06/04; [2004] VSC 10

SUPREME COURT OF VICTORIA

THE AGE COMPANY LTD & ORS v THE MAGISTRATES' COURT of VICTORIA & ORS

Kaye J

23, 28 January 2004

PROCEDURE – COMMITTAL PROCEEDINGS – SUPPRESSION ORDERS – PUBLICATION OF WITNESSES' NAMES SUPPRESSED – DOCUMENT HEADED 'PROSECUTION OPENING' SUPPRESSED – WHETHER MAGISTRATE IN ERROR IN MAKING ORDERS – PARTY NOT GIVEN ADEQUATE OPPORTUNITY TO BE HEARD IN RELATION TO ONE OF THE ORDERS MADE – WHETHER MAGISTRATE IN ERROR IN MAKING ORDER: *MAGISTRATES' COURT ACT* 1989 S126(1).

1. It is a long-recognised fundamental principle which requires that courts be open. However, in relation to committal proceedings, courts have recognised that the right of the public to know, through reporting in the media, may not be as significant as the need for the media to be able to fully report proceedings which finally adjudicate a particular matter.

2. Where a magistrate made an order prohibiting publication of any report which named or tended to identify certain prosecution witnesses in a committal proceeding, the magistrate was not in error in making the order so as not to prejudice the administration of justice or to endanger the physical safety of any person.

3. Where a legal practitioner appeared before the court to decide whether an application might be made to oppose the making of a suppression order in relation to the Prosecution Opening but was not given an opportunity to peruse the document, the party was not accorded natural justice and accordingly, the order made in relation to the document was quashed.

KAYE J:

1. In this matter the plaintiffs, by originating motion, seek an order by way of *certiorari* to quash orders of the Magistrates' Court of Victoria sitting at Melbourne made on 19 January 2004 in committal proceedings relating to the second defendant, Wayne Geoffrey Strawhorn. Those orders were made by the magistrate pursuant to s126 of the *Magistrates' Court Act* 1989. By the orders, the magistrate prohibited publication of:

> (i) any report which names or tends to identify seven specified prosecution witnesses in the committal proceedings;
>
> (ii) any report, picture, photographic image or exhibit sketch which may lead or tend to lead to the identification of any of those witnesses; and
>
> (iii) the document headed "Prosecution Opening".

2. The three plaintiffs to these proceedings are The Age Company Limited, The Herald and Weekly Times Limited, and Australian Broadcasting Corporation. Mr Strahan of counsel appeared on behalf of each of the three plaintiffs. The first defendant is the Magistrates' Court of Victoria. That defendant was not represented. By letter dated 23 January 2004 the Deputy Chief Magistrate advised that the magistrate was content to abide the decision of the Supreme Court. The second defendant was represented before me by Mr McMahon of counsel. The third defendant is the Office of Public Prosecutions, which was represented before me by Mr J Rapke QC and Mr D Maguire.

3. It is first necessary for me to set out, in a little detail, the background to the proceedings before the magistrate, and then to summarise the relevant proceedings before the magistrate on 19 January last.

4. The second defendant, Mr Strawhorn, is a former senior member of the Victoria Police Drug

Squad. The committal proceedings against him relate to a number of charges of drug trafficking and making threats to kill in the course of his duties as a police officer. Mr Strawhorn was first charged in March 2003. Subsequently a number of preliminary hearings have taken place in relation to his committal proceedings. From the materials before me, and indeed as a matter of public notoriety, the proceedings have received a significant amount of publicity. I was informed by Mr Rapke that the hand-up brief consists of six volumes, two of which contain witness statements, and four of which contain exhibits. It currently comprises some 1,700 pages in total. The transcript of the proceedings reveals that leave has been given to the defence to cross-examine some 47 Crown witnesses.

5. The transcript of the committal proceeding of 19 January 2004, so far as it relates to the present application, is an exhibit to an affidavit sworn in these proceedings. For the purposes of convenience I shall summarise what occurred before the magistrate as follows. I shall later return to particular features of the transcript in considering the issues which are raised before me. In essence the following occurred before the magistrate:

(a) After the announcement of appearances, a number of preliminary matters were discussed.

(b) Mr Rapke QC, who also appears in the committal with Mr Maguire on behalf of the prosecution, then sought orders under s126(2) of the *Magistrates' Court Act* 1989 to prohibit the publication of matters identifying seven prosecution witnesses. Mr Rapke stated that three of the witnesses, who he named, are police informers. Of those, one is a registered informer, and two are unregistered informers. In seeking suppression of their names, Mr Rapke relied on issues of public policy, and in particular matters relating to the administration of justice, and questions of personal safety. In relation to the next two witnesses - to whom I shall refer as "X" and "Y" - Mr Rapke stated that they had been corrupt, and had each been before the Magistrates' Court and County Court and had received gaol sentences for their corrupt activities. Mr Rapke stated that both of the two men are married with families and young children. Their spouses and children use their name. Both men are in prison. Mr Rapke stated there was a fear that, they being identified as giving evidence against an accused person, both witnesses' safety might be compromised in gaol. Mr Rapke further stated that both men had families who are equally vulnerable to harassment 'and worse' should the roles which they were to play in the committal proceedings become known. "Y" has received threats to his life in gaol, and his wife has received some harassment. "X" has four children between the ages of eight and 16, his wife is a serving police officer, and there is a concern that she too might face harassment. Mr Rapke also likened the two witnesses to informers and argued that the same considerations which apply to informers should also apply to them. The sixth witness on the list was identified by Mr Rapke is a person who had stored a quantity of drugs which belonged to a well-known drug syndicate and there were fears for his safety should his name as a witness become publicised. The seventh witness, named by Mr Rapke is the wife of one of the three informants and there was also a concern about her safety.

(c) At the conclusion of Mr Rapke's submissions counsel for Strawhorn, Mr Allen, addressed her Worship. He sought an order under s126 of the *Magistrates' Court Act* suppressing publication of the opening which he understood Mr Rapke was about to make. Mr Allen stated that he understood that the Crown was going to use its best endeavours to ensure that the matter came on for trial within a matter of months of the conclusion of the committal. Mr Allen further stated that the case in the past, and numerous other cases associated or connected with it, had received mass publicity. He stated that there was a high level of media interest in the case. Mr Allen stated that the colourful reporting of untested allegations in a sometimes possibly sensational way must carry with it the substantial risk of his client not receiving a fair trial. Mr Allen stated that "As your Worship is well aware" the case had a uniqueness about it and the allegations which were made, and the nature of Mr Strawhorn's background and position were such, that one could expect an unusually high level of publicity associated with the opening.

(d) Mr Rapke took an essentially neutral position in relation to whether or not the opening should be publicised. In order to assist he offered to the magistrate and to Mr Allen a copy of his prepared version of the opening which he intended to deliver. Her Worship (at p16 of the transcript) stated that she thought that the proper way of dealing with the matter was to have the written submission handed up and a copy handed to the defence and that it could be accepted that it would be read by her and "we can simply proceed on that basis'.

(e) The magistrate (at p17) then stated that in relation to each of the seven witnesses named that orders be made pursuant to s126 of the *Magistrates' Court Act* prohibiting publication of the report of those names or anything which tended to identify them. Thereupon Ms Selma Milovanovic, a journalist in the employment of *The Age*, stated to the court:

"Your Worship, excuse me, Selma Milovanovic from *The Age*, I request this proceeding to be stood down briefly so we could get legal advice regarding a challenge to the suppression order, please." In response her Worship stated: "Well, I'm not prepared to stand down the proceedings, the order can be made and of course the organisation that you represent has its rights that it may exercise but what I propose to do is to make the order in the terms as I've announced and that order will be posted and the proceeding will continue."

(f) Mr Allen then requested time to read the opening. Before standing the matter down the magistrate stated that it was appropriate to make the suppression order in relation to the names of the witnesses, having regard to some six matters which she then specified. She then pronounced the order prohibiting the publication of those names. After some further short discussion the matter was stood down.

(g) When the proceedings were reconvened, Ms Veronica Byrne, a solicitor, announced her appearance representing *The Age* and the Australian Broadcasting Corporation in relation to the applications which had been made to suppress the identity of witnesses and the opening of the prosecution. The magistrate pointed out that the orders had been made. Ms Byrne responded that she understood that the orders had been made in relation to the witnesses, but that a decision was still to be made in respect of the opening. She stated that her instructions were to seek a copy of the opening so that she could apply to oppose the suppression of the opening. Mr Allen then made further submissions in support of his contention that the opening be suppressed. In response, Ms Byrne made submissions. She pointed out that the status of the document entitled "Prosecution Opening" was unclear. Accordingly she was in a bit of dilemma whether to make an application opposing the suppression of the document, or alternatively an application for access to the document. After further discussions, to which I shall later refer, the magistrate made an order suppressing the publication of the document. Ms Byrne then foreshadowed that her instructions would be to apply for an order seeking review of the magistrate's order from the Supreme Court.

***Magistrates' Court Act* 1989 s126**

6. The relevant provisions of s126 of the *Magistrates' Court Act* are as follows:

"(1) The Court may make an order under this section if in its opinion it is necessary to do so in order not to— …
(b) prejudice the administration of justice; or
(c) endanger the physical safety of any person; or …

(2) The Court may in the circumstances mention in sub-section (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 by specified kind, relevant to a proceeding that is pending in the Court.

(5) The Court must specify a period (not exceeding seven days) for which an order made under sub-section (2)(d) is to remain in force and the order shall remain in force for that period unless it is sooner set aside by the Court."

The Originating Motion

7. As I have already stated above the plaintiffs make application by originating motion for orders in the nature of *certiorari* quashing the orders of the Magistrates' Court. The originating motion recites three grounds:

(1) The Court fell into jurisdictional error. The particulars of the jurisdictional error are that the Court was required to hold certain opinions in order to invoke the jurisdiction to make the orders, and the Court purported to form the requisite opinions without any evidence of the matters said to be the factual basis for those opinions.

(2) The Court failed to accord the plaintiffs natural justice by refusing to provide them with any or any adequate opportunity to be heard before the making of the challenged orders.

(3) That the third order, prohibiting publication of the prosecution opening, demonstrated error on the face of the order. The originating motion alleges that the prosecution opening was not part of the proceeding, and accordingly the Court was required under s126(5) to specify a period of less than seven days for which the order would remain in force.

Relief Sought

8. Before dealing with each of the bases upon which the orders are sought, it appears necessary to address some preliminary remarks relating to the nature of that relief. First, the proceedings before the magistrate were committal proceedings. In general, such proceedings are characterised as ministerial and not judicial. Accordingly it is well established, at least in the State of Victoria, that an order for *certiorari* will not lie to quash the decision of a magistrate whether to commit an accused person for trial; *Phelan v Allen*[1]; *Brygel v Stewart-Thornton*[2]; *Potter v Tural and Anor*[3]. Similarly, a decision made by a magistrate, in the course of committal proceedings, denying leave to cross-examine a witness, is not amenable to an order in the nature of *certiorari*; *Potter v Tural* (above)[4]. None of the parties addressed to me any submissions that, similarly, an order in the nature of *certiorari* may not be made in respect of an order by a magistrate under s126 of the *Magistrates' Court Act* in respect of committal proceedings before that magistrate. I note that *certiorari* was sought in respect of an order of a magistrate denying the plaintiff access to materials in a hand-up brief in *Herald and Weekly Times Limited and Ors v The Magistrates' Court of Victoria and Ors*[5]. In that case there was no suggestion by the Court of Appeal that, in an appropriate case, *certiorari* may not lie. Neither was any such suggestion made when the matter was heard at first instance before Mandie J; *Herald and Weekly Times Limited and Ors v The Magistrates' Court*[6]. Finally, in *Re Robins SM; ex parte West Australian Newspapers Limited*[7], the Full Court of the Supreme Court of Western Australia held that a decision by a magistrate, in committal proceedings, suppressing publication of evidence given at the preliminary hearing was amenable to an order with *certiorari*. Accordingly, the matter not having been argued before me, I shall assume that I do have jurisdiction to make an order for *certiorari* in respect of the magistrate's decision, should the necessary foundation for such an order be established.

9. Secondly, it is important to bear in mind that the bases upon which an order for *certiorari* may be made are not to be equated with the bases upon which an appeal court might review an order of decision of an inferior court. Relevantly, an order for *certiorari* may be made quashing any impugned decision where there is jurisdictional error, where there is a failure to observe an applicable requirement of procedural fairness, and where there is "error of law" on the face of the record: *Craig v The State of South Australia*[8].

Jurisdictional Error: suppression of names of seven prosecution witnesses

10. The plaintiffs first submit that the magistrate committed a jurisdictional error in suppressing the names of seven prosecution witnesses. Three subsidiary submissions were addressed to this contention, namely:

> (a) In respect of each of the seven witnesses, the magistrate adopted the wrong test, by stating it was "appropriate in the circumstances" that the names be suppressed, rather than articulating the test in terms of s126(1)(b) or (c);
>
> (b) in respect of each of the seven names, the magistrate erred because she received no evidence at all relating to the status of those witnesses or the prospective effect any publication on those witnesses or the administration of justice;
>
> (c) particularly in relation to the two opposed witnesses "Y" and "X" the matters put to the court by the prosecutor were insufficient to enable the magistrate to formulate the requisite opinion under s126(1)(b) or (c).

11. I do not accept the first point made by Mr Strahan, on behalf of the plaintiffs. Although the magistrate stated that it was "appropriate in the circumstances" to make the suppression order, she enunciated six reasons why she formed that opinion. Those reasons involved: the nature of the matter before the court, the nature of the witnesses which the prosecution proposed to call; the status of those witnesses as police informants; the status of those witnesses as serving police officers undergoing sentence; the status of those associated with the nominated witnesses; and the nature of the evidence proposed to be elicited from one of the witnesses who is associated with a drug syndicate. In my view, it is clear from a reading of the transcript that the magistrate was well cognisant of the requisite tests to be satisfied under s126(1)(b) and (c). The matters referred to by her related to each of those two matters, namely, whether it was necessary to make the order so as not to prejudice the administration of justice or to endanger the physical safety of any person.

12. The second contention made by Mr Strahan was that, in order for the magistrate to be able to formulate the requisite opinion in respect of each of the seven witnesses, she must first have received admissible evidence upon which the opinion is to be based. Mr Strahan correctly contended that it was insufficient for any such opinion to be based purely on speculation or guesswork: cf *GTE (Australia) Pty Ltd v Brown*[9]. In support of his contention that, in order that the appropriate opinion be formed, the magistrate must have before her legally admissible evidence, he relied on the judgment of Nathan J of this Court in *Herald and Weekly Times Pty Ltd and Anor v Jones*[10]. In that case, his Honour was concerned with an appeal from a committal proceeding in respect of a notorious sex offender. The magistrate had acceded to a submission made by counsel on behalf of the accused that publication of any part of the proceedings before the court which would tend to identify the accused would both imperil the accused in gaol, and would also prejudice a fair hearing at his trial. No evidence was put to the magistrate to support those conclusions. Nathan J held that there must be "cogent and admissible evidence" in order that the magistrate formulate his requisite opinion under s126(1)(b) or (c).

13. The comments made by Nathan J, in quashing the suppression order, must be read in light of the particular case which is before his Honour. I do not consider that they are, nor were they intended to be, the articulation by his Honour of a universal rule which would bind all applications for suppression orders. Each case must be determined on its own circumstances. In his submissions, Mr Rapke drew attention to the decision of Teague J of this Court in *R v Pomeroy; The Herald and Weekly Times Limited*[11]. That case concerned applications for suppression orders under ss18 and 19 of the *Supreme Court Act*. His Honour held that it was not necessary for admissible evidence to be put before him. His Honour specifically referred to the decision of Nathan J in *Jones'* case, and considered himself entitled to act on considerations relating to dangers to accused persons in custody with which the Court, over the years, had become particularly familiar. In my opinion, the approach of his Honour in *Pomeroy's* case is correct. It is artificial and unrealistic to require courts, on applications for suppression orders, to receive evidence as to matters in respect of which the courts are thoroughly familiar, or as to facts which would be plainly incontrovertible before them.

14. Thus, in my view, it was unnecessary for the prosecutor to lead admissible evidence as to the particular status of any of the seven witnesses in respect of whom he sought suppression orders. Indeed, and in any event, Mr Rapke put to me that the hand-up brief, with which the magistrate was familiar, contained such material. Further, as Mr Rapke pointed out, at the stage at which he made application for the suppression order, and at the stage at which the suppression order was at least first pronounced, the application was unopposed.

15. In this case, Mr Strahan contended that, in respect of all the witnesses except for "Y" and "X", his only point was that no evidence had been tendered to the Court as to their status. As I understood his submissions, in respect of those five witnesses, he accepted that had such evidence been put to the Court, the magistrate would have had an appropriate basis upon which to make the suppression orders. For those reasons, I reject the second subsidiary submission made by Mr Strahan in relation to the orders suppressing the publication of the names of the seven witnesses.

16. The third, and major, contention made by the plaintiffs in support of their proposition that the suppression orders relating to the names of prosecution witnesses were infected by jurisdictional error related only to the witnesses "X" and "Y". Mr Strahan, in a thorough submission, contended that, even if the matters upon which the magistrate need not be supported by sworn evidence, nonetheless the matters which were put to her by the prosecutor were insufficient for her to form the view that the order suppressing the names of "Y" and "X" were necessary in order not to prejudice the administration of justice or endanger the physical safety of any person. Further, Mr Strahan sought to rely on a number of extracts from the media contained in an exhibit, that is, Exhibit SN5 to the affidavit of Ms Milovanovic. In those extracts, there are a number of references to the fact that "X" and "Y" intended to give evidence against Strawhorn at his forthcoming committal. Accordingly, Mr Strahan contended that the magistrate made an error in determining a jurisdictional fact, namely, that the orders made by her were necessary so as not to prejudice the administration of justice or endanger safety.

17. In response to these submissions, Mr Rapke submitted, first, that the magistrate did not

make any such error, and, secondly, if any error was made (which was not conceded) such error was made within jurisdiction.

18. The first question is whether there was any "error" in a relevant sense made by the magistrate in determining that it was necessary to make the order so as not to prejudice the administration of justice or endanger the physical safety of any person. In this respect, I reiterate the point which I made earlier in these reasons, namely, that this is an application for an order by way of *certiorari*, and not the hearing of an appeal.

19. Before considering this question in the above light, it is first important to acknowledge the long recognised fundamental principle in our system of justice which requires that our courts be open: see *Scott v Scott*[12]. Further, as part of the system of open justice, the courts have always recognised that it is important that the media have the ability to responsibly report to the public on the proceedings before it; see, for example, *R v Denbeigh Justices; ex parte Williams*[13]. Thus, the due publication of court proceedings has not only been seen as a matter of public interest in itself, but also as an important part of the administration of justice. This consideration was clearly articulated by Mason CJ in *Hinch v Attorney-General (Victoria)*[14], in a passage heavily relied upon by counsel for the plaintiffs.

20. The proceedings before the magistrate were, of course, committal proceedings, and not a final determination of the matters before her. To that extent, the courts have recognised that the right of the public to know, through reporting in the media, may not be as significant as the need for the media to be able to fully report proceedings which finally adjudicate a particular matter: see *David Syme & Co Limited v Hill*[15] which is quoted with approval by the Court of Appeal in *Herald and Weekly Times Limited v Magistrates' Court* (above)[16]. In the present case, however, the dicta of Beach J must be weighed against the particularly unique features of the matters which were before her Worship. The proceedings involved allegations of high level corruption in the Victorian Police Force in respect of the unit of the Police Force which was entrusted with the responsibility for detecting and prosecuting crimes relating to illegal trafficking and dealing in drugs. It is clear that the public has a high interest in being fully informed of such proceedings.

21. It is in light of the above considerations that I must now determine whether the magistrate has made a jurisdictional error in formulating her view that suppression of the names of "Y" and "X" was necessary so as not to prejudice the administration of justice or endanger human safety. In doing so I shall not set out all the matters that were put to her Worship. However, it was clear what the status of both "Y" and "X" was, and that they were then in custody. In my view, the magistrate was entitled to take notice of the risk they, and their families, may face, should it become public knowledge that they were giving evidence in the committal proceedings. Accordingly, it was open to the magistrate to form the conclusion that, in those circumstances, the suppression orders were necessary so as not to prejudice the administration of justice or to endanger the safety of those persons. I emphasise that it was a matter for the magistrate, on those considerations, whether that opinion might be formulated. Other minds might differ. In particular, a consideration of those matters in light of the media extracts, which are contained in the exhibit and to which I have referred above, may or may not lead to a different conclusion. However, I am unable to come to the conclusion that the magistrate has made an error in deciding that the suppression order in respect of "X" and "Y" was necessary for the purposes of s126(1)(b) or (c).

22. In those circumstances, it is not necessary for me to decide whether, if such an error were made, it was an error within or outside jurisdiction. However, because the matter was argued before me, I do proceed, briefly, to express a view on this matter. In my opinion, if such an error had been made it would not be an error as to jurisdiction. In *Craig v South Australia*[17] the High Court, in its joint judgment, stated:

> " ... An inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the exercise of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which a court has jurisdiction to entertain."[18]

23. As I have stated above, the magistrate did, in my view, formulate the requisite conclusion under s126(1). By formulating that opinion, the magistrate had jurisdiction to make the order. If she made an error in formulating that conclusion, then that error was made within jurisdiction, and it was not an error going to jurisdiction. I note that a similar view was reached by the Full Court of Western Australia in *Re Robins SM* (above)[19].

24. For each of the above reasons, I am of the opinion that the magistrate did not make a jurisdictional error in making the first and second orders suppressing the names and identities of seven prosecution witnesses.

Jurisdiction Error: prosecution opening

25. It is convenient at this stage to also deal with the competing contentions whether there was jurisdictional error by the magistrate in her decision to suppress publication of the document headed "Prosecution Opening", which is recorded in the first clause of her order.

26. It is first convenient and necessary to reach a conclusion as to the status of the document entitled "Prosecution Opening". Both Mr Strahan and Mr McMahon correctly observed in the course of their submissions that the precise status of that document was not entirely clear. I agree with that observation. However, after a careful reading of the transcript I have come to the conclusion, as indeed I tentatively foreshadowed in the course of oral submissions, that the document has been adopted by the learned magistrate as an opening, albeit that it was not read in open court. It seems that Mr Rapke certainly intended, originally, to deliver the opening orally. In order to assist the Court to determine whether publication of it should be suppressed before he actually delivered it, Mr Rapke made the document available both to the magistrate and counsel for Mr Strawhorn. As I have set out in my summary of the proceedings, after an adjournment, the plaintiffs' solicitor announced her appearance. She too expressed some uncertainty as to the status of the document. I shall return to the discussion between the magistrate and the solicitor in due course. However, at the conclusion of that discussion, her Worship herself observed that the document did not have any particular status, but was handed to the Court so that the question of whether it should be suppressed could be considered. Her Worship then delivered reasons why the document should be suppressed. In the course of those reasons her Worship stated:

> "The document in question is designed as an aid and represents outline of the evidence that is sought to be adduced. It is essentially an aid designed to assist the Court in relation to its determination."[20]

27. In light of that final comment which I have just quoted it seems to me that the magistrate ultimately accepted that the document was to perform the role of an opening, namely as an outline of the evidence, so as to assist the court as the evidence is led. Thus, I reach the conclusion, albeit with some hesitation, that the document was treated as an opening in the committal proceeding.

28. The question is whether the magistrate made an error in determining that it was necessary to suppress the opening in order not to prejudice the administration of justice. If such an error was made, then again the question would arise whether that was a jurisdictional error. For the reasons which I have set out above I am of the opinion that if any such an error was made it would not be a jurisdictional error. However, because the matter was fully ventilated before me, I consider that I ought, nonetheless, to consider whether any relevant error was made in any event.

29. I have already rejected the submission on behalf of the plaintiffs that it was necessary for counsel for Mr Strawhorn to place before the magistrate sworn evidence to support the matters asserted by him to the magistrate. Indeed, it is difficult to identify just what facts would need to be put to the magistrate, other than the expectation that, if Mr Strawhorn was committed for trial, the prosecution intended to press on for trial as quickly as possible. That assertion was made on behalf of Mr Strawhorn without any demur to it by the prosecutor. In my view, the magistrate was entitled to accept that statement from the Bar table.

30. Further, in my view, it was open to the magistrate to accept, as a matter of common sense, that, in a matter such as that which was before her, publication of the opening, particularly before any evidence is adduced, would prejudice the administration of justice in affecting the right of Mr Strawhorn to a fair trial. As counsel for Mr Strawhorn pointed out, the opening consisted of a presentation by the Crown of its case in one block. By contrast, during the committal, various

witnesses would be called, and would be cross-examined, over a period of some time. It is relevant that no application has been made for the proceedings to be closed. As Mr Rapke pointed out to me, the magistrate has been seized of the matter for some time. She has had before her the voluminous hand-up brief. She was best in the position to assess the likely prejudice to Mr Strawhorn at his trial, should there be no prohibition on the publication of the opening to be made by Mr Rapke, particularly before witnesses were called during the committal. In those circumstances, I do not conclude that there was a relevant "error" by the magistrate in determining that suppression of the opening was necessary in order to avoid the prejudice of the administration of justice.

31. Mr Strahan also contended that the magistrate failed to apply the correct test in determining whether suppression of the opening was necessary in order not to prejudice the administration of justice. He pointed to the part of the ruling of her Worship where she stated:

> "These of course involve considerations not only relating to the administration of justice, but also and importantly, the rights of the defendant and also the interests of the community in being made aware of the types of proceedings that are conducted in courts of this type. It is important that a balance be struck wherever possible between these various competing considerations." (Transcript at p26)

32. It was submitted by Mr Strahan that that statement by the magistrate involved an error, since the magistrate failed to appreciate that the full publication of the proceedings was an important ingredient of the administration of justice. In my view, no such error can be inferred from the statement of reasons, *ex tempore*, by the magistrate. Her Worship clearly acknowledged the interest of the community in being made aware of the proceedings being conducted in court. Although she did not articulate that interest as part of the administration of justice, in my view that point alone did not vitiate the manner by which her Worship considered the question and came to her conclusion. For all of the above reasons I am of the view that the magistrate did not make a jurisdictional error in determining that it was necessary to suppress the opening so as not to prejudice the administration of justice.

Natural Justice: suppression of prosecution witness names

33. The second basis upon which the plaintiffs seek to impugn the decision of the magistrate is that she failed to accord them natural justice or, as it is now called, "procedural fairness". In particular, it is put that the magistrate failed to provide to the plaintiffs a proper opportunity upon which they might be heard.

34. As a matter of technicality, I note that Ms Milovanovic only announced that she sought for the matter to be stood down on behalf of *The Age*. When Ms Byrne later came to the court, she stated that she was representing *The Age* and the Australian Broadcasting Corporation. No representation was made to the magistrate on behalf of the second plaintiff, The Herald and Weekly Times Limited. Quite properly, no point was made about this by either Mr Rapke or Mr McMahon. I do not consider that that affects the outcome of my considerations.

35. As I have already set out above, after announcing the decision to suppress publication of the seven names, Ms Milovanovic announced that she was from *The Age*, and stated the following:

> "I request this proceeding to be stood down briefly so we could get legal advice regarding a challenge to the suppression order please."

36. As I set out above, her Worship stated that she would not stand down the proceedings, the order could be made, and that *The Age* had its right which it may exercise. After the order was pronounced, the matter was stood down for other reasons. After the adjournment Ms Byrne, solicitor for *The Age* and the ABC, then announced her appearance "in relation to the applications that have been made to suppress the identity of some witnesses and also the opening of the prosecution." Her Worship noted that orders had already been made. Ms Byrne acknowledged that the orders had been made in relation to the witnesses, but that her Worship was still to make a decision in relation to the opening and that she sought a copy of the opening under the procedures in the Magistrates' Court, so that she might make an application to oppose a suppression of the opening.

37. The plaintiffs contend that in the above circumstances they were denied the opportunity to make appropriate submissions to her Worship in relation to the first two orders concerning

the suppression of the names of the prosecution witnesses. In response, Mr Rapke makes the point that neither Ms Milovanovic nor Ms Byrne clearly sought to be heard in relation to those two orders. I have come to the conclusion that Mr Rapke's submission is correct.

38. I acknowledge that Ms Milovanovic is a reporter, and does not have legal training. Nevertheless, she did not request the opportunity to be heard in relation to the proposed or just announced suppression order, but, rather, sought for the matter to be stood down so that *The Age* could get legal advice regarding a challenge to that order. At that point, in my view, no application was made to actually address the order before it was made, or to set it aside. It is correct that Ms Byrne did, initially, announce her appearance as representing *The Age* and the ABC in relation to the applications that had been made to suppress the identities of the witnesses (and also the opening). However, she acknowledged that the orders had been made in relation to the witnesses, and then only sought to address the magistrate in relation to the opening. She did not ask the magistrate to vacate her orders in relation to the suppression of witness names, nor did she seek to be further heard in relation to that. If Ms Byrne had made such a request, then she would, at an appropriate time, have had a full right to be heard. Any denial of that right, without justification, would have been a breach of the rules of procedural fairness. However, I do not consider, in the circumstances, that it has been established that the plaintiffs did seek to exercise that right on 19 January, and that they were thus denied that right. Accordingly, I have reached the conclusion that the plaintiffs did not suffer a denial of procedural fairness as they have contended for.

39. In this context, I do note two concessions by Mr Rapke on behalf of his client. First, it is conceded that the plaintiffs do have standing to be heard in relation to the making of the suppression orders. Secondly, he conceded that the plaintiffs have a present right to make application to the magistrate to vacate her order, and to be heard further in relation to it. Of course, that right cannot be exercised vexatiously, and must be exercised on good grounds. Further, Mr Rapke hastened to add that if the plaintiffs did seek to exercise that right, he would seek to support the suppression orders for the reasons which he has already outlined to the magistrate. Both of the concessions made before me by Mr Rapke are correct and represent the state of the law. Thus it has always been and remains the position that the plaintiffs have standing before the magistrate, and have the right to seek, before the magistrate, the right to be heard in relation to clauses 1 and 2 of the orders which she made on 19 January. That circumstance fortifies the conclusion which I have already reached, in any event, that there was no denial of procedural fairness to the plaintiffs in respect of clauses 1 and 2 of the orders made by her.

Procedural Fairness: suppression of prosecution opening

40. The next question is whether there was a breach of procedural fairness in respect of the order made by the magistrate suppressing publication of the document headed "Prosecution Opening".

41. This issue mainly arose during the reply made by Mr Strahan. I gave leave to Mr McMahon to respond to that reply. I suspect that the matter arose reasonably late in oral argument because, as the proceeding before me evolved, it became more clear that the document itself constituted the actual opening by the prosecution before her Worship.

42. In order to determine this question it is necessary for me to set out further what occurred. After Ms Byrne stated that she wished to make an application to oppose the suppression of the opening, Mr Allen made submissions as to why the opening should be suppressed. In essence, he enlarged on the submissions he had previously made, and which I have summarised above. Ms Byrne then made brief submissions. It is important to note that at the time at which she made the submissions her Worship had not made the remark, which I have set out above (at p27 of the transcript) which characterises the document itself as, *de facto*, the opening made by the prosecution. Ms Byrne noted that there was a process in the Magistrates' Court for applications of access to material on the provision of undertakings. She referred to a concession made by Mr Allen that, at trial, some prejudice might be alleviated by the judge giving appropriate directions to the jury. She then stated:

> "My understanding was that the application in terms of suppressing the opening, and I wasn't here for that application and I haven't seen the document itself, may go some way to suppressing the opening in terms of what is actually said in open court. I don't know if that's the case. It would therefore seem that the application for the document to be suppressed would have been premature

> in any event then because it actually hasn't been tendered or handed up or provided to anybody until the application was made, so I'm in a bit of a dilemma in terms of whether I'm to make this an application opposing the actual dealing with any of the contents of that document in open court, or the document itself, but certainly I would make an application for access to that document on the basis that it becomes part of the proceedings and I actually have a copy of a signed application in that respect."[21]

43. After brief discussion her Worship then made her ruling to which I have already referred, and in the course of which her Worship, in my view, characterised the document as the opening "as made".

44. It is clear that Ms Byrne did attend at court and announce that she wished to oppose the suppression of the document characterised as the opening. She was then at a disadvantage because she did not understand its characterisation, and that characterisation was not pointed out to her while she was addressing the magistrate. On reading the transcript, it does seem to me that Ms Byrne was not given an appropriate opportunity to address submissions in relation to the suppression of the document. In reaching that conclusion I do not make any criticism of any of the parties or of the magistrate. The document came into her Worship's hands in order that her Worship might be able to rule, prospectively, whether the oral opening to be made by Mr Rapke should be suppressed. Obviously, having read the opening, her Worship felt it was unnecessary for it to be read in open court. She was faced with a lengthy committal and her reading of the document had no doubt enlightened her as to the context in which particular witnesses were to be called and cross-examined. However, in those circumstances, the critical question is whether the first and third plaintiffs were given an adequate opportunity to be heard in relation to any suppression order to be made in relation to the document. It is clear that they so wished to be heard. It is also evident that, while she was on her feet, Ms Byrne was, quite understandably, unclear as to any proposed suppression of the document. Thus she was not in the position to make proper submissions in relation to any proposed suppression of the document. I have reached the conclusion, accordingly, that the first plaintiff and the third plaintiff were not given an adequate opportunity to be heard in respect of the suppression of the opening. Accordingly, an order should be made quashing clause 3 of the Order made on 19 January. In reaching that conclusion, I express and convey no views at all whether her Worship should or should not make such a suppression order. That decision is entirely one for her Worship and not for me.

Error on the face of the record

45. The final submission made by Mr Strahan on behalf of the plaintiffs was that there was error on the face of the record. That submission was made on the assumption that the document entitled "Prosecution Opening" did not form part of the proceeding, but, rather, constituted material relevant to the proceeding within s126(2)(d). For the reasons which I have set out above, I am of the opinion that the document did form part of the proceeding, and therefore did not fall within s126(2)(d). Accordingly, s126(5) does not apply. For those reasons I conclude that there has not been error on the face of the record.

Conclusion

46. For the reasons set out in this judgment I have reached the following conclusions:

> (1) There was no jurisdictional error by the learned magistrate in making the suppression orders;
>
> (2) there was no failure to accord natural justice in relation to the suppression order concerning the names of the seven witnesses;
>
> (3) the first and third plaintiffs were not accorded natural justice in relation to clause 3 the suppression order concerning the document entitled "Prosecution Opening";
>
> (4) there was no error on the face of the record.

47. Accordingly, subject to hearing from counsel I propose the following orders:

> (1) That the proceeding, and the plaintiffs' summons dated 22 January 2004, against the third named defendant, the Office of Public Prosecutions, be dismissed.
>
> (2) Order in the nature of *certiorari* quashing clause 3 of the order of the magistrate dated 19 January 2004 by which her Worship prohibited publication of the document headed "Prosecution Opening".

48. I shall hear counsel further on issues relating to any proposed prohibition of publication of these proceedings, any stay on clause 2 of the order and the question of costs.

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[1] [1970] VicRp 28; (1970) VR 219.
[2] [1992] VicRp 70; [1992] 2 VR 387; (1992) 67 A Crim R 243.
[3] [2000] VSCA 227; (2000) 2 VR 612 at 614; (2000) 121 A Crim R 318.
[4] At 617 to 18.
[5] [2000] VSCA 242; (2000) 2 VR 346; (2000) 117 A Crim R 122.
[6] [1999] VSC 136; (1999) 3 VR 231.
[7] [1999] WASCA 16; (1999) 20 WAR 511; (1999) 105 A Crim R 554.
[8] [1995] HCA 58; (1995) 184 CLR 163 at 175-6; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[9] (1986) 14 FCR 309; (1986) 76 ALR 221 at 249.
[10] (Unreported, 25-3-92; BC 9203152).
[11] (2002) VSC 178.
[12] (1913) AC 417 at 434, 437-8 (per Viscount Haldane LC); [1911-1913] All ER 1; 29 TLR 520.
[13] (1974) QB 759 at 765 (per Lord Widgery CJ); (1974) 2 All ER 1052.
[14] [1987] HCA 56; (1987) 164 CLR 15 especially at 25-26; 74 ALR 353; 28 A Crim R 155; 61 ALJR 556.
[15] ([1995] VSC 59; [1995] VICSC 59, Unreported, Supreme Court of Victoria, Beach J, 10-3-95).
[16] At 349.
[17] [1995] HCA 58; (1995) 184 CLR 163 at 177; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[18] At 177.
[19] At 522-3.
[20] Transcript at p27.
[21] Pages 24-25 of transcript.

APPEARANCES: For the plaintiffs *The Age* etc: Mr AT Strahan, counsel. Minter Ellison, solicitors. For the second defendant Strawhorn: Mr JP McMahon, counsel. Galbally & O'Bryan, solicitors. For the third defendant Office of Public Prosecutions: Mr JW Rapke QC with Mr DB Maguire, counsel. Kay Robertson, Solicitor for Public Prosecutions.
