11/10; [2010] VSC 88

SUPREME COURT OF VICTORIA

DPP & ANOR v DALE & ORS

Beach J

22, 26 March 2010 — (2010) 199 A Crim R 235

PRACTICE AND PROCEDURE – COMMITTAL PROCEEDINGS – SUPPRESSION ORDER – APPLICATION FOR AN ORDER THAT THE IDENTITY OF A WITNESS IN THE WITNESS PROTECTION SCHEME BE NOT PUBLISHED – APPLICATION BY CHIEF COMMISSIONER OF POLICE TO BE HEARD ON THE APPLICATION – SUCH APPLICATION REFUSED ON THE GROUND THAT THE CHIEF COMMISSIONER DID NOT HAVE STANDING TO MAKE SUCH AN APPLICATION – WHETHER JURISDICTIONAL ERROR – DENIAL OF PROCEDURAL FAIRNESS – WHETHER MAGISTRATE IN ERROR – STATUTORY INTERPRETATION – RELEVANCE OF PROVISION IN *WITNESS PROTECTION ACT* 1991 IN AN APPLICATION TO SUPPRESS PARTICULARS OF A WITNESS – WHETHER A NON-PUBLICATION ORDER NECESSARY TO AVOID PREJUDICING THE ADMINISTRATION OF JUSTICE: *WITNESS PROTECTION ACT* 1991, S10(5); *MAGISTRATES' COURT ACT* 1989, S126.

At a committal hearing involving D. and others, the Magistrate heard an application for a non-publication order in relation to the identity of Witness "R" who was a participant under the *Witness Protection Act* 1991 ('Act'). During the course of the application, the Chief Commissioner of Police sought leave to appear in order to join in the application. The Magistrate concluded that the Chief Commissioner did not have standing to be heard on an application for an order under s126 of the *Magistrates' Court Act* 1989. On the application, the Magistrate made an order that the name of Witness "R" could be published but not his location nor the fact that he is a witness under the Act. Upon appeal—

HELD: Appeal allowed. Order permitting the publication of the name of Witness "R" be quashed and remitted to the Magistrate for further hearing and determination according to law.

1. The Chief Commissioner's interest in the operation of the Victorian witness protection program arises directly by force of the Act. Further, the Chief Commissioner has additional powers and responsibilities in respect of the witness protection scheme and participants in it as set out in ss3B, 3C, 5, 6, 15 to 21 and 23 of the Act. Consistently with these matters, the Supreme Court of Victoria has permitted the Chief Commissioner to make applications under ss18 and 19 of the *Supreme Court Act* in relation to matters concerning the operation of the witness protection program. Whilst the facts in *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal* [2004] VSCA 3; (2004) 9 VR 275 concerned police methodology (and not the witness protection program), the interest of the Chief Commissioner in the operation of the witness protection program is at least as great as the Chief Commissioner's interest in protecting the police methodologies the subject of *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal*. There can be no doubt that the Chief Commissioner had standing to apply under s126 of the *Magistrates' Court Act* for an order prohibiting matters concerning the identity of a participant in the witness protection program.

2. It appears that the Magistrate's principal basis for denying the Chief Commissioner standing was that the Chief Commissioner was not a party to the committal proceeding. As was submitted by the Chief Commissioner, this was true – but irrelevant. The Chief Commissioner, likewise, was not a party in the underlying criminal proceedings in *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal*. Similarly, the media are not parties to the underlying proceedings in which they are routinely granted leave to appear for the purpose of contesting an application for a suppression order. Whilst the committal provided the occasion for the exercise of jurisdiction under s126 of the *Magistrates' Court Act*, the application under that section was not itself part of the committal. The application under s126 involved a separate exercise of jurisdiction. Accordingly, it follows that there was a jurisdictional error in denying the Chief Commissioner a hearing in respect of the application made to the Magistrate pursuant to s126 of the *Magistrates' Court Act*. In the circumstances, the order permitting the publication of Witness "R"'s name must be quashed and the application remitted to the Magistrate for further hearing and determination in accordance with these reasons.

3. *Obiter*. The construction of s10(5)(a) of the Act is as follows:

(a) The offence created by s10(5)(a) has a mental element, being knowledge or recklessness as to a person's status as a participant.

(b) Section 10(5)(a) prohibits publication (disclosure) of the identity or location of a person who

is or was in the witness protection program where publication (disclosure) has some connection with that participation – such connection including the fact that the person is giving evidence in criminal proceedings. Further, it is not necessary for there to be an express reference to the person's participation in the witness protection program in such a publication (or disclosure) in order to contravene s10(5)(a).

(c) It is not necessary for the purposes of this proceeding to further define the connection referred to in sub-paragraph (b) above or the limits of that connection.

***R v JP* [2008] VSC 86, approved.**

BEACH J:

Introduction

1. There are presently on foot committal proceedings involving Mr Paul Dale and Mr Rodney Collins, the first and second defendants in this proceeding respectively. It is anticipated that during the course of the committal a witness known as Witness "R" will give evidence.

2. On 4 March 2009, Cummins J made an order in the following terms:

> "No person shall publish or cause to be published in any newspaper or journal or broadcast by means of radio or television or any other means, any statement, photograph, picture or other matter including any name which might directly or indirectly refer to or enable identification of the Witness 'R' and the Witness '2'."

This order was made pursuant to ss18 and 19 of the *Supreme Court Act* 1986 and in the inherent jurisdiction of the Court.

3. In the course of making this order, Cummins J said:

> "In relation to Witness 'R' I am satisfied that the prohibition order which presently exists under the *Magistrates' Court Act* should be continued but under the *Supreme Court Act* s18(1)(c) until the committal, that is until it is expected, November 2009, where it can then be reviewed."

4. On 6 August 2009, during an application for bail, Byrne J made another order in the same terms as that made by Cummins J. The only difference between the orders was the insertion of the words "and the Witness 'F'" at the end of the order made by Byrne J. The order of Byrne J was authenticated on 7 August 2009.

5. The committal hearing commenced on 9 March 2010 before Reardon M. At the commencement of the committal, his Honour ordered that the suppression order of 7 August 2009 in relation to Witness "R" be continued until further order.

6. On 10 March 2010, Reardon M heard an application for a non-publication order in relation to the identity of Witness "R". His Honour was told that Witness "R" was a "participant" under the *Witness Protection Act* 1991.[1] His Honour was also told that Witness "R" was not a participant at the time the matter was before Cummins J.

7. During the course of the application, the Chief Commissioner of Police sought leave to appear in order to "join in the application for an order that there be non-publication of proceedings in relation to [Witness "R"]". Reardon M concluded that the Chief Commissioner did not have standing to be heard on an application for an order under s126 of the *Magistrates' Court Act*.

8. Ultimately, on 10 March 2010, his Honour made an order in the following terms:

> "Order that Witness R's name can be published. His location cannot be published nor the fact that he is a witness under the *Witness Protection Act* 1991."[2]

9. The plaintiffs seek relief in the nature of *certiorari* in relation to this order. The grounds upon which this relief is sought cover two main issues: first, whether there was a jurisdictional error involved in denying the Chief Commissioner of Police a hearing in respect of the s126 application; and secondly, whether the Magistrate erred in construing s10(5) of the *Witness Protection Act*. The first issue involves the standing of the Chief Commissioner to make (or join in) an application under s126 of the *Magistrates' Court Act*. The second issue involves not only the proper construction of s10(5) of the *Witness Protection Act*, but also the relevance of the operation of that section in an application under s126 of the *Magistrates' Court Act*.

10. Mr Dale (the first defendant) and the Magistrates' Court of Victoria (the third defendant) took no part in the trial of this proceeding. These parties advised the Court that they would abide by the decision of the Court, save as to costs.

11. On 15 March 2010, Seven Network (Operations) Limited, Nine Network (Australia) Pty Ltd and the Australian Broadcasting Corporation were given leave to intervene in this proceeding. The fourth defendant and the interveners (collectively, "the media parties") did not advance any argument concerning the alleged denial of procedural fairness to the Chief Commissioner of Police. Instead, they confined their arguments to the issues concerning the proper construction of s10(5) of the *Witness Protection Act*, its relevance in relation to an application under s126 of the *Magistrates' Court Act* and the correctness of the Magistrate's approach in the application of s126. Mr Collins (the second defendant) made a short submission in support of the media parties' submissions. Like the media parties, Mr Collins made no submissions on the issue of the standing of the Chief Commissioner.

12. For the reasons given below, the decision of the Magistrate must be quashed and the matter remitted to the Court below for re-hearing and reconsideration in accordance with these reasons.

Was there a jurisdictional error in denying the Chief Commissioner a hearing?

13. The Magistrate concluded that the Chief Commissioner did not have standing to be heard on an application for an order under s126 of the *Magistrates' Court Act*. As a result, the Chief Commissioner was denied the opportunity of putting in evidence and making argument in favour of a non-publication order in respect of Witness "R"'s identity. There is no doubt that a denial of a hearing to a person who has a right to be heard is a denial of procedural fairness. Further, a denial of procedural fairness is a jurisdictional error.[3] Consistently with these propositions, this Court has held that a denial of an opportunity to the media to make submissions opposing a suppression order involves a denial of natural justice, with the result that such suppression orders should be quashed.[4]

14. It follows that the question of whether there was a jurisdictional error in denying the Chief Commissioner a hearing in this case is answered by determining whether or not the Chief Commissioner had standing to make (or join in) an application under s126 of the *Magistrates' Court Act*. If the Chief Commissioner had standing, then denying him a hearing constituted a jurisdictional error.

15. In *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal*,[5] the Court of Appeal had to consider applications for leave to appeal by the Chief Commissioner from orders that had been made on her application under ss18 and 19 of the *Supreme Court Act* 1986. At first instance, the Chief Commissioner had made applications to suppress, for an unlimited time, publication of the details of the names and identities of undercover police officers who had employed certain investigative techniques for the purposes of securing admissions from the accused. In each trial, the application on behalf of the Chief Commissioner was entertained by the judge in camera. However, in each case, the judge declined to make orders for an unlimited time. The orders granted were in a limited form and expired on particular dates. As a result of these limits, the Chief Commissioner sought leave to appeal.

16. The Chief Commissioner was unsuccessful before the Court of Appeal and ultimately unsuccessful on appeal to the High Court. However, neither the Court of Appeal nor the High Court cast any doubt upon the capacity of the Chief Commissioner to seek orders under ss18 and 19 of the *Supreme Court Act*. In the Court of Appeal, Winneke P, Ormiston and Vincent JJA said:[6]

> "It is not necessary for us to consider whether the Chief Commissioner has a right to appeal against the form of suppression orders made by the respective judges. *In our view she would have the standing to seek leave to appeal because she is a person who is sufficiently interested in, if not aggrieved by, the refusal of the trial judge to grant suppression orders in the terms which she had sought.*"[7]

17. There can be no doubt that if the Chief Commissioner had standing to seek leave to appeal from a refusal to grant a suppression order in the terms sought by her, then she had a sufficient interest to seek such a suppression order at first instance.

18. The Chief Commissioner's interest in the operation of the Victorian witness protection program arises directly by force of the *Witness Protection Act*. "Victorian witness protection program" is defined in s3 of the *Witness Protection Act* to mean "the program established and maintained by the Chief Commissioner of Police under s3A". Section 3A(1) provides:

> "The Chief Commissioner of Police, through the establishment and maintenance of a Victoria witness protection program, may take such action as he or she thinks necessary and reasonable to protect the safety and welfare of a witness or a member of the family of a witness."

Section 3A(2) provides that such action may include:

> "(a) applying for any document necessary—
> (i) to allow the witness or family member to establish a new identity; or
>
> (ii) otherwise to protect the witness or family member;
>
> (b) relocating the witness or family member;
>
> (c) providing accommodation for the witness or family member;
>
> (d) providing transport for the property of the witness or family member;
>
> (e) doing any other things that the Chief Commissioner of Police considers necessary to ensure the safety of the witness or family member."

19. Further, the Chief Commissioner has additional powers and responsibilities in respect of the witness protection scheme and participants in it as set out in ss3B, 3C, 5, 6, 15 to 21 and 23 of the *Witness Protection Act*. Consistently with these matters, this Court has permitted the Chief Commissioner to make applications under ss18 and 19 of the *Supreme Court Act* in relation to matters concerning the operation of the witness protection program.[8] Whilst the facts in *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal* concerned police methodology (and not the witness protection program), the interest of the Chief Commissioner in the operation of the witness protection program is at least as great as the Chief Commissioner's interest in protecting the police methodologies the subject of *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal*. In my view, there can be no doubt that the Chief Commissioner had standing to apply under s126 of the *Magistrates' Court Act* for an order prohibiting matters concerning the identity of a participant in the witness protection program.

20. It appears that the Magistrate's principal basis for denying the Chief Commissioner standing was that the Chief Commissioner was not a party to the committal proceeding. As was submitted by the Chief Commissioner, this was true – but irrelevant. The Chief Commissioner, likewise, was not a party in the underlying criminal proceedings in *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal*. Similarly, the media are not parties to the underlying proceedings in which they are routinely granted leave to appear for the purpose of contesting an application for a suppression order. Whilst the committal provided the occasion for the exercise of jurisdiction under s126 of the *Magistrates' Court Act*, the application under that section was not itself part of the committal. The application under s126 involved a separate exercise of jurisdiction.[9]

21. It follows from what I have said that there was a jurisdictional error in denying the Chief Commissioner a hearing in respect of the application made to the Magistrate pursuant to s126 of the *Magistrates' Court Act*. In the circumstances, the order permitting the publication of Witness "R"'s name must be quashed and the application remitted to his Honour for further hearing and determination in accordance with these reasons.

22. Strictly speaking, it is not necessary for me to consider the other grounds of review. However, all parties accept that critical considerations, that resulted in the Magistrate's decision, concerned the meaning of s10(5) of the *Witness Protection Act* and the relevance of its operation so far as s126 of the *Magistrates' Court Act* is concerned. Detailed submissions were made to me concerning these matters and the parties sought to have these matters dealt with in this proceeding. The concern of the parties was that if I upheld the application on the denial of procedural fairness ground and did not consider the other grounds, then, having regard to the Magistrate's initial reasons, the high probability was that the matter would again come before this Court – involving a further

interruption of the committal. In these circumstances, I turn to consider the other grounds upon which relief was sought in this proceeding.

The parties' submissions

23. The plaintiffs contend that in making the order he did, the Magistrate made an error of law on the face of the record (if not a jurisdictional error). The error concerned the proper construction and operation of s10(5) of the *Witness Protection Act*. It was submitted by the plaintiffs that the approach taken by the Magistrate, in making the order his Honour made, could not be reconciled with:

> (a) the terms of s10(5) of the *Witness Protection Act*;
>
> (b) the policy of the *Witness Protection Act* more generally; or
>
> (c) the decision of this Court in *R v JP*.[10]

24. The submissions of the media parties (supported by Mr Collins[11]) may be summarised as follows:

> (a) The transcript of the Magistrate's ruling (which forms part of the record) reveals no error of law.
>
> (b) His Honour correctly determined that he could only make an order under s126 if it was "necessary to do so".
>
> (c) It was open to His Honour to conclude that the physical safety of Witness "R" was not endangered.
>
> (d) In the circumstances established before his Honour, it was "difficult to see" why it could be necessary either for the administration of justice or to protect the physical safety of Witness "R" to preclude publication of what was said in open Court, or more specifically, the name of Witness "R".
>
> (e) In the circumstances, established before his Honour, his Honour was entitled to conclude that he was not satisfied as to the necessity of any order.
>
> (f) Section 10(5) of the *Witness Protection Act* neither required, nor of itself justified, a non-publication order under s126 of the *Magistrates' Court Act*.
>
> (g) In the circumstances of this case, the operation of s10(5) of the *Witness Protection Act* is irrelevant.

25. The principles concerning the operation of s126 of the *Magistrates' Court Act* are well settled. They were not in dispute in this proceeding. However, in the course of advancing their submissions, the parties contended for different constructions of s10(5) of the *Witness Protection Act*. Further, whilst the plaintiffs relied upon the decision of *R v JP* in support of their contentions, the media parties contended that insofar as that decision was contrary to their submissions, then the decision was distinguishable; alternatively, wrong and ought not be followed.

26. Before going on, it is necessary to set out the relevant statutory provisions.

Section 126 of the *Magistrates' Court Act*

27. Section 126 of the *Magistrates' Court Act* relevantly provides:

> "126. Power to close proceedings to the public
> (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) ...
> (b) prejudice the administration of justice; or
> (c) endanger the physical safety of any person; or
> (d) ... (e) ...
>
> (2) The Court may in the circumstances mentioned in subsection (1)-
> (a) order that the whole or any part of a proceeding be heard in closed court; or
> (b) order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding; or
> (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.

(3) ... (4) ... (5) ... (6) ... (7) ... ."

Section 10(5) of the *Witness Protection Act*

28. Section 10(5) of the *Witness Protection Act* provides:

"(5) A person must not, without lawful authority, disclose information in Victoria or elsewhere-
(a) about the identity or location of a person who is or has been a participant; or

(b) that compromises the security of such a person.

Penalty: Level 5 Imprisonment (Maximum 10 years)."

29. In its original form, the *Witness Protection Act* did not contain s10(5). Section 10(5) was introduced in a form substantially similar to the present form by s9 of the *Witness Protection (Amendment) Act* 1996. Section 10(5) was then substituted and enacted in its present form by s12(2) of the *Witness Protection (Amendment) Act* 2000. None of the extrinsic materials in relation to the *Witness Protection (Amendment) Act* 1996 and the *Witness Protection (Amendment) Act* 2000 (and specifically, neither of the explanatory memoranda of these Acts) are of any assistance in the construction of s10(5).

30. Read literally, s10(5)(a) could be construed so as to prohibit for all time the publication of the name (that is, the identity), including any new name or any old name, of a person who is or was in the witness protection program, without any link to the person's participation in the witness protection program. It was submitted by the media parties that "[t]his would forever preclude the publication of the name of Witness "R", even in relation to events or circumstances completely unrelated to his participation in the witness protection program". An example was given by the media parties of the operation of s10(5)(a) in circumstances where, say, Witness "R" won Tattslotto many years into the future.

31. Such a broad construction was said by the media parties to be absurd. The media parties submitted that s10(5) must be construed in the light of three important principles: first, that statutes that interfere with or purport to interfere with the principles of open justice are to be construed narrowly; secondly, that statutes that limit fundamental common law rights, including freedom of speech, are to be construed narrowly so as to impose as little limit on these rights as possible; and thirdly, that penal statutes are to be construed narrowly. It was submitted that these principles all lead to a narrow construction of s10(5).

32. The plaintiffs did not cavil with the media parties' submissions concerning the way in which statutes that limit common law rights and penal statutes are to be construed. However, they took issue with the question of whether the principles of open justice have any application in this case. The plaintiffs relied upon the distinction identified by Warren CJ and Byrne AJA between "proceedings suppression orders" and "general suppression orders" in *News Digital Media Pty Ltd v Mokbel*.[12] Their Honours said in respect of proceedings suppression orders (orders restraining publication of proceedings involving a particular party) and general suppression orders (orders restraining the publication of specific matters concerning a party) that the countervailing principle in respect of a general suppression order was not the preservation of open justice – but rather that of free speech or the public's right to know.[13]

33. Section 10(5) was considered by Whelan J in *R v JP*.[14] In the circumstances of that case, his Honour determined that it was not necessary for him to attempt a comprehensive analysis of the width of s10(5).[15] However, in analysing s10(5), his Honour said:[16]

"The noteworthy feature of s10(5) is its apparent width. It seems to me that the concept of an identity is a very broad one. A person's identity is not just their name, it also includes the features of that person which enable that person to be differentiated from others. Thus, information about a person's character, physical features, activities, and a myriad of other matters that relate to them, could, in a given context, be information about the person's identity.

> Information which s10(5) says cannot be published is information about the identity of a person who is, or has been, a participant. It seems to me that there must be some connection between the information in question and the person's status as a participant before s10(5) applies.
>
> Whilst each individual case would need to be assessed by reference to the particular circumstances of that case, in addition to the obvious prohibition upon naming a person as being a witness in the witness protection program, it seems to me that s10(5) also prohibits disclosing information which would enable others to recognise a person as being a witness in a criminal proceeding where that person is a participant in the program. It may also be significant in particular cases that the information which cannot be disclosed is information "about" the identity of a participant."

34. In order to overcome the apparent width of s10(5), the plaintiffs submitted that the connection referred to by Whelan J in *R v JP*[17] is the mental element of knowledge or recklessness as to a person's status as a participant. It was submitted that this was the mental element of the offence created by s10(5)(a). In support of this submission, reliance was placed upon the presumption "that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence".[18] The plaintiffs submitted that that presumption was not displaced either by the words of the *Witness Protection Act* or by the subject matter with which it deals.

35. In my view, the difficulty with the plaintiffs' submission that the mental element of knowledge or recklessness as to a person's status as a participant constitutes the connection referred to by Whelan J is that such a construction still gives rise to the situation that where a person knows that a particular individual is a participant, then that person is, on the words of the statute, prohibited for all time and in all circumstances from publishing the name (or the identity) of the participant.

36. In *R v JP*, Whelan J relied upon s10(5) to found orders under ss18 and 19 of the *Supreme Court Act*. Insofar as his Honour held that the operation of s10(5) required the making of orders under ss18 and 19, the media parties contend that his Honour was wrong; alternatively, that his Honour's decision can (and should) be distinguished on the facts. I do not read his Honour as saying that if there is any potential for a breach of s10(5), then this alone is sufficient to mandate the making of non-publication orders under ss18 and 19 of the *Supreme Court Act* (or their equivalent, s126 of the *Magistrates' Court Act*). To that end, there is no basis, in my view, for suggesting that *R v JP* was wrongly decided.

37. Further, the issue of whether *R v JP* should be distinguished does not arise: it was an application of ss18 and 19 of the *Supreme Court Act* (in the light of the operation of s10(5) of the *Witness Protection Act*) to the facts as his Honour found them in that case. What his Honour said about the construction and operation of s10(5) is, in my view, correct.

38. Without demurring from the plaintiffs' contention that there is a mental element in s10(5)(a),[19] it seems to me that the proper construction of s10(5)(a) is to prohibit publication of the identity or location of a person who is or was in the witness protection program where publication has some connection with that participation – such connection including the fact that the person is giving evidence in criminal proceedings. Further, it is not necessary for there to be an express reference to a person's participation in the witness protection program in such publication (or disclosure) in order to contravene s10(5)(a). This construction accords with the construction given by Whelan J in *R v JP* at paragraph [19].

39. The media parties contend that this construction, whilst narrower than a literal construction (and narrower than a construction which involves only a mental element as being the relevant connection between the information in question and the person's status as a participant), "remains too extensive in light of the penal sanction and the significant limitation on freedom of speech imposed by s10(5) if interpreted in that way, particularly in light of the principle of open justice". No doubt there are competing principles. However, it is to be remembered that the purpose of the Witness Protection Act (and s10(5)) is "to facilitate the security of persons who are, or who have been, witnesses in criminal proceedings in Victoria …".[20] The Minister for Police and Emergency Services' Second Reading Speech said of the *Witness Protection Bill*:[21]

> "The Bill is designed to help the police to combat organised crime and to solve major crimes of

> violence. In these areas, the police rely heavily on inside information – the evidence of persons closely connected to the perpetrators of the crimes. By agreeing to give evidence, many of these people place themselves and their families at risk from the threat of death or injury designed to prevent them testifying at criminal trials.
> ...
>
> The Bill will provide a major weapon in the armoury of the Victoria Police available to combat serious crime. It will encourage witnesses to come forward, safe in the knowledge that they will be fully protected at all times against retribution from the criminals they have helped to convict."

40. As was said by Whelan J,[22] "The protection of the identity of persons to whom the *Witness Protection Act* applies is a matter of great significance. It may in some cases truly be a matter of life and death". In my view, these considerations lead to the conclusion that the construction I have favoured does not give an operation of s10(5)(a) which is "too extensive".[23]

41. It was put by the media parties that a more narrow construction of s10(5)(a) was justified because disclosures that compromised the security of a participant were caught by s10(5)(b). The plaintiffs answered this contention by submitting:

> (a) First, s10(5)(a) should be given a construction that is not completely subsumed within the operation of s10(5)(b). That is, s10(5)(a) must have some operation over and above prohibiting disclosures that compromise the security of a participant.
>
> (b) Secondly, the mental element of the offence created by s10(5)(b) may be different from the mental element of the offence created by s10(5)(a). That is, it was suggested that the mental element in respect of s10(5)(b) might be "compromises the security of such a person with intent to do so".

42. I take leave to doubt that the mental element of the offence created by s10(5)(b) is different from the mental element of the offence created by s10(5)(a). However, it is not necessary for me to resolve this issue. It is sufficient to say that s10(5)(a) must be given a construction which does not deprive it of any operative effect having regard to the existence of s10(5)(b). One area of operation may relate to the security of the family of a participant (as referred to in the Second Reading Speech of the *Witness Protection Bill*).

43. Further, s10(5)(a) has work to do even if a disclosure would not compromise the security of any person. It is of importance that relevant witnesses who may be in need of protection if they come forward are assured that their identity will not be disclosed. Such a person who observes the disclosure of the identity of a participant may not come forward for fear that his or her identity might be similarly disclosed after becoming a participant.[24] It follows that the fact that certain matters relating to the identity of a participant might be "common knowledge" or might be capable of being ascertained from prior reports in the media cannot be of any moment when considering the construction or operation of s10(5)(a).[25]

44. Ultimately, the media parties submitted that s10(5) should be "construed so as to prohibit publication of the identity or location of a person who is or was in the witness protection program where publication identifies the person as a participant in the program, but does not prohibit publication identifying the person simply as a witness in criminal proceedings".[26] It follows for the reasons I have given in relation to the construction I have preferred that this construction cannot be accepted. One difficulty with respect to this suggested construction is it fails to take account of situations where those to whom information is disclosed already know that the named witness is a participant in the program. Indeed, it was fairly (and properly) conceded by counsel for the media parties that an inference one can draw from the media articles put in evidence in this case is that Witness "R" is a participant in the witness protection program.[27] Another difficulty with the media parties' construction is that it is contrary to *R v JP*.[28] I would only depart from *R v JP* if I was satisfied that it was clearly wrong. Far from being satisfied that *R v JP* is wrong, I am of the view that it is in fact correct.

45. In summary, for the reasons given above, my conclusions in respect of the construction of s10(5)(a) are as follows:

> (a) The offence created by s10(5)(a) has a mental element, being knowledge or recklessness as to a person's status as a participant.

(b) Section 10(5)(a) prohibits publication (disclosure) of the identity or location of a person who is or was in the witness protection program where publication (disclosure) has some connection with that participation – such connection including the fact that the person is giving evidence in criminal proceedings. Further, it is not necessary for there to be an express reference to the person's participation in the witness protection program in such a publication (or disclosure) in order to contravene s10(5)(a).

(c) It is not necessary for the purposes of this proceeding to further define the connection referred to in sub-paragraph (b) above or the limits of that connection.[29]

The relevance of s10(5)(a)

46. The media parties submitted that in the circumstances of this case, the operation of s10(5) of the *Witness Protection Act* was irrelevant. They submitted that s10(5) neither required, nor of itself justified, a non-publication order under s126 of the *Magistrates' Court Act*. They pointed to the fact that s126(1) does not contain any reference to s10(5) of the *Witness Protection Act* or any necessity to make a non-publication order in circumstances where a breach of s10(5) was threatened or possible.

47. In *R v JP*,[30] Whelan J was dealing with the issue of whether orders should be made under ss18 and 19 of the *Supreme Court Act* in relation to information contained in a sentence of the Court, the disclosure of which might contravene s10(5). His Honour said:[31]

> "The protection of the identity of persons to whom the *Witness Protection Act* applies is a matter of great significance. It may in some cases truly be a matter of life and death. Section 10(5) is expressed in very wide terms. There is considerable potential for uncertainty as to its application in a particular case. A person's status as a participant whose identity is protected under s10(5) is itself a matter which cannot be disclosed. These are circumstances which do not necessarily arise in relation to other statutory prohibitions on publication. Given these matters, *where the source of the information in question is a judgment or sentence of the Court itself in my view the court ought not to deliver judgment or sentence and leave the matter of compliance with s10(5) unaddressed. This is particularly so where the court is of the view that disclosure of some parts of the judgment, or sentence could be disclosed without contravening s10(5), and some parts could not. In my view in such circumstances it is necessary in order not to prejudice the administration of justice that the court should order that the material which the Court considers cannot be disclosed without contravening s10(5) is prohibited from publication. It seems to me that otherwise the recipients of the information in the judgment or sentence are placed in an unnecessarily uncertain and potentially dangerous position, and the risk of a disclosure and breach of s10(5) is unacceptably high.*"[32]

48. A potential or threatened breach of s10(5) of the *Witness Protection Act* does not mandate that in all circumstances the Court must make a non-publication order under s126 of the *Magistrates' Court Act* (or its equivalent, ss18 and 19 of the *Supreme Court Act*). It remains necessary in each case for the Court to consider the terms of s126 of the *Magistrates' Court Act*.[33] That is, the question is whether, in all the circumstances that have been established, is it necessary to make a non-publication order in order not to prejudice the administration of justice or endanger the physical safety of any person.[34]

49. However, it must be said that it would be a very unusual case where a threatened breach of s10(5) did not lead to the conclusion that a non-publication order was necessary.[35] Whilst it seems very likely to me that if Witness "R" gives evidence a non-publication order of his name (identity) will be necessary so as not to prejudice the administration of justice, I cannot foreclose the possibility that upon all of the evidence and circumstances that might be presented to the Magistrate when the committal recommences, the plaintiffs might fail to establish the necessity for an order under s126. Equally, the matter may never arise because, upon the application under s126 being re-heard, the plaintiffs (more particularly, the Chief Commissioner of Police) may establish some other ground for the necessity of an order.[36]

50. Whatever be the outcome of the plaintiffs' application under s126 of the *Magistrates' Court Act*, it must be emphasised that the result of that application cannot alter the operation of s10(5). Those intending to disclose any material remain subject to the prohibition in s10(5) must comply with that section independently of whether any order is or is not made under s126 of the *Magistrates' Court Act*.[37] Similarly, the reference in the order made below that "Witness "R"'s name can be published" whilst being epexegetical of the order made below, could not have

relieved those intending to make a disclosure of complying with s10(5). Nothing in s10(5) or s126 gave (or gives) the Magistrate jurisdiction to permit the publication of a name or material, the disclosure of which is prohibited by s10(5).

The decision below

51. His Honour's reasons[38] disclose that his Honour gave s10(5) a construction which was too narrow. If it had been necessary, I would also have quashed the order made below on the grounds that his Honour's construction of s10(5) disclosed an error of law on the face of the record. However, in view of the conclusions I have reached in relation to the denial of procedural fairness to the Chief Commissioner, it is not necessary for me to consider this issue further.

Conclusion

52. For the reasons given above, the decision of the Magistrate must be quashed and the matter remitted to the Court below for rehearing and reconsideration in accordance with these reasons.

53. I will hear counsel on the precise form of the orders and the question of costs.

---

[1] "Participant" is defined in s3 of the *Witness Protection Act* to mean "a person who is included in the Victorian Witness Protection Programme".
[2] Whilst the certified extract of the Magistrates' Court Register suggests this order was made on 12 March 2010, the evidence discloses that it was in fact made on 10 March 2010.
[3] *Kirk v Industrial Relations Commission* [2010] HCA 1; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154 at paragraph [60]; (2010) 113 ALD 1; (2010) 190 IR 437.
[4] See for example *The Age Company Limited v Magistrates' Court of Victoria* [2004] VSC 10 per Kaye J at paragraphs [36]-[44].
[5] [2004] VSCA 3; (2004) 9 VR 275.
[6] [2004] VSCA 3; (2004) 9 VR 275 at paragraph [13].
[7] Emphasis added.
[8] See for example *R v Condello (Ruling 2)* [2006] VSC 27.
[9] See *Re Application by the Chief Commissioner of Police (Victoria)* [2005] HCA 18; (2005) 214 ALR 422; (2005) 79 ALJR 881 per Gleeson CJ, McHugh, Gummow Hayne and Heydon JJ at paragraph [7] and *General Television Corporation v DPP* [2008] VSCA 49; (2008) 19 VR 68 at paragraphs [10]-[17]; (2008) 182 A Crim R 496.
[10] [2008] VSC 86 (Whelan J).
[11] The submissions of the media parties were adopted by Mr Collins. When I refer to the submissions of the media parties hereafter, I will not repeat that they were supported by Mr Collins.
[12] [2010] VSCA 51, and in particular at paragraphs [33], [36] and [39].
[13] [2010] VSCA 51 at paragraph [36].
[14] [2008] VSC 86.
[15] [2008] VSC 86 at paragraph [20].
[16] At paragraphs [17]-[19].
[17] At paragraph [18].
[18] See generally *Sherras v De Rutzen* [1895] 1 QB 918; 11 TLR 369*; Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at 540 and *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523, 528 and 552; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[19] Being knowledge or recklessness as to the relevant person's status as a participant.
[20] See s1 of the *Witness Protection Act*.
[21] Victoria, Parliamentary Debates, Legislative Assembly, 15 November 1990, 2060 (Mr Sandon (Minister for Police and Emergency Services)).
[22] *R v JP* [2008] VSC 86 at paragraph [26].
[23] Cf paragraph 34(b) of the media parties' written submission dated 19 March 2010.
[24] See the Second Reading Speech extracted at paragraph [39] above.
[25] However, such matters may be relevant when considering the operation of s10(5)(b).
[26] See paragraphs 33 and 34 of the media parties' written submissions dated 19 March 2010.
[27] T45.3 - .10
[28] [2008] VSC 86.
[29] Cf *R v JP* [2008] VSC 86 at paragraph [20].
[30] [2008] VSC 86.
[31] At paragraph [26].
[32] Emphasis added.
[33] Or in the case of the Supreme Court, ss18 and 19 of the *Supreme Court Act*.
[34] Referring only to paragraphs (b) and (c) as relevant in this case.
[35] Giving full allowance to the fact that the requirement that the order be "necessary" imposes a high standard.

[36] For example, paragraph (c) "In order not to ... endanger the physical safety of any person".
[37] Cf *R v JP*, supra at paragraph [27].
[38] Set out at T92 – T97 of the edited transcript, being Exhibit LMC11 of the affidavit of Lana Maree Custovic sworn 19 March 2010.

APPEARANCES: For the first plaintiff DPP: Mr DA Trapnell SC with Mr AJ Grant, counsel. Solicitor for Public Prosecutions. For the second plaintiff Davey: Dr SP Donaghue, counsel. Victorian Government Solicitor's Office. For the first defendant Dale: Mr P Brown, counsel. Tony Hargreaves & Associates, solicitors. For the second defendant Collins: Mr JP McMahon, counsel. CD Traill, solicitor. For the fourth defendant Herald & Weekly Times Ltd and other media: Ms KL Walker, counsel. Kelly Hazell Quill, solicitors.
