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SUPREME COURT OF VICTORIA

BOUCHER & ZERVAAS v McGINLEY and ORS

Marks J

22 March 1982

SUPPRESSION ORDER – COMMITTAL PROCEEDINGS – APPLICATION BY DEFENDANTS FOR AN ORDER PROHIBITING PUBLICATION OF ANY REPORT OF THE PROCEEDINGS – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S44(4).

The applicants faced a number of conspiracy charges arising out of land transactions between 1973 and 1977. Committal proceedings against them commenced and application was made for an order prohibiting publication of any report of the proceedings, or any part thereof, including the opening address of the Crown Prosecutor and all evidence adduced at the committal proceedings. The Magistrate made an interim order to that effect to enable him first to hear the opening and then rule on the application. After their conclusion the Magistrate refused the application and gave reasons. Upon an order nisi—

HELD: Order nisi refused.
1. The magistrate interpreted the words "Likely to prejudice" as involving "a distinct probability", which is indubitably correct, especially if meant in the mathematical sense. But even if the Magistrate meant "more likely than not" then there is no effective distinction between "likely to prejudice" and "more likely than not to prejudice".

2. The magistrate was right to consider the likely time lapse before commencement of the trial. He was entitled to take into account the normal experience of the law which invariably is that some delay occurs and that in cases of complexity the delay is likely to be significant.

3. The magistrate was not in error in saying that if the public were informed about the proceedings and the opening, they would understand that these things were being reported in respect of committal proceedings and not a trial.

MARKS J: *[After setting out the facts and the terms of the order nisi, His Honour continued]* … (a) There is ample authority that some decisions within the criteria of the statutory definition of "orders" made in the course of or in connection with committal proceedings are reviewable. In *Weppner v Arnold* [1923] VicLawRp 17; [1923] VLR 127; 29 ALR 82; 44 ALT 129 the Full Court held that where justices of their own motion amended an information charging an indictable offence, they made an "order" capable of review. (See also *Hall v Braybrook* [1956] HCA 30; (1956) 95 CLR 620; [1956] ALR 587.)

(b) It is a feasible contention that the refusal by the learned Stipendiary Magistrate was less a matter touching the committal proceedings than one touching any trial that might eventuate. Thus, it may be argued that the refusal was of a qualitatively different kind than any decision relating to committal. If the refusal indeed related to the future fair trial of the accused, then arguably it was a judicial decision capable of review as clearly it was a refusal of an application for which the definition of "order" provides. …

It is submitted for the applicants that the discretion of the learned Stipendiary Magistrate miscarried or arguably did so because:

1. He misdirected himself as to the test laid down by s44(4) of the *Magistrates (Summary Proceedings) Act* for the exercise of discretion.

2. He took into account extraneous or irrelevant considerations, namely the time between the committal proceedings and any trial, and gave it undue weight. Alternatively, or in addition, he took it into account without any evidence that there would be any such time lapse or the extent of it.

3. He wrongly took into account that the public would know the difference between the

Prosecutor's opening and evidence adduced, and that the public would know that the proceedings being reported were committal proceedings only.

4. He failed to give due weight to the likely extent of any publication of reports of the proceedings, the extent of previous published material and the likely combined effect.

5. That the refusal was so manifestly wrong that it must have stemmed from error.

1. **Misdirection.** In his reasons, the learned Stipendiary Magistrate referred to the words of s43(1) and s44(4) of the *Magistrates (Summary Proceedings) Act* and the submissions on behalf of the applicants and said:

"It is my opinion that the words 'would be likely' in the context does not mean 'may' or 'could', but is to be regarded as referring to a distinct probability and not a mere possibility. To use an example can one assume, because of inaccurate reports being published in the past, that this will continue to be the case. I think it can be acknowledged that publicity may or could affect a fair trial but this court must be satisfied that publication would affect a fair trial."

In concluding his reasons, the learned Stipendiary Magistrate said:

"Gentlemen, I have considered all matters raised by counsel and have reached the conclusion that the allowing of publication at this stage, in the circumstances that surround this case, would not be likely to affect a fair trial should any of the accused persons be ordered to stand their trial."

It is necessary to consider what the learned Stipendiary Magistrate said as a whole. So considered, I see no arguable case of misdirection. He interpreted the words "Likely to prejudice" as involving "a distinct probability'', which I think is indubitably correct, especially if meant, as I understand it, in the mathematical sense. But even if the learned Stipendiary Magistrate meant "more likely than not", as counsel for the applicants contended, then I see no effective distinction between "likely to prejudice" and "more likely than not to prejudice". I would not grant an order nisi on the ground incorporating the first contention.

2. Next is the point as to the time interval. The learned Stipendiary Magistrate said he thought that the likely time lapse before commencement of any trial was relevant to be considered. I think he was clearly right. Anderson J in *Brych v The Herald & Weekly Times Ltd* [1978] VicRp 67; (1978) VR 727 especially at p731, observed that remoteness of the date of the trial may tend against possible damage from present publicity. I add my own view that it is a matter of common sense. It is contended that the learned Stipendiary Magistrate had no evidence before him of the time lapse or likely time lapse. In my view he was entitled to take into account the normal experience of the law, which invariably is that some delay occurs and that in cases of complexity such as the one before him the delay is likely to be significant.

3. Next, as to the knowledge of the public: What the learned Stipendiary Magistrate said was;

"If publicity was to take place then it is a preliminary enquiry that is being reported. The public would be aware of the nature of these proceedings and would appreciate that an opening by counsel is not evidence against an accused person."

It was submitted for the applicants that the learned Stipendiary Magistrate was purporting, without proper foundation, to read the mind of the public, or alternatively to assess its knowledge. But it is clear that the learned Stipendiary Magistrate was not doing that. He was saying merely that if the public were informed about the proceedings and the opening, they would necessarily be informed that these were the things being reported and that they were being reported in respect of committal proceedings and not a trial. It is not unreasonable to assume that generally speaking the information the public receives is the information given. I detect no arguable error in what the learned Stipendiary Magistrate said in this regard.

4. Wide reportage and previous publicity: I do not think any failure to assess the likely extent of publication of the proceedings is arguably an error. In any case, the learned Stipendiary Magistrate considered the submission that there was much media interest in the case but it cannot be suggested, and I do not think it was, that prohibition of publication must follow as a matter of

course. As to previous publicity, it is not contended that the learned Stipendiary Magistrate did not give this aspect due consideration. Apparently he was provided with the material submitted to me and took time to peruse it, as I have. The overwhelming thrust of the material is some four to five years old. In my view, no arguable error has been demonstrated in relation to this aspect.

5. As to the final contention, I have read the opening, as requested, and perused the newspaper clippings. In my view, the learned Stipendiary Magistrate was entitled to weigh the various factors involved. It has been conceded by all counsel representing each interest that *prima facie* a fair report of the proceedings is lawful. (See s4 *Wrongs Act* 1958) The opening, in my view, had no unusual features of presentation, it being mainly factual and expressed in temperate language. If the facts are prejudicial, the case is not distinguishable from many others. If the facts are interesting, it is undistinguishable from much experience of the law. There was no basis, in my view, for an argument that the learned Stipendiary Magistrate could not reasonably have decided as he did. The result is there will be an order that my order of March 16th, 1982, is discharged, the summons dismissed and the order nisi refused.
