24/04; [2004] VSC 194

SUPREME COURT OF VICTORIA

HERALD & WEEKLY TIMES LTD & ORS v MAGISTRATES' COURT of VICTORIA and ORS

Whelan J

19, 20 May 2004 — 21 VAR 117

PRACTICE AND PROCEDURE – CRIMINAL LAW – SUPPRESSION ORDER – APPLICATION TO LIFT SUPPRESSION ORDER PREVIOUSLY MADE – APPLICATION REFUSED BY MAGISTRATE – STATEMENT BY MAGISTRATE THAT IT WAS NOT IN THE INTERESTS OF JUSTICE TO LIFT THE ORDER – REQUIREMENT OF 'NECESSITY' – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S126.

Section 126(1) of the *Magistrates' Court Act* 1989 relevantly provides:

> "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."

1. When a magistrate is dealing with an application to lift a suppression order previously made, the same considerations apply as apply when considering whether an order should be made. Accordingly, the issue is not what the interests of justice indicate but rather whether it is necessary to make the order.

2. Where a magistrate decided that it would not be in the interests of justice to lift a suppression order, the magistrate applied the wrong test. The magistrate should have determined whether it was necessary for the order to continue.

WHELAN J:

1. On Monday 17 May 2004, Mr Justin Quill, a solicitor, appeared before Magistrate Popovic in the Magistrates' Court of Victoria on behalf of the Herald & Weekly Times Ltd, Channel 7 Melbourne Pty Ltd and the Australian Broadcasting Corporation with an application by those entities to vacate a suppression order Magistrate Popovic had made on 19 December 2003 in a matter described in the material on this application as *R v Miechel, Dale & Anor*. Her Worship refused the application. The order she made incorporated brief reasons.

2. By an originating motion filed on 18 May 2004, two of those applicants before her Worship, Herald & Weekly Times and Channel 7, joined by a third plaintiff, General Television Corporation Pty Ltd, seek, amongst other orders, an order in the nature of *certiorari*. The proceeding is under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 1996 (Vic).

3. The plaintiffs are a publisher of a mass circulation newspaper and two television broadcasters. In this hearing they have been represented by Mr Houghton QC and Mr D Bennett. The first defendant is the Magistrates' Court of Victoria, which, unsurprisingly, has not appeared. The second defendant is the Office of Public Prosecutions which has been represented on this hearing by Mr Rapke QC and Mr D Maguire. The third defendant is the Victoria Police, which has been represented by Mr G Maguire.

4. Mr Papas of counsel appeared on behalf of the fourth defendant and indicated that the fourth defendant had no submissions he wished to make. When this matter was originally called on in the Practice Court, a solicitor, Mr Hargreaves, appeared on behalf of the fifth defendant. I was told in this hearing that he advised the Practice Court Judge that he had no submissions he wished to make on behalf of the fifth defendant and that he asked to be excused.

5. The material before me was exceedingly scant. Mr Quill swore an affidavit which deposed to the nature of the business conducted by the plaintiffs, the order made on 19 December 2003, the making of the application on 17 May 2004, the order refusing that application, notification

of an intention to seek relief in this Court, and which produced articles published in *The Age* newspaper on 17, 18 and 19 May 2004.

6. I gave all the parties an opportunity to file further material; they all declined.

7. The plaintiffs say that they rely on the record and are content to be confined to that. Those defendants who made submissions opposed the relief sought. They submitted that the paucity of material meant that the application was bound to fail.

8. The order produced by Mr Quill relevantly reads as follows:

> "This order is made on 17/5/04 – Mr Quill appearing for the ABC, Channel 7 and Herald & Weekly Times applied to the court to have the suppression order made by me on 19/12/03 lifted. Having heard the application and the arguments against the lifting of the order it would not be in the interests of justice to lift the suppression order due to the potential for damage to teh [sic] administration of justice, the protection of identity of informers outweighs the public's right to know together with prejudice to the remaining accused."

9. None of the parties submitted to me that 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* 1989 (Vic). A similar position arose before Kaye J in *The Age Company Ltd v Magistrates' Court of Victoria*.[1] For the reasons he gave at paragraph 8, I shall also assume I do have jurisdiction to make an order in the nature of *certiorari* in respect of this decision should the necessary foundation for such an order be established.

10. Before turning to s126 some underlying public interest considerations which were uncontroversial in this hearing should be referred to.

11. The first was that the fundamental importance of openness in the courts and the importance of the media's ability to responsibly report to the public proceedings before the courts have been emphasised in many authorities. I will not repeat them here. Some are cited in Kaye J's decision in *The Age Company Ltd v Magistrates' Court of Victoria*,[2] at paragraph 19.

12. The second was that there is an important public interest in protecting the anonymity of informers. Mr G Maguire referred me to *Jarvie v Magistrates' Court of Victoria*[3] and it seemed to me that the principles set out in that case were accepted on behalf of the plaintiffs.

13. Section 126(1) of the *Magistrates' Court Act* 1989 (Vic) relevantly provides as follows:

> "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."

14. As a provision derogating from the openness of the courts, s126 is to be read strictly and to be narrowly construed: *Raybos Australia Pty Ltd v Jones*;[4] *Herald & Weekly Times Ltd v Magistrates' Court of Victoria*;[5] *R v Pomeroy*.[6] The key requirement of s126 is necessity; it must be necessary to make the order in order not to prejudice the administration of justice or endanger the physical safety of any person. This is what the section says.

15. The requirement of necessity was described in these terms by Teague J in *Pomeroy*:

> "There can be no doubt that because of the word 'necessary' in s19 the bar must be very high. It will be reached only in wholly exceptional circumstances. The requirement of necessity is an integral part of other exceptions to the open justice principle."[7]

16. His Honour's reference to s19 was a reference to s19 of the *Supreme Court Act* 1986 (Vic) which, as his Honour himself observed, is relevantly the same as s126 of the *Magistrates' Court Act* 1989 (Vic).

17. The requirement that a court must find that an order is necessary contrasts with the approach courts are commonly required to undertake where competing interests and concerns are to be balanced and the desirable or more appropriate course is determined upon. Here the legislation has provided that the scales are weighted in favour of openness and move to suppression

not when a balancing exercise indicates the desirability of suppression, but only when an opinion has been formed by the court that suppression is necessary.

18. The need to address necessity is fundamental, but that does not mean that the magistrate must use that word, although that may be preferable. In *The Age Company Ltd v Magistrates' Court of Victoria,*[8] Kaye J dealt with an order where the magistrate had found it to be "appropriate in the circumstances" that the order be made. Kaye J referred to the six reasons the magistrate had given for the order and then said: "In my view it is clear from a reading of the transcript that the magistrate was well cognizant of the requisite test." I do not have the benefit of recourse to similar material here.

19. *[After dealing with the scope of* certiorari*, His Honour continued]: ...*

24. The plaintiff submitted that her Worship fell into jurisdictional error by failing to apply the correct test. It was submitted that the test she applied was not the test of necessity in s126, but rather, whether there was potential for damage to the administration of justice. It was also submitted that it was not clear what test her Worship applied in referring to prejudice to the remaining accused. The plaintiffs submitted that identification could not possibly cause prejudice to the remaining accused.

25. Mr Houghton also submitted on behalf of the plaintiffs that her Worship erred in failing to take into account a relevant matter, namely, the fact that the informer's identity had already been revealed by *The Age*. The plaintiffs submitted that the necessity test could not be satisfied in the circumstances here.

26. Addressing the grounds set out in the originating motion, Mr Houghton said that the first two grounds concerned the application of the wrong test, and the last two grounds concerned the failure to address a relevant matter and the submissions he had made that the necessity test could not possibly be satisfied here.

27. The last two grounds, in my opinion, can be dealt with briefly. Mr Rapke and Mr G Maguire submitted that there is no material which supports these grounds. In my view, that is correct.

28. Mr G Maguire, on behalf of the Victoria Police, supported the Magistrate's decision. He submitted that the public interest in protecting informers is clearly established by the authorities. I accept that, and it seemed to me that the plaintiffs accepted that also. I also accept that in particular circumstances the public interest might require the protection of the identity of an informer even after his or her death.

29. Mr Rapke for the Office of Public Prosecutions submitted that this application was an appeal dressed up as an order to review. He then referred to the submissions made by the plaintiffs as to the matters which might have been taken into account. As I indicated earlier, these submissions by Mr Rapke seemed to me to be well founded.

30. Mr Rapke submitted that when considering an application to revoke or vary a suppression order, a magistrate should apply, not the test in s126(1), but rather what he described as "a balancing exercise". He submitted there was no necessity for the Court here to have been satisfied of the existence of the criteria mentioned in s126(1). He submitted that an approach of balancing various interests was open and submitted that the record indicated "that's exactly how she proceeded". In this respect, he referred to the last sentence of the order about protection of informers outweighing the right to know. Mr Rapke submitted:

> "So she's engaged in a balancing exercise which is a perfectly proper way to exercise the jurisdiction. She is not exercising jurisdiction under s126."

31. Mr Rapke repeated this analysis in different ways a number of times. He also submitted that even if the wrong test had been applied, or indeed even if the Magistrate had acted in what he described as a perverse way, which no one was suggesting in this application, that would still have been an error within jurisdiction. When asked what he submitted the test to be when considering variation or revocation, he said it was whether it was appropriate to lift the order.

32. In the alternative, Mr Rapke submitted that her Worship did apply the s126(1) test. He submitted under this head of argument that her Worship's use of expression ought not be determinative of this matter. When expanding on this submission, it seemed to me that he returned to a description of a balancing exercise with what he called "the asserted right of the public to know" on one side and the two factors her Worship referred to on the other.

33. No issue was raised by the parties as to Magistrate Popovic's power to vacate or otherwise revisit her previous suppression order. At one point I mistakenly suggested that sub-s (6) of s126 was being invoked. As was pointed out by Mr Houghton, that was not so. The power to revoke or revisit such an order is assumed by Teague J in *Pomeroy*.[15] As the parties appear to accept Magistrate Popovic's power to revoke the order, I will also assume it for the purpose of this application.

34. Before me counsel for the plaintiffs submitted that when considering this application the Magistrate should have applied the necessity test in s126(1). Counsel for the Office of Public Prosecutions submitted that was not so, that the Magistrate could properly balance the competing interests, and that that is what she did. Neither counsel cited any authority on this point.

35. Teague J's decision in *Pomeroy*,[16] which was relied upon by Mr Houghton in another context, is an instance of a reconsideration of a suppression order upon the hearing of submissions on behalf of media interests. Whilst Teague J never addresses this issue in terms, he clearly approaches the application on the basis that the order should only continue if it continues to be necessary for it to do so. In this respect, I refer to his judgment particularly at paragraphs 7, 11 and 13.

36. At paragraph 21, Teague J said:

> "The setting by common law and Supreme Court Act of the bar as being `necessary' is, for understandable reasons, a high one. Having carefully reviewed the authorities, I am satisfied that the order I earlier made was not necessary and that it should not continue. I revoke it."

37. Unlike Kaye J in *The Age Company Ltd v Magistrates' Court of Victoria*,[17] I have no material here beyond the record itself. I cannot look to a transcript, as he did, to clarify the test the Magistrate was applying. All the parties insisted I proceed on this basis. In argument, during the course of Mr Rapke's submissions when this point was reached, I gave Mr Rapke another opportunity to file material explaining what was put to her Worship, but he again indicated that he did not wish to do that.

38. The record reveals that the Magistrate decided that it would not be in the interests of justice to lift the suppression order. This is not the same as saying, in my opinion, that an order is appropriate, as was said by the Magistrate in *The Age Company Ltd v Magistrates' Court of Victoria*.[18] In my view, it is also not the same as saying that an order is necessary, as set out in s126(1).

39. Her Worship refers to the reasons why it is not in the interests of justice to lift the order. She says this is because of the potential for damage to the administration of justice. The record reveals two reasons why she found this to be so. The first is that the protection of the identity of informers outweighs the public's right to know; the second is prejudice to the remaining accused.

40. The conclusions stated and the reasons given indicate that the Magistrate has balanced the competing considerations and concluded that the interests of justice are best served by continuing the order. She says it would not be in the interests of justice to lift the order. She refers to the "potential" for damage to the administration of justice and to the fact that the protection of informers "outweighs" the public's right to know.

41. Mr Rapke's description of her process of reasoning precisely reflects my own conclusion in this regard. She is not determining whether it is necessary for the order to continue. She is undertaking a balancing exercise. Such an approach might be very appropriate in a different context, but it is not what the Act provides for. As was done by Teague J in *Pomeroy*,[19] when considering whether an order should continue, the same considerations ought to apply as apply

when considering whether an order should be made. The issue under the Act is not what do the interests of justice indicate; the issue is, is it necessary to make an order.

42. For these reasons, it seems to me that the Magistrate has applied the wrong test. In my view, this is an error on the face of the record. However, if Hansen J's approach in *AB v Magistrates' Court of Victoria*[20] is correct, it constitutes a jurisdictional error. Accordingly, the order made on 17 May 2004 should be quashed. This does not, of course, affect in any way the suppression order itself, which was made on 19 December 2003 and which remains in force.

43. I turn to the question of to whom the matter should be remitted. Often it is inappropriate for a matter to be remitted back to the same person or persons who made the impugned decision. This is not invariably so, and indeed in New South Wales the practice is to leave the assignment of the rehearing to the court or tribunal to whom the matter is remitted.[21]

44. In the particular circumstances here, in my view the matter should be remitted to Magistrate Popovic. There are a number of reasons why.

45. First, there is no material before me which would give rise to any apprehension of apparent unfairness in Magistrate Popovic dealing with the matter. This is not always the case in applications of this kind. Second, I am told by Mr Rapke that Magistrate Popovic has been assigned the relevant proceeding and is familiar with the issues it raises. Third, the order under consideration is her own order of 19 December 2003. Finally, the plaintiff's material deposes to developments since 17 May 2004 which appear likely to be relevant and it seems to me that the rehearing will necessarily involve considerable new material which may substantially alter the entire analysis of the position as it is today, compared with how matters stood on Monday. I should indicate in this respect that in considering the necessity for an order when the matter is remitted, the Magistrate should not confine herself only to the matters that were before her on Monday.

46. I note that remission to the same magistrate is the course taken by Hansen J in *AB v Magistrates' Court of Victoria*.[22] In all the circumstances, I propose to make orders in accordance with the minutes I have distributed.

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[1] [2004] VSC 10.
[2] [2004] VSC 10.
[3] [1995] VicRp 5; [1995] 1 VR 84.
[4] (1985) 2 NSWLR 47 at 55 per Kirby P (as he then was).
[5] [1999] VSC 232; [1999] 2 VR 672 at 677.
[6] [2002] VSC 178 at [9].
[7] [2002] VSC 178 at [11].
[8] [2004] VSC 10.
[15] [2002] VSC 178.
[16] [2002] VSC 178.
[17] [2004] VSC 10.
[18] [2004] VSC 10.
[19] [2002] VSC 178.
[20] [2003] VSC 378.
[21] *Steedman v Baulkham Hills Shire Council (No 2)* (1993) 31 NSWLR 562; (1993) 80 LGERA 323.
[22] [2003] VSC 378.

APPEARANCES: For the plaintiffs Herald & Weekly Times Ltd & Ors: Mr WT Houghton QC and Mr DW Bennett, counsel. Corrs Chambers Westgarth, solicitors. For second defendant OPP: Mr J Rapke QC and Mr D Maguire, counsel. Office of Public Prosecutions. For the third defendant Victoria Police: Mr G Maguire, counsel. For the fourth defendant: Mr N Papas, counsel. For the fifth defendant: Mr A Hargreaves.
