21/96; [1996] VSC 31

SUPREME COURT OF VICTORIA

DAVID SYME & CO LTD & Anor v X & Ors

Beach J

13 March, 23 April 1996

PRACTICE AND PROCEDURE – SUPPRESSION ORDER – REASON FOR MAKING – PUBLICATION MAY DETER PERSONS FROM REPORTING CRIMES AND/OR GIVING EVIDENCE – PUBLICATION COULD PREJUDICE THE ADMINISTRATION OF JUSTICE – WHETHER SUPPRESSION ORDER APPROPRIATE: *MAGISTRATES' COURT ACT* 1989, S126.

X. pleaded guilty to 6 charges of impersonating an ASIO officer. It was alleged that for a period of 5 years, X had manipulated a female G. to perform sexual favours for him by pretending to recruit her as a spy. Before the plea was heard, an application was made for a suppression order prohibiting the publication of the names of X., G. and her four friends. The magistrate granted the application and then proceeded to hear the plea. Upon appeal—

HELD: Appeal dismissed.

1. To publish the names of G. and her friends could prejudice the administration of justice in that it may have the effect of revealing the identity of G. which in itself could hereafter deter the victims of similar crimes from complaining to the police and/or giving evidence in court.

2. Whilst there would be some prejudice to the administration of justice by publishing X's name, in that his identification may enable others to identify G. as the victim and thus lead to the situation that hereafter victims of such offences may be reluctant to come forward and give evidence, it would have been open to the magistrate to conclude that that prejudice was far outweighed by the right of the public to know the offender was X. However, it could not be said that in making the suppression order the magistrate misconstrued the statutory provision or disregarded the nature or limits of the powers given by the statute.

***Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359; and**

***John Fairfax Group Pty Ltd v Local Court of New South Wales* (1992) 26 NSWLR 131, applied.**

BEACH J: [1] This is the return of a summons filed upon an originating motion whereby the plaintiffs, David Syme and Co Ltd and The Herald and Weekly Times Ltd, seek an order quashing the order of the Melbourne Magistrates' Court made on 6 March 1996 whereby the court prohibited from publication the name of the defendant in a criminal proceeding then before the court and the names of a number of other persons. The order of the Magistrates' Court was made pursuant to the provisions of s126 of the *Magistrates' Court Act* 1989, the relevant subsections of which read:

> "126 (1) The Court may make an order under this section if in its opinion it is necessary to do so in order not to—
>
> (a) endanger the national or international security of Australia; or
>
> (b) prejudice the administration of justice; or
>
> (c) endanger the physical safety of any person; or
>
> (d) cause undue distress or embarrassment to the complainant in a proceeding that relates to a charge for a sexual offence; or
>
> (e) cause undue distress or embarrassment to a witness under examination in a proceeding that relates to a charge for an offence where the conduct constituting the offence consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in s35 of the *Crimes Act* 1958.
>
> (2) The Court may in the circumstances mentioned in subs(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."

[2] To appreciate the nature of the dispute between the parties to the present proceeding, it is necessary at the outset to say something of the proceedings which were before the Magistrates' Court. Those proceedings involved a defendant named X. X had been charged with six counts of impersonating an ASIO officer. It was alleged by the Crown that for a period of five years commencing in 1989 X had posed as an ASIO officer and had manipulated a young lady named G into performing sexual favours for him by pretending to recruit her as a spy. The scheme by which X duped G was an elaborate one whereby he sent her hundreds of faked ASIO orders, memos and documents and paid her up to $5,000 in wages.

He convinced G that any personal relationship of hers had to be approved by ASIO and he imposed a nightly curfew of 2am on her. In that way, he engineered the destruction of any personal relationships G had by providing her with fake transcripts of telephone conversations involving persons with whom she had any association, and on one occasion by telling her that her then boyfriend had a sexually transmitted disease. X invented five fictitious ASIO agents, including his superior who would contact G by a fax machine set up in her bedroom. Towards the end of the hoax, X invented a terminal illness called "cardiotoxic syndrome" and then, through one of the bogus agents, ordered G to have oral sex with him on the basis that regular orgasms would enhance the experimental drugs he was taking for the condition. As invariably proves to be the case, X ultimately went too far and was unmasked. He faxed G information implying he was dead. G contacted ASIO only **[3]** to learn that neither she nor X were agents. The police were notified of the hoax and in due course the six charges in question were laid against X.

When the matter came before the Magistrates' Court on 6 March, X pleaded guilty to all counts and the matter proceeded as a plea. Before counsel for the Director of Public Prosecutions outlined the nature of the Crown case to the presiding magistrate, she made application to the court for a suppression order pursuant to s126 of the Act. The application was supported by the affidavit of Andrea Simone Pavleka which reads:

"1. Andrea Simone Pavleka, a Barrister and Solicitor of the Supreme Court of Victoria, make oath and say as follows:
2. I am a solicitor employed with the Office of the Commonwealth Director of Public Prosecutions, 200 Queen Street, Melbourne and I have the conduct of this matter.
3. On 6 November 1995 I met and spoke with the complainant in this matter, G. I had a further telephone conversation with her on 30 January 1996 and on 5 March 1996. She informed me and I verily believe that: (a) Only a very small number of people are aware of her involvement as a victim in this matter;
(b) She has suffered and continues to suffer extreme embarrassment and distress as a result of these offences;
(c) She would suffer further embarrassment and distress should she be publicly identified in any way as the victim of these offences because to do so would expose private and personal information about her, including:
(i) the fact that she engaged in sexual relations with X believing that she was doing so on instructions from ASIO;
(ii) the fact that she suffers from a medical condition which at the time of these offences, precluded her from engaging in sexual intercourse:
(iii) the length of time over which she believed she was an ASIO agent, namely 5 years; and **[4]**
(iv) the fact that various relationships with men were terminated by her as a result of her belief that she was an ASIO agent;
(d) She believes that to expose her as the victim of these offences would be to compound the humiliation which she has already suffered and that she would become the subject of ridicule.
(e) She believes her employment as a teacher of children would be jeopardised should her involvement in this matter be made public.
(f) She hopes that this Honourable Court will respect her wish to keep her private life private.
4. G has also informed me and I verily believe that any prohibition order regarding names would need to extend to X's name and the names of her boyfriends during the relevant period, namely, A, B and C. Naming those persons would tend to identify G as the victim amongst friends and acquaintances because of the close and public association which G enjoyed with these individuals. She is also fearful that naming her friend D, who was also deceived by X into believing he was an ASIO agent,

might tend to identify G as the victim in this matter.
5. As a result of the foregoing, I humbly request, pursuant to s126(2)(c) of the *Magistrates' Court Act* 1989, that an order be made prohibiting from publication the names of G, X, A, B, C and D."

Without hearing from any representative of the news media, the presiding magistrate ordered that the names of X, G and the other persons named in para4 of Pavleka's affidavit be prohibited from publication. The magistrate then proceeded to hear the plea. Later that day, an application was made to the magistrate by counsel for the present plaintiffs to vacate his original order and to re-hear the application for the suppression order. The magistrate acceded to the application to re-hear the suppression order application and proceeded to do so. At the conclusion of that hearing, the magistrate stated that the suppression order would not be vacated or varied because he was satisfied that G would suffer distress and embarrassment if her identity was revealed. He stated further that if G's identity was revealed she would suffer humiliation and torment; that this was particularly so as he believed there were unpredictable people in the community who could make her life unpleasant; and that women may be deterred from making such complaints in the future if they had to undergo distress and embarrassment.

[His Honour then dealt with the question of what is the record of an inferior court for the purposes of certiorari and continued] ...**[6]** It is not contended by the plaintiffs in the present case that there is error of law on the face of the record or that there was a failure on the part of the presiding magistrate to observe some applicable requirements of procedural fairness. What is said is that in granting the suppression order, the magistrate made a jurisdictional error in that he misconstrued the provisions of s126 and **[7]** made an order he had no power to make. In that situation, so it was contended, it is appropriate to look at his reasons for making the order to determine whether he had the power to make the order for the reasons he did. It was not disputed by counsel for the parties that in making the order he did, the magistrate purported to act pursuant to the provisions of subs1(b) of the section, that is, that it was necessary to do so in order not to prejudice the administration of justice. What was said by counsel for the plaintiffs in that regard was that the fact that the identification of G by the publication of X's name and the names of the other persons concerned might well cause G distress, embarrassment, humiliation and torment, that fact did not cause any prejudice to the administration of justice and at common law was no basis for the grant of a suppression order. The administration of justice is a very wide term covering, as it does, the detection, prosecution and punishment of offenders: see *Kalic v R* (1920) 55 DLR 104. In certain circumstances, it may well be necessary to suppress the name of a witness in order to secure the proper administration of justice. What other reason could the legislature have for enacting subs(d) and subs(e) of s126(1). It can only be in the interests of justice that the name of the victim of a crime be suppressed if the failure to do so would deter the victim from making a complaint to the police concerning the offence, or having made the complaint would deter the victim from giving evidence.

Historically, the names of informers and victims of blackmail and extortion have been suppressed from publication. Indeed, in many cases such persons have **[8]** been permitted to use a pseudonym. The matter was recently considered by the New South Wales Court of Criminal Appeal in the case of *Mr C* (1993) 67 A Crim R 562. At 564 Hunt J said:

> "The other alternative to be considered is the use of a pseudonym for the applicant. The use of a pseudonym for a *witness* is permitted where it is necessary in order to secure the proper administration of justice. The power of the Supreme Court to make an order that a witness be referred to in court only by a pseudonym is undoubted. It is discussed in *Savvas* at (1989) 43 A Crim R 331 at 335-336. It is generally exercised where the administration of justice would be rendered impracticable by the disclosure of the identity of the particular person because the parties entitled to justice would reasonably be deterred by fear of that disclosure from seeking justice: Cf *Scott v Scott* (at 437-438, 446). The usual case where a pseudonym is used is for the victim of blackmail: *Socialist Worker Printers and Publishers Ltd; Ex parte A-G* [1975] QB 637 at 650. The power has also been exercised in order to protect the identity of an informer: *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 246-247. It has now been held to have been properly exercised in relation to the victim in an extortion case: *John Fairfax Group Pty Ltd v Local Court* (at 160; 95). In the last of those cases (at 161; 96), the rationale for the exercise of the power is again stated by Mahoney JA (with whom Hope AJA agreed upon this issue) as being to avoid deterring the informer or the victim of blackmail or extortion from giving evidence in court. Such is said by the law to be necessary to secure the proper administration of justice. Those cases were all concerned with the names of victims, although the procedure is adopted not out of tenderness towards the victim but because it serves the important public interest

> in securing convictions in such cases, where experience has shown that complainants will not come forward unless they are given this kind of protection."

An order suppressing publication of a victim's name cannot be equated to an order that the whole or any part of a proceeding be heard in closed court. It is of the first importance that justice should be done openly in public: see *R v Horsham Justices Ex parte Farquharson and Ors* (1982) 1 QB 762; [1982] 2 All ER 269; (1981) 76 Cr App R 87; [1982] 2 WLR 430 per Lord Denning MR at QB 793. In the present case, G was referred to by name during the course of the plea. Members of the public and **[9]** the press were present during the hearing of the plea. The order made simply forbade the publication of G's name. In my opinion, the presiding magistrate made no error in the matter. Had he not made the order he did, it could well be that hereafter other complainants might be deterred from making complaints and/or giving evidence in similar cases. Such a result would clearly prejudice the administration of justice. What then of the suppression order in relation to those persons other than X with whom G had had some relationship during the year in question? In my opinion, it could not be said to be in the public interest to publish their names. Those persons were not involved in any way with the commission of the offences. They were merely on the periphery of the affair. Further, to publish their names could well prejudice the administration of justice in the way I have already indicated, that is, that it may have the effect of revealing the identity of G which in itself could hereafter deter the victims of similar crimes from complaining to the police and/or giving evidence in court.

I turn finally to the orders made in respect of X. Clearly, the magistrate adopted the same approach so far as X was concerned. Had I been dealing with the application, I would have differentiated between X and the other persons whose names were suppressed. I say that for the following reason: X had pleaded guilty to the offences in question and was to be sentenced to a term of imprisonment in respect of them. **[10]** It is trite to say that the public is entitled to know the identity of such offenders and wherever possible the circumstances surrounding the offences they have committed, and which justified the imposition of the custodial sentence. It is part and parcel of what is often described as "our open system of justice": see *John Fairfax Group Pty Ltd and Another v Local Court of New South Wales and Others* (1992) 26 NSWLR 131; 26 ALD 471. At NSWLR 142 of the decision in that case, the President Kirby J said:

> "It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms."

His Honour then cited a number of authorities dealing with the matter and continued: "A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported."

Although it can be said that there would be some prejudice to the administration of justice if X is identified as the person who committed the offences, in that his identification may enable others to identify G as the victim and thus lead to the situation that hereafter victims of such offences may be reluctant to come forward and give evidence in court, my own view is that that prejudice is far outweighed by the right of the public to know that the offender was X. But does the fact that I **[11]** would have taken a different view of the matter entitle me to interfere with the magistrate's order? In my view, in light of the decision in *Craig's* case [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359, it does not. I am not satisfied that the presiding magistrate misconstrued s126 of the *Magistrates' Court Act* or disregarded the nature or limits of the powers given him by the section. **Order:** The summons and originating motion will be dismissed, with costs to be taxed and paid by the plaintiffs. Pursuant to the provisions of s18 of the *Supreme Court Act*, I prohibit publication of the names of G, X, A, B, C and D.

APPEARANCES: For the Plaintiff: M Wheelahan, counsel. Solicitors for the Plaintiff: Minter Ellison. For the Defendant: Mrs J Morrish, counsel. Solicitor for the Defendant: Commonwealth DPP.