31/92

SUPREME COURT OF VICTORIA

HERALD & WEEKLY TIMES PTY LTD v JONES

Nathan J

25 March 1992 (Judgment certified: 27 March 1992)

PROCEDURE – COMMITTAL PROCEEDING – SUPPRESSION ORDER MADE – BASED ON ASSERTIONS MADE BY COUNSEL AND MAGISTRATE'S KNOWLEDGE – REQUIREMENTS FOR THE MAKING OF AN ORDER – WHETHER ASSERTION, BELIEF OR NOTORIETY SUFFICIENT: *MAGISTRATES' COURT ACT* 1989, S126.

Section 126 of the *Magistrates' Court Act* 1989 provides that a Court may make a suppression order where it is necessary to ensure the administration of justice or the physical safety of a person. As a result of assertions made by an accused's counsel and from the magistrate's own experience, the magistrate made a suppression order that because of allegations that the accused was a notorious child molester his physical safety would be endangered and he would not receive a fair trial if proceedings of the committal hearing were to be published. Upon appeal against the order—

HELD: Appeal allowed. Suppression order quashed.
(1) Whilst a magistrate may act on assertions made by counsel and the magistrate's own knowledge and experience, the court must be satisfied by cogent and admissible evidence that it is necessary for a suppression order to be made. Assertion, belief and notoriety may not be sufficient for a court to conclude that a person's physical safety would necessarily be endangered by publication of the proceedings.

(2) In the present case, there was no evidence, cogent or otherwise to show that publication would of necessity endanger the accused's physical safety or prejudice his fair trial. Accordingly, the magistrate fell into error in making the suppression order.

NATHAN J: [1] This appeal illustrates the collision between the interests of free speech and freedom of the press on the one hand and the right to have a fair trial and the proper administration of justice on the other. The conflict in this case is revealed from the following history.

In March of 1992 the Magistrate sitting at Elsternwick ordered the publication of the name or any material which would be likely to identify the accused in a committal proceeding be totally suppressed. The committal proceedings related to Brian Keith Jones, formally known as Megson and also known in the community as Mr Baldy. Mr Kayser, appearing for him, put to the Magistrate that the accused was known generally as a notorious child molester, and consequently, if his identify was revealed (which, since release from prison, he had obscured) he would be subjected to harassment and possible violence whilst in prison or on remand. Therefore his personal safety was imperilled. Secondly, Mr Kayser put that the identification of Jones in association with a husband and wife team by the name of Taylor would so inflame the community against him that any ultimate trial, should he be committed, would be prejudiced by advance unfair and improper publicity.

The Magistrate ordered – and I repeat the terms of his order – that any publication of any or any part of the matters raised in the court in respect of a hearing relating to the accused Brian Keith Jones which would tend to identify the accused be prohibited and, further, prohibited any representation of the face of Jones, whether by sketch, photograph, electronic facsimile or otherwise. He also prohibited the publication of the fact of the **[2]** making of the order. The Magistrate's comments in granting the order are of short compass, and it is necessary to repeat them in full. He said:

> "I am satisfied the disclosure of the material the subject of this application may have a detrimental effect on the personal safety and well-being of the accused, should the accused be identified. I formed that view upon the matter put to me by Mr Kayser from the Bar table and from my own experience. I am satisfied that the disclosure may really in the future should the accused be committed to stand

> trial prevent the accused from receiving a fair trial. I formed that view having regard to the nature of the allegations made against the accused and having regard to the matters put to me in the earlier applications before the court."

I interpolate, those applications related to hearing the evidence of the alleged victim by a remote process which did not bring him face-to-face with Jones, and secondly that the Magistrate should stand aside because he had some knowledge of one of the Crown witnesses. I return to the text:

> "When it was conceded that the complainant in this matter was the victim of horrible abuse by persons who had already been trialled and sentenced of whom publicity had been attended (?) [I interpolate, that was a reference to the Taylors] in those circumstances I propose to make an order in respect of prohibition."

From that order the Herald & Weekly Times and David Syme have appealed. They obtained from the Master leave to appeal in order to pose the following questions:

> "1. Was the learned Magistrate entitled to rely upon material in the form of submissions made by the respondent's counsel from the Bar table and his own experience as the basis for concluding the disclosure of the material sought to be suppressed may have a detrimental effect on the personal safety and well-being of the respondent [that is, Jones]?
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> 2. Did the learned Magistrate properly apply the provisions of s126(1)(c) of the *Magistrates' Court Act* 1989 in granting the order?
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> **[3]** 3. Was the learned Magistrate entitled to find upon the basis of the matters relied upon by him that disclosure of the matters sought to be suppressed may prevent the respondent from receiving a fair trial?
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> 4. Did the learned Magistrate properly apply the provisions of s126(1)(b) of the *Magistrates' Court Act* in granting the order?"

The *Magistrates' Court Act* reads as follows (as necessarily edited):

> "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—
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> (b) prejudice the administration of justice; or
>
> (c) endanger the physical safety of any person;
>
> (2) The Court may in circumstances mentioned in sub-section 1 order the whole or any part of the proceedings be heard in a closed court."

I am satisfied that the section does relate and encompass committal proceedings, which are ministerial in character, rather than judicial. Having said that, committal proceedings are, in our system of justice, a necessary and integral part of the process of bringing persons to trial. Contempt powers and the suppression powers, in my view, rightly relate to such process. There is no doubt the law in Australia is to extend the contempt powers in relation to fair trials and committal processes, and I refer to *Hinch v Attorney-General (Vic)* [1987] HCA 56; (1987) 164 CLR 15; 74 ALR 353; 28 A Crim R 155; 61 ALJR 556.

The dichotomy presented to me requiring judicial balancing is that of the interests of a fair trial and safety of an accused on one hand and the interest the community has in sustaining a free press on the other. It has vexed this Court, the High Court and particularly the Supreme Court of the United States for many years in many **[4]** cases. The dilemma is best posed in *Irvin v Dowd* 366 US 717 (1961); 6 L Ed 2d 751; 81 SCt 1639 per Frankfurter J:

> "How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.
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> This court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system – freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice

result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying this trade."

The current judicial opinion in liberal democracies such as Australia and the United States is to preserve and elevate the interests an accused has in a fair trial above those of the merely passing interests of the press particularly in cases of a sexual or quasi-sexual nature where the interest of the press and their readers is often based on prurience and salaciousness, rather than having a real interest in knowing the facts. Having said that, as a principle, I am satisfied it is not decisive, determinative or, indeed, overwhelming in this case.

The first ground of appeal was whether the Magistrate was entitled to rely upon material in the form of submissions made by Mr Kayser and from his own knowledge. The short answer is, in part, "Yes". But the long answer depends upon the weight or the effect that was given by the Magistrate to those submissions and to his own prior knowledge. To those matters I must now turn.

[5] Mr Kayser asserted, without any supporting material, but, nevertheless, from the point of being an experienced and respected practitioner in the law and particularly the criminal law, that his client would be physically imperilled were his identity revealed. This assertion was based on notoriety, and certainly not on any personal experience of Mr Kayser's or the Magistrate's. In fact, a search of the reports has failed to reveal any reported cases of offenders known in the prisons as rock spiders being murdered or grievously wounded. If there had been some public record which entitled me to the view that the accused man's physical integrity was endangered, I would have expected Mr Kayser to bring it forward; or else it to be so apparent, that the Magistrate would have referred to it.

[6] It is a matter of common parlance that child molesters are seen at the bottom of the criminal pecking order, and they are the subject of opprobrium within the criminal groups. It is a long way however, from the teasing and the disparagement that these people receive, to suggest as is required by the section, that it would be necessary to ensure the physical safety of the person that a suppression order be granted. The terms of s126 are mandatory and a Magistrate may make an order thereunder only upon the basis of necessity. The section reads:

> "If in its opinion it is necessary to do so—" that is suppress, "- in order not to endanger the physical safety of any person."

Assertion, belief, notoriety are not involved. The court in order to pronounce a suppression order must be moved, in my view, by cogent and admissible evidence of necessity, that in order to protect the physical integrity of an accused, a suppression order should follow.

I turn to the second ground pronounced by the Magistrate, and that was his own personal knowledge. We are mightily well-served in this State by a professional and dedicated magistracy. They come to their judicial tasks with a wealth of experience. It would be futile to assume they do not bring that common knowledge and experience with them. Part of the benefits this community has from its experienced and dedicated magistracy is their experience and knowledge. I would not find that this appeal were made out were it simply that the Magistrate relied upon his experience. In this case **[7]** however, that experience was required under the terms of the section to establish "necessity".

If the Magistrate had been of the view there was an established necessity, he was obliged as a matter of fairness to reveal that to the parties then and there before him. The fact is that the prison system does maintain sub-sections for the safe custody of prisoners at physical risk. That system requires closer supervision and of necessity less freedom for the prisoners. It is unfortunate but it does keep them immunised from the proximate fear of physical danger. It is not a matter of notoriety, that rock spiders even of the pernicious nature of Jones would, of necessity be physically imperilled by the revelation of his identity.

Having said all that, it is necessary to add that the identity of Jones in this case had been revealed on the previous day in the committal proceedings prior to the announcement of the suppression order. Identification of him, as Megson and Mr Baldy, had already been carried in

the press. [*His Honour referred to a portion of the judgment of the Chief Justice in* Hinch v Attorney-General (*supra*) *and continued*] ... **[9]** I turn to the next ground upon which the Magistrate granted the order, and that is prejudice to the right of a fair trial. This is a more substantial and difficult issue.

A fair trial is a basic right of a citizen in our society. In the short term the public interest of knowing the lurid details of a crime may have to be suppressed in order to ensure a fair trial. This ground was not strenuously argued before the Magistrate, and even if it had been, very substantial and cogent evidence would need to have been advanced in order for a Magistrate to find, as a matter of necessity, pursuant to s126(1)(b) that the **[10]** administration of justice would be prejudiced by material identifying the accused.

As Mason CJ says in *Hinch v Attorney-General (Vic)* (at p361 ALR):

> "A report of committal proceedings has a special capacity to influence the minds of potential jurors because the evidence is directed to the very issues which will arise at the trial and the evidence led may include evidence not admissible at the subsequent trial. On the other hand a fair and accurate report will necessarily be confined to a summary of evidence and submissions based on the evidence. Nevertheless it would be a mistake to draw too much from the fact that reports of committal proceedings do not constitute contempt because these reports give effect to another public policy, namely that such proceedings should be reported."

And so in proceedings of this kind there is the substantial public interest of a free society, in knowing of the fact of the committal proceedings. In my view no evidence, cogent or otherwise, was proffered that the identification of the accused in this case would necessarily result in the prejudice to a fair trial. His alleged crime was surrounded by circumstances which raise in the minds of most citizens feelings of abhorrence and horror. Rock spiders, child molesters, attract the same degree of opprobrium in the general community as they receive with the criminal one. Nevertheless there is no provision in any Act which suggests that the identity of persons accused of such crimes, must, by virtue of the accusation be suppressed.

There will always be some crimes which raise greater degrees of disapprobation than others. Were the Parliament to have intended that the identity of alleged child molesters be protected from disclosure then indeed one would expect such a provision to be made clear in the legislation. The mere fact that Jones falls within this **[11]** class does not of itself suggest that the administration of justice will be prejudiced. The mere fact that he falls within the high profile class of molesters or rock spiders, he having prior convictions for crimes which attracted public attention at the time because of their bizarre and perverted nature, does not establish, as a matter of necessary opinion, that a fair trial cannot follow.

[*After referring to* Glennon v Attorney-General*, unrep., Vic Sup Ct (FC) His Honour continued*] ... **[12]** It follows that the appeal on ground 1 must succeed, and it follows that the appeal on ground 2, namely, "Did the Magistrate properly apply the provisions of the section?" is also made out. The necessity or the certainty of opinion required of the Magistrate must come not only of his own experience, or assertions from the Bar table, but also on the basis of cogent and admissible evidence. It follows that the Magistrate was not entitled to be satisfied that the interests of justice would be forever prejudiced if the identity of Jones was disclosed at the committal proceedings. This ground of appeal and the one following it are also made out.

It does not follow from these remarks that, if there is further untoward, unfair or highly prejudicial material, Mr Jones' right to make an application to have a trial set aside on the basis of that publication could not or should not be made. That depends upon events hereafter. Insofar as the material was before the Magistrate, I am satisfied the Magistrate strayed into error for the reasons I have given. The orders pronounced by him shall be quashed and I will order the adjournment committal proceedings before the Magistrate be brought on for hearing and proceed in **[13]** accordance with the tenor of this judgment. The appeal is allowed. Are there any applications?

MR KAYSER: Yes, Your Honour. With the greatest of respect, Your Honour, I ask for an order that publication of Your Honour's judgment be prohibited. I do so for the following reasons. (Discussion ensued.)

NATHAN J: [14] I have an application for suppression of the judgment just delivered and I have had counsel put to me, in my view very cogently and properly, some intemperate language and, even worse, some language which it could be said was directly attributable to Mr Kayser. That is unfortunate, if I have that view, and I indicate immediately I retract and will amend the judgment insofar as there is the slightest suggestion or reference to Mr Kayser himself using terms such as "pernicious rock spider" or "rock spider" or "perverted" or "bizarre". Mr Kayser in his applications before the Magistrate did not use such terms and insofar as I may have used those terms in the course of this judgment let me say this, it is, of course, subject to amendment until I certify it. Insofar as that term "rock spider" which has excited so much interest is concerned, I will delete any references attributable to Mr Kayser to that term, but I will insert and it will remain as part of the judgment that within the hierarchy of prisons and prisoners, the class at the bottom of the pecking order and subject to the contempt of all is the class of "rock spiders", or, as they are known in the community, child molesters. In this case the matter is a committal process. They are allegations alone. The innocence of Mr Jones stands. It is the very purpose of the committal process to ascertain whether there is sufficient material to warrant reference for trial. **[15]** Nothing I have said should be interpreted in any way reflecting upon that committal process or the guilt or innocence of Mr Jones. I eschew and will strike from my judgment any reference which could impliedly indicate a view on that issue one way or the other.

Insofar as I made reference to Mr Jones' prior conviction for child molestation offences, it was the very ground of Mr Kayser's contention that these offences, because of the bizarre circumstances which surrounded them, were likely to have remained fixed in the public mind, and any reiteration of them of itself would be likely to prejudice the potential jurors who might hear a case if Mr Jones were committed. There is always a risk when counsel seek a suppression order on the basis of the bizarre nature of the offence, that in the event of the application failing the very bizarre circumstances to which they have referred in turn must be referred to by the Appeals Court. That is what has happened here, and no complaint in respect of it can be heard or entertained.

Insofar as I have an application for a suppression order, I consider it only appropriate that the terms of this judgment should be finally revised by me and not published until final revision, which I should be able to do tomorrow. In no way are the interests of the parties prejudiced by me having the opportunity to examine what I have said and putting it into appropriate grammatical form, and accordingly I think it appropriate I concede Mr Kayser's objections and I see them as being well-**[16]** founded, and it is only appropriate that I revise the judgment in the terms which I have just pronounced.

APPEARANCES: For the appellants Herald & Weekly Times: Mr J Ruskin, counsel. For the respondent Jones: Mr B Kayser, counsel.
