

10/90

SUPREME COURT OF VICTORIA

DAVID SYME & CO LTD & ORS v RYAN and ORS

Beach J

18, 19 December 1989

PROCEDURE – COMMITTAL PROCEEDINGS - ORDER SUPPRESSING PUBLICATION OF PROCEEDINGS IN PART – WIFE OF ACCUSED GIVING EVIDENCE – POSSIBILITY OF WIFE BEING CHARGED WITH OFFENCES – WHETHER FAIR TRIAL OF ACCUSED AND/OR WIFE LIKELY TO BE PREJUDICED BY PUBLICATION: MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975, S44(4).

Section 44(4) of the *Magistrates (Summary Proceedings) Act 1975* gives power to a magistrate when conducting committal proceedings to suppress publication of the proceedings where such publication is likely to prejudice the fair trial of any person. Such an order would not be justified because of the nature of information given by a witness to police or the fact that there was an ongoing police investigation into matters involving the witness. However, if publication of a witness' evidence would be likely to prejudice the fair trial not only of the accused but also of the witness (in the event of charges being laid), it would be within the magistrate's discretion to make a suppression order.

[See also *R v Collins; ex p David Syme & Co. Ltd*, MC 32/1983. Ed.]

BEACH J: [1] There is presently on foot at the Melbourne Magistrates' Court committal proceedings in relation to the Walsh Street murders. On 13 December last the Magistrate conducting the committal made the following order:

"Magistrates (Summary Proceedings) Act 1975

Order prohibiting publication

Pursuant to section 44(4) of the above Act I prohibit the publication by the print, audio or visual media of any evidence given in respect of the following persons:

John Peterson

Helga Wagnegg

Victor Gouroff

Greg Pashe

Wayne Stanhope

Anton Kenny"

Section 44(4) of the Act states:

"Where a justice is sitting to take a preliminary examination or statement in a proceeding for an indictable offence, if he is satisfied that the circumstances are such that the publishing of a report of the proceeding or any part thereof or of any evidence adduced would be likely to prejudice the fair trial of any person, the justice may make an order prohibiting the publication of a report of the proceeding or part thereof or of any evidence adduced."

I now have before me an application on behalf of David Syme & Co Ltd and The Herald and Weekly Times Ltd for an order nisi to review the Magistrate's order. It is said that in making the order he did the Magistrate took into account irrelevant considerations and on that basis his order should be reviewed. It is further said that, in any event, [2] there was no basis for the Magistrate making the order.

The committal before the Magistrate has been proceeding for many weeks. I only have before me pp2645 to 2685 of the transcript. That is a matter of some significance as I shall later demonstrate. The material before me indicates that at the time the Magistrate made the order the wife of the accused man Peirce was giving evidence. Counsel for one of the accused apparently indicated to the Magistrate that he wished to cross-examine Mrs Peirce concerning the alleged murders of the six persons referred to in the Magistrate's order. The material before me does not indicate the relevance of that cross-examination. It is clear, however, that the Magistrate intended to permit him to do so. Before the cross-examination commenced the Prosecutor at the committal,

Inspector Bowles, said this:

"Your Worship has had access to that particular transcript and the video. There are many things mentioned there and I would submit, your Worship, that they are part of a continuing inquiry. In many instances those matters are still on foot. This particular witness can exercise her rights under s26 of the *Evidence Act* and refuse to answer, and I would submit that each time Mr Flatman pursues a particular line in that sphere, she is entitled to be warned that s26 is applicable to her.

Your Worship, to explore this in open court at this stage is going to prejudice the ongoing enquiries that this particular witness has been involved in and without outlining the details, there are many instances of where she has provided information. Your Worship, I would submit that it is not relevant to pursue each and every one of those, looking for a [2A] particular discrepancy. It is an issue where it is relevant to credit, but, your Worship, I would submit that Mr Flatman is entitled to ask her and then he is bound by her answer, if she refuses to answer on the grounds that it might incriminate her."

[3] Counsel for each accused was then heard in relation to the matter. The only point of significance to note about those submissions is that no counsel argued that the cross-examination would prejudice the trial of his client. At the end of the submissions the Magistrate said:

"What I propose to do, gentlemen, is to refresh my memory as to what exactly is in the rest of that transcript, so I will just take a short adjournment and consider your submissions in respect of that."

At 11.35 a.m. the Magistrate adjourned the Court. Upon resuming at 12.36 p.m. the Magistrate said:

"Well, gentlemen, having considered the arguments put forward by defence counsel, I accept their argument. In my opinion it is quite entitled to put to Mrs Peirce the matters in respect of which I had previously ruled out. Now because of the nature of what Mrs Peirce has given to the police, her possible involvement in some of those matters, and further, that there is at this stage an ongoing investigation into those matters, I propose to make a suppression order under s44(4) of the *Magistrates (Summary Proceedings) Act*, that any evidence given in this court by this witness be not published by the print, audio or visual media. Specifically, it is directed to the evidence in respect of the following persons: John Peterson, Helga Wagneg, Victor Gieroff, Greg Pashay and Wayne Stanhope, and I will formally post an order on the court door."

It would appear that shortly following that the Magistrate caused the order to which I have already referred to be posted on the court door. If those were the only reasons the Magistrate had for making the suppression order, it could very well be successfully argued that the Magistrate's [4] discretion had miscarried. I say that for this reason: Section 44(4) gives the Magistrate the power to make a suppression order where he is satisfied that the publishing of a report of the committal proceeding would be likely to prejudice the fair trial of a person. At the time the Magistrate first made the suppression order he gave the following reasons for so doing:

- (1) The nature of the information Mrs Peirce had given the police.
- (2) Mrs Peirce's possible involvement in some of the matters.
- (3) The fact that there was an ongoing police investigation into the matters.

In my opinion, reasons (1) and (3) would not justify the making of the order. If in referring to Mrs Peirce's possible involvement in some of the matters the Magistrate had in mind that if Mrs Peirce was subsequently charged with offences arising out of the murder of one or more of the six persons named – assuming for present purposes that any one of such persons was murdered – and that the trial in respect of such offences would be prejudiced if the cross-examination was published, it is arguable that that was a proper matter for the Magistrate to take into account in arriving at the decision he did. If the Magistrate had something else in mind, then it is arguable it was not.

[5] However, that was not an end to the matter. Shortly after 2 p.m. that day counsel for the present applicants made an application to the Magistrate to lift the suppression order. In refusing the application the Magistrate said:

"Well, under s44(4) of the *Magistrates (Summary Proceedings) Act* on the authorities of *Boucher* and *McGinnlay* and *Graeme Collins* case, I think both before Marks J back in about 1983, in my opinion they set out the guidelines on which a Magistrates' Court must exercise its discretion, and I happen

to be satisfied on the exercise of that discretion, that the publication of evidence would, it is the operative word, would prejudice a fair trial.

The first limb of Mr Houghton's argument was indeed the time factor between a committal and trial. That paid some weight to my consideration in this. I know from experience in respect of where persons are in custody jail cases as they are called, from after committal they are brought on for trial very, very speedily because of that fact. As I indicated, that was one of the considerations. As I indicated in my reasons earlier, when I made the order, and I do not intend to reiterate those, but simply to say that on hearing the evidence of Mrs Peirce certainly and Mr Houghton has correctly pointed out that that lady had been warned under s26 of the *Evidence Act* but in my opinion, if that witness were subsequently charged in respect of her involvement in these offences, any subsequent trial of her would certainly be affected.

Why this publication came about, or this prohibition came about, was in respect of material that had been previously denied to the defence. That was made available. When I made the original order in respect of one of the deceased persons of which Mrs Peirce gave evidence about, it alleged that a defendant in this trial helped in the disposal of that body. Now, that, in my opinion, certainly would prejudice the fair trial of that person if that were made known at this stage."

[6] What the Magistrate was there saying is that in his opinion publication of the evidence in question would prejudice the fair trial not only of the present accused or one of them, but also Mrs Peirce in the event charges were subsequently laid against her. In my opinion the applicants in a case such as this face a heavy onus.

A Magistrate making an order of the kind in question is familiar with the whole of the evidence already given in the committal and much of the evidence still to come; this Court is not. As I have already pointed out, I have only been supplied with pages 2645 to 2685 of the transcript. In that connection it is significant that the Magistrate adjourned the committal for approximately one hour to enable him to refresh his memory from the transcript before making the order he did. On the face of the material before the court, in particular what the Magistrate said in refusing the present applicants' application, I cannot discern any error in the way in which the Magistrate exercised his discretion when he dealt with the matter later that afternoon.

It is said, however, that if the Magistrate was in error in making the original order in that he took into account extraneous matters, that order cannot be validated by anything he later said. For the purpose of the present application I am prepared to accept that that is so. However, if I [7] granted an order nisi in the matter and then made that order nisi absolute, the course I would follow thereafter would be to remit the matter to the Magistrate to have the application for a suppression order dealt with in accordance with the law, that is in accordance with the provisions of s44(4) of the Act.

Having regard to what the Magistrate said when dismissing the present applicants' application to lift the suppression order, I have no doubt the Magistrate would make a further suppression order on the ground that publication of the evidence in question would prejudice the fair trial of one or more of the accused, or the trial of Mrs Peirce if she is subsequently charged with offences arising from the deaths of one or more of the persons named. In my opinion, that would be a valid exercise of the Magistrate's discretion in the circumstances of this case and one with which this Court would not interfere. As I have already stated, the Magistrate is fully familiar with the evidentiary material relating to the committal; this Court is not. In that situation it would be quite wrong to interfere with the matter unless I was satisfied that the Magistrate's decision was clearly wrong. The fact of the matter is that I am not.

Before parting with the matter I wish to make one further observation. Counsel for the applicants made much of the fact that at the hearing [8] before the Magistrate counsel for the various accused persons did not support the application for the suppression order. I am unable to speculate as to why that was so. The fact of the matter, however, is that when the matter came before me yesterday counsel for those accused did support the suppression order. The application for an order nisi to review the decision of the Magistrate made on 13th December last is refused.

APPEARANCES: For the applicants David Syme & Co Ltd and The Herald & Weekly Times Ltd: Mr PW Almond, counsel. Minter Ellison Corrs, solicitors. For the respondents Ryan and Noonan: Mr P Putnam of the Victorian Government Solicitor. For the respondents Farrell, McEvoy and Pierce: S Collins, counsel. Legal Aid Commission Victoria.