59/94

SUPREME COURT OF VICTORIA

DPP v HINCH and ANOR

Mandie J

25 July, 5 August 1994

CRIMINAL LAW – IDENTIFICATION OF VICTIM OF SEXUAL OFFENCES – VICTIM AN 8-YR-OLD CHILD – CAPACITY OF CHILD TO GIVE EFFECTIVE PERMISSION TO BE IDENTIFIED – EXPERT EVIDENCE ABOUT CAPACITY – WHETHER OPEN TO FIND EFFECTIVE PERMISSION GIVEN – WHO MAY GIVE PERMISSION – WHETHER PARENTS MAY GIVE PERMISSION – WHETHER DEFENCE OF HONEST AND REASONABLE BELIEF OPEN: *JUDICIAL PROCEEDINGS REPORTS ACT* 1958, S4.

Section 4 of the *Judicial Proceedings Reports Act* 1958 ('Act') provides (so far as relevant)

> "(1A) A person who publishes ... any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed is guilty of an offence ...
>
> (1B) ... (I)t is a defence to a charge under sub-section (1A) for the accused to prove ...
> (b) that the matter was published ... with the permission of—
> ... (ii) the person against whom the offence is alleged to have been committed.

Two persons were convicted and sentenced in respect of sexual offences against a young victim. A short time after sentencing, H. conducted a televised interview with the victim's father concerning the perceived leniency of the sentences. During the telecast, the victim's name and other particulars likely to identify the victim were disseminated. Subsequently, H. and the owner of the TV channel were charged with an offence against s4(1A) of the Act. On the hearing the charges were dismissed on the basis that the victim (aged 8 years 3 months at the time of the telecast) gave permission for publication of his identification and that the defendants honestly and reasonably believed they had the relevant permission. Upon appeal—

HELD: Appeal allowed. Dismissals set aside. Remitted for further hearing.
1. What is required for capacity to grant permission is that there be sufficient understanding and intelligence to enable [the minor] to understand fully what is proposed. Further, legal capacity will vary according to the gravity of the particular matter and the maturity and understanding of the particular young person.

> ***Secretary, Dept. Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218; (1992) 106 ALR 385; [1992] FLC 92-293; (1992) 15 Fam LR 392; 66 ALJR 300, applied.**

2. The question of capacity in the present case was one of fact not law. The magistrate had to decide whether the victim had given an "effective" permission for his identification. At the hearing the victim was not called as a witness; there was no evidence as to his level of maturity or understanding. There was no real basis to assess whether the victim understood what he was permitting in any more than a formal sense. Further, expert evidence was given to the effect that an 8-year-old child would not understand the significance of consenting to his name being released. Having regard to this evidence and the absence of any cogent evidence as to the maturity or degree of understanding of an 8-year-old child, it was not open to the magistrate to find that the victim had sufficient understanding and intelligence to enable him to understand fully or sufficiently what was proposed.

3. Permission under s4(1B)(b) of the Act may be given only by the victim or a court. If a victim lacks capacity, a parent does not have power to give permission.

4. The defence of honest and reasonable belief is not available in relation to a charge under s4 of the Act.

MANDIE J: [1] These proceedings consist of two appeals under s92 of the *Magistrates' Court Act* 1989 from final orders of the Magistrates' Court at Prahran made on 29th March 1994 whereby two charges under s4(1A) of the *Judicial Proceedings Reports Act* 1958 (Victoria), one against each of the respondents, were dismissed with costs. The appeal is brought by the Director of Public Prosecutions ("the DPP") on behalf of the informant, Dannye Owen Moloney. The charge in each

case was that the respondent (defendant) at South Yarra in the State of Victoria on 13th November 1992 did publish or cause to be published by means of a telecast the name and other particulars likely to lead to the identification of a certain male person against whom a sexual offence was alleged to have been committed. S4 of the *Judicial Proceedings Reports Act* 1958 ("the Act") provides as follows: *[After setting out the relevant provisions of the Act, His Honour continued]* ...

[3] I will generally refer to a person against whom a sexual offence is alleged to have been committed as the "victim" and to the victim in this case as "William" (which is not his real name). William was born on 29th July 1984 and was thus aged 8 years and 3 months at the time of the telecast on 13th November 1992. Sexual offences as defined by the Act were committed by two men against William in the period from December 1991 to January 1992 and those men were convicted and sentenced in the County Court a short time before the telecast. The telecast consisted of an interview conducted by the respondent Mr Hinch with William's father relating to the perceived leniency of the sentences. William's name and other particulars likely to lead to his identification were disseminated by the telecast. The telecast was transmitted on Channel 10 by the respondent company. On 27th October 1993 the DPP sanctioned the commencement of a prosecution against each of the respondents pursuant to s4(4) of the Act. The charges were heard in March 1994. On 29 March 1994 after argument and consideration, the learned magistrate dismissed the charges. Apart from written admissions which were tendered, the informant called evidence from Dr DM Thomson, Director of Forensic Psychology and Associate Professor, Department of Psychology, Monash University. For the respondents, evidence was given by William's father and mother and the respondent Mr Hinch. His Worship's conclusions, stated in his reasons for decision, may be summarised as follows:-

> * S4(1A) was not restricted to a relevant publication which occurred whilst a sexual offence **[4]** was "alleged" but not proved. The section applied indefinitely to relevant publications at any time after conviction (or acquittal).
>
> * "Permission" for the purposes of the defence under s4(1B)(b)(ii) of the Act meant "a liberty or licence granted to do something" and the person giving permission had to understand what it was that he gave. William had permitted his father to refer to him by name in the interview, which concerned the two men who had sexually assaulted him. The defence was made out.
>
> * S4(1B)(b)(ii) did not extend to a permission by a parent or guardian of a young child.
>
> * The offence fell into the category in respect of which the respondents were entitled to advance "the defence of honest and reasonable belief that the conduct is not criminal". The respondents had raised the issue that they mistakenly believed that they had the relevant permission of William or his father and the prosecution had failed to negative the existence of that belief beyond reasonable doubt. The charges would also fail on that ground.

[His Honour then set out the questions of law raised by the appeal and continued] ...

[6] Permission granted by a minor

I note at the outset that it had been agreed by the parties and announced to the magistrate as a fact that the DPP conceded that William had agreed (in discussion with his parents) to his father referring to him by name on the Hinch Report on 13 November 1992, when a discussion would take place about the two men who sexually assaulted him. The learned Solicitor-General, Mr Graham, QC, who appeared with Mr Berglund for the appellant, submitted that no "effective" permission could be granted by an eight-year-old child, alternatively that it was not open on the evidence for the magistrate to find that William had given an "effective" permission.

Mr Graham, in submitting as a matter of law that no effective permission could be given by an eight-year-old child, referred to various statutory provisions including s127 of the *Children and Young Persons Act* 1989 as to the conclusive presumption that a child under the age of 10 years cannot commit an offence and to *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218; (1992) 106 ALR 385; [1992] FLC 92-293; (1992) 15 Fam LR 392; 66 ALJR 300, *Gillick v West Norfolk Area Health Authority* [1985] UKHL 7; [1986] AC 112; [1985] 3 All ER 402; [1985] 3 WLR 830 and *R v D* [1984] 1 AC 778; [1984] 2 All ER 249; (1984) 79 Cr App R 313. The authorities cited support the broad proposition that a minor has an evolving capacity to understand and effectively consent depending upon the issue involved and that the rate of development depends on the individual child. I think that the question of capacity in the present case was, on this basis, one of fact not of law.

[7] Mr Uren, QC, who appeared with Mr Ruskin for the respondents, submitted (and I accept) that what is required for capacity to grant permission to be shown was that there be "sufficient understanding and intelligence to enable [the minor] to understand fully what is proposed" (see *Marion's Case* at 237-8 per Mason CJ and Dawson, Toohey and Gaudron JJ) and that legal capacity will vary "according to the gravity of the particular matter and the maturity and understanding of the particular young person" (*Marion's Case*, per Deane J at 293). The above statements were made in the context of a discussion about informed consent to medical treatment but counsel did not suggest that they were limited to that field.

It is important to consider the precise evidence bearing on the question of capacity which was before the magistrate. The father described going home to report to his wife and to William of the sentences passed in the County Court. He gave an account of the following conversation:

> "[William] turned around and said, 'Well, they got locked up and the key thrown away'. I said, 'No, he didn't. He got a four year gaol sentence, and its down to two years because he's been held in custody' and the child repeats to me, 'That means he's not out this Christmas, but he's out the Christmas after'."

Then later the following answer to a question from respondents' counsel was given:

> "Q. And how did you perceive, after you'd gone public about this, that his relationship with his own schoolfriends?
>
> A. I asked him was he having any problems at school, and he says, 'No, Dad, none whatsoever'. I said, 'Do you mind me mentioning your name on the TV program?' **[8]** He says, 'No' he says 'I wanted to go along with you'."

It is possible to understand this answer to relate to a conversation after the respondents' telecast but it may be read as confirming that William agreed prior to the telecast to his name being mentioned. The father also agreed in cross-examination that William had said that it was alright to name him. The mother's evidence took the matter a little further. She said that there was a three-way conversation between her husband, herself and William about her husband going on television (the Hinch program) to talk about the case. Then she was asked did she and her husband ask William what he felt about his name being mentioned on television. She replied: "yes we did and he said go for it". She went on to agree that she believed that William understood that his name was going to be on television and "he understood everything we were saying to him".

William was not called as a witness. There was no other evidence as to his level of maturity or understanding. There was little detail given of the conversation between William and his parents and little or no evidence of what was constituted by "everything we were saying to him". There was no real basis for the magistrate to assess whether William understood what he was permitting in any more than a formal sense or whether William understood any of the implications involved. In my view, there was no evidence upon which the magistrate might as a reasonable person find on the balance of probabilities that William had sufficient understanding **[9]** and intelligence to enable him to understand fully or sufficiently what was proposed.

Mr Uren submitted that the proposed publication was of no particular gravity because, *inter alia*, William was young and not concerned by it being made (indeed wanted it); it was for his benefit; his friends and teachers already knew about the offence and of his being the victim and his parents were "in control" of the publication. This was said in support of a contention (based on what was said by Deane J in *Marion's Case*) that the extent of capacity required to be shown was not great, having regard to the lack of gravity of the particular matter. Having regard to the policy of this provision, enacted for the protection of victims of sexual offences, I cannot think that the matter is not of real gravity (which gravity can hardly be lessened in the case of a young child). The gravity of the matter and the degree of understanding required is, I think, emphasised by the provision enabling permission to be granted by a Court. In any event, I do not think that the evidence was adequate to enable the magistrate to assess any level of maturity of William or his understanding of what was involved save for the minimal conclusion that William had agreed in terms that his father might mention his name on the program. In my opinion, the magistrate's decision in this regard cannot be supported on any reasonable view of the evidence, once the evidence is considered in the light of the test of capacity proposed by counsel for the respondents

or on any basis requiring evidence of real understanding. In so deciding, I apply the principle (when a finding of fact by a **[10]** magistrate is challenged) referred to by the Full Court in *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232 (see too *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1, 11; (1972) 30 LGRA 19 per Stephen J).

I have not referred to the expert evidence of Dr Thomson called by the informant. I have thus far assumed that the magistrate was entitled to and did disregard it. Dr Thomson gave general evidence that eight-year-old children do not have the capacity to understand the consequences of many of their actions; that an eight-year-old child would not understand the significance of consenting to his name being released; that research (including that of Piaget) indicates that there is quite a significant change in people's capacity to understand those sorts of implications around about 11 to 12 years of age; that, prior to that age, children are anchored very much in the concrete level of responding and respond very much simply on the surface of events; that an eight-year-old child would not understand the extensive coverage that a telecast would involve; that an eight-year-old child would have no notion of the purpose of the protection intended by the legislation and would be totally unable to understand the effect of that protection being taken away by the publication of details of the offences committed against him.

It is noteworthy that the joint judgment of the High Court in *Marion's Case* contains the following reference (at p238, footnote 74):

> "The psychological model developed by and Inhelder, *The Psychology of the Child (*1969)), one of the leading theorists in this area, suggests **[11]** that the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally appears in a child somewhere between the ages of eleven and fourteen. But again, even this is a generalisation. There is no guarantee that any particular child, at fourteen, is capable of giving informed consent nor that any particular ten year old cannot: see Morgan, 'Controlling Minors' Fertility' *Monash University Law Review*, vol 12 (1986) 161."

The learned magistrate was not necessarily bound to accept Dr Thomson's uncontradicted evidence but he gave no reason for apparently discounting or disregarding it. I am disposed to think that a reasonable magistrate, in the absence of any cogent evidence as to the maturity or degree of understanding of a particular eight-year-old child (as here), could not in the light of Dr Thomson's evidence be satisfied on the balance of probabilities that William had the capacity to grant permission for the relevant publication (or to understand the nature or implications thereof).

Permission granted by the parents

[After setting out the facts surrounding the telecast, His Honour then dealt with the question of the parents' permission] ... **[14]** However, it is first necessary to determine that construction – whether the words in s4(1B)(b)(ii) "in accordance with the permission of ... the person against whom the offence is alleged to have been committed" extend to a permission given by parents of a victim who is a minor either on the basis that such permission stands as the minor's permission or is given for or on behalf of the minor. Mr Graham submitted that the words of the provision were clear and admitted of no construction other than that the permission was to be either of a Court or of the victim and that there was no reason to imply a third category of persons who might give permission. In aid of this submission, he referred to the relevant Report No. 13 of the then Law Reform Commission of Victoria which stated (para71):

> "There should be two exceptions to the prohibition. First, the right to anonymity is a right that should be able to be waived by the complainant. Second, a court should be able to order identification in exceptional circumstances – for example, if a complainant cannot give consent and identification is seen as essential to tracing the offender." (my underlining).

Mr Uren submitted that the parents, as guardians and custodians of the child, had power to give permission on his behalf if he lacked capacity. He said that the statute was enacted in the context (*inter alia*) of the common law with respect to parents and children and that there would need to be a clear expression of statutory intent before the parent's rights or duties should be treated as abrogated. *[After referring to the* Family Law Act *and* Marion's Case*, His Honour continued] ...*

[17] Returning to s4 of the *Judicial Proceedings Reports Act*, the scheme of the section is

that it is made an offence to publish any matter likely to identify a victim without the permission of the court in which the proceeding in respect of the sexual offence is pending, or, where a proceeding is not pending, without the permission of a court on the application of any person or the permission of the victim. It seems reasonable to think that provision was made by Parliament for application to be made to a court, where a proceeding was not pending, to cover cases where the victim either had refused permission or was or might be unable to grant permission. I say "might be unable" because if a person had reason to doubt the capacity of a victim to grant permission it would be convenient for that person to be able to apply to a court for permission. In such an application, the court would be able to take into account *inter alia* the need for the publication and where appropriate the degree of understanding possessed by the victim and the wishes of the victim.

On the whole, I can see good reason to adhere to, and little reason to depart from, an interpretation which gives effect to what appears from the words used to be the plain intention of Parliament, namely, that the permission may only be given either by the victim or by a Court on the application of any person. I conclude that the section does not extend to permission purportedly granted by parents on behalf of a child who lacks capacity.

[18] Publication after conclusion of relevant proceedings

Section 4(1A) of the Act expressly applies whether or not a proceeding in respect of the alleged sexual offence is pending but the respondents contended that although the section can be operative before pending proceedings commence it does not operate after pending proceedings are concluded. This argument relies upon an inference to be drawn from the use of the expression "alleged offence" which expression would normally be inapposite after conviction. In my view the learned magistrate was correct when he rejected this argument for the reasons which he gave. The purpose of the section is to preserve anonymity for the victim. This purpose would be defeated if a victim's name could be published without permission after the conclusion of the proceedings (including proceedings resulting in an acquittal) or, indeed, after conviction and before sentence (see too s35(a) *Interpretation of Legislation Act* 1984). The use of the word "alleged" was I think adopted, as Mr Graham suggested, simply for drafting convenience.

Publication for a purpose connected with a judicial proceeding

The respondent further argued that the prosecution had failed to advance evidence to satisfy the definition of "publish" in s4(1) of the Act by failing to prove that the matter was published "other than for a purpose connected with a judicial proceeding." The purposes of the publication are manifest from the evidence including the transcript of the telecast and I am satisfied that none of those purposes were "connected **[19]** with" a judicial proceeding. This exception was intended in my opinion to cover purposes directly linked with the furtherance or conduct of a judicial proceeding and not simply purposes "relating to" such a proceeding (such as reportage or criticism). Otherwise, the whole purpose of the section would be defeated (see again s35(a) *Interpretation of Legislation Act* 1984). "Connected with" in this context has a connotation of "bound up with" or "involved with" (compare *Collector of Customs (Tasmania) v Davis* [1989] FCA 308; (1989) 23 FCR 378, 384-5; (1989) 10 AAR 439). I further accept Mr Graham's point that this matter involved an "exception" which had not been relied upon below (see s130 *Magistrates' Court Act* 1989).

Honest and reasonable mistake of fact

Mr Graham argued first that upon a proper construction of the section there was no room for a defence of honest and reasonable but mistaken belief in the existence of permission because s4(1B)(b) provided only for a defence that permission had actually been given. Second (and in the alternative), he argued that the mistake was one of law not of fact.

Mr Uren strongly urged upon me that it was not open to the appellant to argue that the defence was not available as a matter of law because that question had not been stated by the Master in her Order. He conceded that if the appellant was entitled to raise the argument it would be difficult to justify the view that, if the statute says something is a defence and has to be proved by the defendant, **[20]** that his belief that it is true is as good as if it was true". In my opinion this concession was rightly made and the appellant's submission that there is no room in relation to s4(1B)(b) for a defence of mistake is correct. In my opinion this question of law is fairly covered by para2.6 of the Master's Order which states:

"Whether or not the magistrate erred in law in applying *Kumar v The Immigration Department* (1978) 2 NZLR 553 to the facts in this case."

This question was no doubt framed primarily to cover the issue of mistake of fact versus mistake of law but in my opinion, the magistrate erred in law in applying *Kumar's Case* because the defence of honest and reasonable mistake was not available at all.

If I am wrong in my interpretation of the above question, it seems to me that it would be wholly artificial to proceed to consider whether the magistrate was correct in characterising the "mistake" as one of fact rather than law in circumstances where the concession has been made that the defence of mistake in this respect was not available at all. I would not ignore this concession unless I was constrained by legislation or the rules of the Supreme Court so to do. This aspect I will now consider. *[After considering this aspect, His Honour continued]* ...

[22] Orders

I conclude that the appellant has succeeded in showing that each of the bases relied upon by the magistrate in dismissing the charges involved an error of law and the respondent has failed to establish that the dismissals can be upheld on any other basis.

I propose to order that each appeal be allowed, that the orders of the Magistrates' Court at Prahran made on 29th March 1994 be set aside and the matters be remitted to **[23]** that Court for conviction or other final disposition according to law and in accordance with these reasons. I will hear the parties as to costs and any other orders.

APPEARANCES: For the appellant DPP: Mr G Graham QC with Mr R Berglund, counsel. JM Buckley, Solicitor to the DPP. For the respondent Hinch and Anor: Mr G Uren QC with Mr J Ruskin, counsel. Holding Redlich, solicitors.
