give a court or tribunal the power to make an interim or temporary suppression order. Once a court or tribunal is satisfied that it is necessary to make a suppression order because of the social or economic consequences to a person if the fact that the person is infected with the HIV virus is disclosed, then **[5]** the court has no option in the matter but to grant the suppression order and the order cannot be expressed to be an interim or temporary order. In my opinion that contention is correct. As counsel for SS contended during the course of his submissions, a suppression order operates in perpetuity in the absence of evidence that it was obtained by fraud or by mistake or in circumstances which would otherwise justify setting it aside; it is a final order of the court and not one made on any interim or temporary basis."

I then held that having made the suppression order the magistrate was functus officio

and properly dismissed the application. In *Braun's case* the court had finally determined the proceedings before it at the time the Herald and Weekly Times Ltd made its application to lift the suppression order. That was not the situation in the present case. No final order had been made in the matter and the plaintiff had every entitlement to make the application it did at the time it did and to have the application dealt with on the merits. In failing to determine the application on the merits I consider the plaintiff was denied natural justice and in the ordinary course of events would be entitled to an order quashing the decision made by the magistrate whereby the magistrate dismissed its application.

Having regard to the circumstances of the case, however, and in the exercise of my discretion I would not quash the decision unless I was satisfied that it was quite inappropriate to make a suppression order in the matter. To determine whether it was inappropriate it is necessary to have regard to the facts which gave rise to the charge brought against the principal. In about August 1996 a 5 year old boy who at that time was in the preparatory class of the school in **[6]** question told his teacher that he had been sexually assaulted by his father. The teacher drew the matter to the attention of the principal, but the principal, for reasons which are irrelevant for present purposes, did not report the matter to a protective intervener. It is prescribed by s64 of the *Children and Young Persons Act* 1989 that the Director-General of the Department of Health and Community Services and all members of the police force are protective interveners. In due course, the infant's complaints were brought to the attention of the police. Following appropriate investigation the infant's father was charged and brought before the County Court where he was convicted of 20 counts of incest and 23 counts of sexual penetration of a minor and was sentenced to 9 years' imprisonment.

At the school attended by the infant there are approximately 300 students of whom only 25 were in the preparatory class. During the course of the hearing before the Magistrates' Court evidence was given by witnesses to the effect that the victim was a 5 year old boy in the preparatory class at the school, that he had an older brother at the school who at the relevant time was in Grade 1, and that the victim had behavioural problems including the fact that he suffered from attention deficit disorder. The evidence before me is to the effect that at the relevant time the victim was the only boy in the preparatory grade who had an older brother in Grade 1.

It is my opinion that in the circumstances of this case, if the identity of the principal was published it would almost certainly lead to the identification of the school **[7]** and the victim's teacher and it is highly likely that it would lead to the identification of the victim. In so far as the identity of the school is concerned, that could be ascertained by a simple enquiry of the Department of Education or of schools in the general area of the Ringwood Magistrates' Court. Once one ascertained the identity of the school, a simple enquiry of students or staff at the school would be sufficient to enable a person so minded to establish the identity of the teacher of the preparatory grade in 1996. Once one established the identity of the teacher or, for that matter, the identity of any of the students who were in the class in 1996, it would be a simple enough matter to ascertain which student who attended the preparatory class in 1996 had a brother in Grade 1 that same year.

In my opinion, to disclose any information which would be likely to lead to the identification of the victim in this case would not only cause undue distress or embarrassment to the victim within the meaning of s126(d) of the *Magistrates' Court Act* 1989, it would also breach the provisions of s4(1A) of the *Judicial Proceedings Reports Act* 1958. The latter section reads:

> "A person who publishes or causes to be published any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court."

In my opinion this was an appropriate case in which to grant a suppression order in the terms of the order of **[8]** the Ringwood Magistrates' Court and I find that the learned magistrate made no error in that regard. The plaintiff's originating motion is dismissed with costs to be taxed and paid by the plaintiff.

APPEARANCES: For the Plaintiff: Mr W Houghton QC with J Elliott, counsel. Corrs Chambers Westgarth, solicitors. For the Defendant: Mr N Young QC with R McGarvie, counsel. Mallesons Stephen Jaques, solicitors.