L v ABC & Ors [2005] NTSC 5

PARTIES:	L
	v
	AUSTRALIAN BROADCASTING CORPORATION DAVID LOADMAN SM PAUL TUDOR-STACK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 14 of 2005 (20502695)
PARTIES:	L
	v
	PAUL TUDOR-STACK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 9/05 (20424339)
DELIVERED:	11 February 2005
HEARING DATES:	3 February 2005
JUDGMENT OF:	MILDREN J

CATCHWORDS:

EVIDENCE – suppression order – Evidence Act s 57 – relevant test – whether desirable that name be suppressed in interests of justice – plaintiff facing two sets of criminal proceedings – name suppressed in respect of proceedings brought by complaint to ensure fair trial in indictable proceedings.

Criminal Code (NT) s 125B(1)(a); *Criminal Law Consolidation Act; Evidence Act* s 4, s 5, s 57, s 57(1), s 58; *Supreme Court Act 1986 (Vic)* s 19(b)

Justice Virginia Bell, *How to Preserve the Integrity of Jury Trials in a Mass Media Age*, (unpublished paper delivered at the Supreme and Federal Court Judges' Conference – Darwin, January 2005)

Advertiser Newspapers Ltd v Bunting & Ors [2000] SASC 458; *Director of Public Prosecutions v Carl Williams & Ors* [2004] VSC 209; *G v The Queen* (1984) 35 SASR 349; *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* [2004] NSWCA 324; *Nine Network Australia Pty Ltd v McGregor & Ors* [2004] NTSC 27; *R v K* [2003] NSWCCA 406; 59 NSWLR 43; *R v Skaf* [2004] NSWCCA 37; 60 NSWLR 86; referred to

REPRESENTATION:

Counsel:

Plaintiff:	M. Grant
ABC:	R. Whitington QC
Loadman SM:	C. Smyth
Tudor-Stack:	M. Carey

Solicitors:

Plaintiff:	Priestleys
ABC:	Clayton Utz
Loadman SM:	Solicitor for the NT
Tudor-Stack:	DPP

Judgment category classification:	A
Number of pages:	15

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 14 of 2005 (20502695)

BETWEEN:

L
Plaintiff

AND:

AUSTRALIAN BROADCASTING CORPORATION
DAVID LOADMAN SM
PAUL TUDOR-STACK
Defendants

JA 9/05 (20424339)

BETWEEN:

L
Appellant

AND:

PAUL TUDOR-STACK
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 11 February 2005)

[1] In matter No 19 of 2005 the plaintiff seeks an order in the nature of certiorari quashing the determination of Mr Loadman SM made on 25 January 2005 to lift a suppression order made by the Court of Summary

Jurisdiction constituted by another magistrate made on 11 January 2005. The original suppression order forbade the publication of the name of the plaintiff and any details likely to lead to his identification until further order in respect of proceedings brought against the plaintiff by complaint dated 7 December 2004. Alternatively the plaintiff seeks an order pursuant to the Court's inherent jurisdiction or pursuant to s 57 of the Evidence Act forbidding until further order the publication of the name of the plaintiff and any details likely to lead to his identification as the person subject to the charge in the Court of Summary Jurisdiction in proceedings No 20424339.

[2] The appeal is brought pursuant to s 163 of the Justices Act on the grounds that the learned magistrate erred in holding that the Court of Summary Jurisdiction could not make a suppression order because the order sought was not in relation to a proceeding before the court. Further the appellant alleges that the learned magistrate erred in not continuing the suppression order in circumstances where the publication of appellant's name in connection with the matter on complaint was necessary in the interests of the administration of justice in order to prevent undue prejudice to the appellant.

[3] During the course of argument it became common ground between the parties that this Court has appropriate original jurisdiction to make the orders which the plaintiff seeks and that if this Court were to be minded to make such an order in the exercise of its discretion there would not be any

necessity for the Court to consider the relief sought by way of certiorari or by way of appeal.

[4] I should add that there are also other proceedings commenced in this Court in action No 9 of 2005 (20501446) commenced by the Australian Broadcasting Corporation and which relate to the same issues. Those proceedings are not presently before me, but it is common ground that the outcome of these proceedings will determine the success or otherwise of those proceedings.

Background Facts

[5] The plaintiff has been charged by complaint dated 7 December 2004 with possession of child pornography contrary to s 125B(1)(a) of the Criminal Code (NT). On 11 January 2005 Mr Cavenagh SM sitting as the Court of Summary Jurisdiction made an order pursuant to s 57 of the Evidence Act forbidding the publication of the plaintiff's name and any details likely to lead to his identification until further order. That order was clearly made in relation to the proceedings commenced by way of complaint. At the time of that order, it was anticipated that the plaintiff would be charged on information with a number of sexual offences against various provisions of the Criminal Law Consolidation Act and the Criminal Code (NT). These latter offences were all alleged to have occurred many years ago. An application was made by the Australian Broadcasting Corporation (ABC) to the Court of Summary Jurisdiction on the 20 January 2005 to have the order

of Mr Cavenagh SM discharged. As Mr Cavenagh SM was no longer in the jurisdiction the matter came before Mr Loadman SM who heard the ABC's application on 20, 21 and 24 January 2005.

[6] In the meantime on 24 January 2005 an information for the indictable offences relating to the breaches of the Criminal Law Consolidation Act and the Criminal Code (NT), to which I have previously referred, was filed. It is common ground that that matter was mentioned before Mr Loadman SM on 24 January 2005.

[7] On 25 January 2005, Mr Loadman SM delivered his decision. In summary his Worship concluded that the power to make an order under s 57 of the Evidence Act confined the exercise of a Court of Summary Jurisdiction's power in any circumstances engaging that provision to the exercise of a power in relation to the protection of the proceeding before the court and not in relation to the protection of anticipated proceedings before this Court and thus he was precluded from making any suppression order as requested. His Worship further held that there was no implied power for the court to make such an order. The formal order of the court was to "lift the decision of Mr Cavenagh SM made 11 January 2005". However that order was stayed until close of business on 3 February 2005.

[8] These matters came before me for urgent hearing on that date. After hearing submissions I made an order prohibiting the publication of the plaintiff's

name in connection with the complaint proceedings until I had published my decision in this matter.

[9] Section 57 of the Evidence Act provides as follows:

> **57. Prohibition of the publication of evidence and of names of parties and witnesses**
>
> (1) Where it appears to any Court –
>
> (a) that the publication of any evidence given or used or intended to be given or used, in any proceeding before the Court, is likely to offend against public decency; or
>
> (b) that, for the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party or intended party to, or witness or intended witness in, such proceeding,
>
> the Court may, either before or during the course of the proceeding or thereafter, make an order –
>
> (i) directing that the persons specified (by name or otherwise) by the Court, or that all persons, except the persons so specified, shall absent themselves from the place wherein the Court is being held while the evidence is being given;
>
> (ii) forbidding the publication of the evidence, or any specified part thereof, or of any report or account of the evidence, or any specified part thereof, either absolutely or subject to such conditions, or in such terms or form, or in such manner, or to such extent, as the Court approves; or

(iii) forbidding the publication of the name of any such party or witness.

(2) Where the Court makes an order under subsection (1)(iii), the publication of any reference or allusion to any party or witness, the name of whom is by the order forbidden to be published, shall, if the reference or allusion is, in the opinion of the Court hearing the complaint for the alleged offence, intended or is sufficient to disclose the identity of the party or witness, be deemed to be a publication of the name of the party or witness.

(3) When the Court makes an order under subsection (1)(ii) or (iii), forbidding the publication of any evidence or any report or account of any evidence, or the publication of any name, the Court shall report the fact to the Director of Public Prosecutions, and shall embody in its report a statement of –

(a) the evidence or name, as the case may be, by the order forbidden to be published; and

(b) the circumstances in which the order was made.

[10] Section 58 of the Evidence Act provides:

58. Temporary prohibition of the publication of evidence where witnesses ordered out of Court

Where, in the course of any proceeding before any Court, witnesses are ordered out of Court, and it appears to the Court that, for the furtherance or otherwise in the interests of the administration of justice, it is desirable to prohibit for any period the publication of any evidence given or used in the proceeding, the Court may make an order forbidding, for such period as the Court thinks fit, the publication of the evidence or any specified part thereof.

[11] The word "Court" is defined by s 4 to include "any Court, Judge, Magistrate or Justice, and any arbitrator or person having authority by law or by consent of parties to hear, receive and examine evidence". Section 4 also defines "proceeding" to include "any action, trial, inquiry, cause or matter, whether civil or criminal, in which evidence is or may be given, and includes an arbitration".

[12] Section 5 of the Evidence Act provides:

> **5. Application of Act**
>
> The provisions of this Act shall, unless the contrary intention appears –
>
> (a) apply to every proceeding before any Court whatever; and
>
> (b) be in addition to, and not in derogation of, any rules of evidence, or any power, right or duty in relation to procedure or evidence, whether existing at common law or provided for by any law for the time being in force in the Territory.

[13] The plaintiff's application is supported by the counsel who appears for Paul Tudor-Stack who is both the complainant in respect of the child pornography charge and the informant in relation to the indictable offences. Counsel for the complainant/informant is general counsel employed in the Office of the Director of Public Prosecutions for the Northern Territory.

[14] The history of this Court's inherent powers at common law and of the provisions of s 57 and s 58 of the Evidence Act were recently considered by the Full Court in *Nine Network Australia Pty Ltd v McGregor & Ors* [2004]

NTSC 27. Although that case is primarily concerned with the power of the court to make orders under s 58 there are a number of observations made which are relevant to the exercise of the power under s 57 as well. Firstly, it is plain that an order may be made under s 57(1) either before or during the course of a proceeding or thereafter. Secondly it is apparent that an order may be made prohibiting the publication not only of the name of a party but also of an intended party to such a proceeding. In my opinion the power granted by s 57 is very wide and is limited only by the requirement that a prohibition order is "desirable" "for the furtherance, or otherwise in the interests of, the administration of justice".

[15] As King CJ said in *G v The Queen* (1984) 35 SASR 349 at 351 in relation to the expression "the interests of the administration of justice":

> The width of this expression requires no emphasis. It comprehends every aspect of the administration of justice and is obviously intended to confer on the courts the widest of discretions. The phrase is apt to encompass, in addition to wider considerations pertaining to the administration of justice, many situations which are more suitably considered under the ground of undue prejudice or undue hardship.

[16] That passage was cited with approval by the Full Court in *Nine Network Australia Pty Ltd v McGregor & Ors* (supra) at par [38]. On the other hand, although s 57 does not have a statutory requirement that the courts weigh in the balance considerations favouring publication, those are obviously very relevant to the exercise of the discretion: *cf Nine Network Australia Pty Ltd v McGregor & Ors* (supra) at par [52]. There is no doubt that there is very

considerable public disapprobation attached to those who engage in the possession of child pornography. It is my observation that the media take every opportunity to publicise such cases from the moment a charge is laid until the proceedings are finally determined. Because the plaintiff is an extremely prominent person, there is a very high risk that most, if not all, of the potential jury panel is likely to be aware of the existence of such a charge at the time the plaintiff faces trial on the indictable offences, assuming of course that he is committed for trial. Furthermore as Mr Carey for the complainant/informant submitted, no matter how much time may pass it is extremely unlikely that publication of this material will be forgotten by the time of the plaintiff's trial. Clearly such material would be inadmissible in evidence at the plaintiff's trial. Even if the complaint matter were to proceed to conviction, the fact of the conviction would also be inadmissible at the plaintiff's trial.

[17] Counsel for the Australian Broadcasting Corporation, Mr Whitington QC, submitted that the principle of open justice required that the public be informed through fair and accurate media reporting. I accept that this is the general rule. In *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* [2004] NSWCA 324, Spigelman CJ referred to the conflict which can occur between the principles of open justice and of a fair trial, and that a judgment must be made as to which is to prevail in the circumstances. His Honour describes the principle of open justice as "one of the most fundamental aspects of the system of justice in Australia" (at para

[18]). But the most fundamental principle of all is the requirement that the accused must receive a fair trial. In the same case, Spigelman CJ said, at paras [22]-[23]:

> The principle of a fair trial has been characterised in numerous High Court judgments in the most forceful of terms. It has been described as "the central thesis of the administration of criminal justice": *McKinney v R* (1991) 171 CLR 468 at 478; as "the central prescript of our criminal law": Jago at 56; as a "fundamental element" or a "fundamental prescript": *Dietrich v R* (1992) 177 CLR 292 at 299, 326; and as an "overriding requirement": Dietrich at 330. It is not a new principle. As Isaacs J put it in 1923 with reference to "the elementary right of every accused person to a fair and impartial trial": "Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle": *R v MacFarlane; Ex parte O'Flanaghan & O'Kelly* (1932) 32 CLR 518 at 541–542.
>
> There is no aspect of preparation for trial or of criminal procedure which is not touched by, or indeed determined by, the principle of a fair trial. As Lord Devlin once put it:
>
> > [N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accuseds. *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1347.

[18] There can be no doubt, in my opinion, that where the principle of a fair trial is threatened by the principle of open justice, the principle of a fair trial must prevail. But the extent of the threat to a fair trial is not always clear-cut; there are, as in most things, questions of degree. It was submitted by Mr Whitington QC that one of the matters the Court must consider is whether any prejudice might be avoided by the giving of appropriate directions. In New South Wales, the view has been taken that in the

experience of experienced trial judges in that State, juries approach their task in accordance with their oath, listen to the directions given to them, and implement them; and in particular, listen to directions given to them to determine guilt only on the evidence: see *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors*, supra at paras [102]-[105]. Recent cases which have gained some notoriety in New South Wales show that this is not always the case. In a recent rape trial, it was shown that two jurors visited the scene, notwithstanding the trial judge's directions to the contrary: *R v Skaf* [2004] NSWCCA 37; 60 NSWLR 86. A recent study of jurors in New South Wales has shown that of 41 trials conducted between mid 1997 and mid 2000, in 3 cases jurors admitted to having conducted internet searches relating to the case and had obtained information in each case of which the parties were unaware: see Justice Virginia Bell, *How to Preserve the Integrity of Jury Trials in a Mass Media Age*, (unpublished paper delivered at the Supreme and Federal Court Judges' Conference – Darwin, January 2005). In yet another embarrassing case, in *R v K* [2003] NSWCCA 406; 59 NSWLR 431, a number of jurors had conducted searches on the internet and had come to learn that K, who was charged with the murder of his first wife, had been charged and acquitted of the murder of his second wife as well as a lot of other prejudicial information. I accept that in many cases, the risk of prejudice can be avoided by an appropriate direction, but there can be no such assurance where the prejudicial material is of such a kind as in this case. It might be different if, for example, the plaintiff was

not facing charges for sexual offences, or if the matter of complaint related to some other and more minor misbehaviour, especially misbehaviour not involving children. In my opinion many people have strong and often very emotional opinions and feelings when it comes to sexual offences and offences involving children. It is difficult for the subconscious mind to put to one side these feelings which are likely to be very prejudicial to any accused person, regardless of whether the individual is well-known in the community or not. The potential for this to infect the trial comes about in a number of ways. It may affect a juror's assessment of the accused's evidence, whether that evidence is in the form of a record of interview tendered at trial or in the form of evidence given by the accused at his trial. It might be used to draw an adverse inference if he gives no evidence. It might be used, albeit subconsciously, to arrive at a conclusion of guilt in the face of what might turn out to be a very weak Crown case at his trial.

[19] Mr Whitington QC submitted that the appropriate test to be applied was whether it was necessary, in the interests of justice, for a suppression order to be made. He submitted that the test of necessity has been applied in the context of implied powers of statutory courts and in the case of courts exercising inherent jurisdiction, in exercise of a power to make an order as distinct from the existence of such a power: see *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors*, supra at paras [35]-[49]. However that may be, that is not the test to be applied in considering whether or not to make an order under s 57 or s 58 of the Evidence Act. So

far as s 57 and s 58 are concerned, the word used by the sections is "desirable". In Victoria, the statutory power to make a non-publication order depends upon the court reaching an opinion that the order is "necessary" so as to not prejudice the administration of justice: Supreme Court Act 1986 (Vic) s 19(b): see also *Director of Public Prosecutions v Carl Williams & Ors* [2004] VSC 209 per Cummins J. In this jurisdiction the Full Court in *Nine Network Australia Pty Ltd v McGregor*, supra at [51] approved the test stated by Martin J in *Advertiser Newspapers Ltd v Bunting & Ors* [2000] SASC 458 at para [19] that "once the court is satisfied that there is a **realistic possibility of creating the relevant risk**, ...a court should not hesitate to use the power of suppression" (emphasis mine).

[20] Mr Whitington QC submitted that it was relevant to take into account the fact that the application is facilitated by a coincidence in timing. But for happenstance, the pornography charge laid may have been laid and disposed of before the trial of the sexual assault charges. That is so. It is also the case that the sexual assault charges may have been laid and disposed of years ago. In my opinion these are not relevant considerations. I must deal with the circumstances as I find them to be, not how they might otherwise have been.

[21] It was also submitted that no weight can be given to the fact that the plaintiff is an extremely prominent person, so there is not a perception of unequal justice. I agree that the prominence or otherwise of an applicant for an order is not in itself a relevant consideration. But, what I am bound to

consider is the degree of possibility of creating the relevant risk if the order is not made and in considering that question one of the considerations is the period of time likely to elapse between now and the date of trial. When there is a significant time gap this may result in the controversial material dying down or becoming forgotten and may result in the order being refused. However, if the applicant is well-known in the community, the likelihood of the material being forgotten (or not related by the jury to the particular accused) is of a different order, particularly in a small community like Darwin and particularly where the material is of a kind many in the community are likely to regard with considerable repugnance.

[22] It was put by Mr Whitington QC that it is likely that the plaintiff's identity will travel by rumour and gossip even in the face of a suppression order. Perhaps it might, at least in some circles, but even if that be so I am more confident of jurors dismissing rumours and gossip than I am of the fact that the plaintiff has been charged with possession of child pornography.

[23] In all the circumstances I am satisfied that there is a realistic possibility of prejudice to the accused's ability to receive a fair trial in relation to the sexual offences unless a suppression order is made forbidding publication of his name as the defendant in the complaint proceedings and that, therefore, in the interests of justice, it is desirable that the plaintiff's name as the defendant in those proceedings be suppressed.

[24] There will be an order pursuant to s 57 of the Evidence Act forbidding the publication of the plaintiff's name as the defendant in matter No 20424339 in the Court of Summary Jurisdiction until further order. It is therefore not necessary to consider the appeal or the application for certiorari and in these circumstances the appeal is dismissed and the application for certiorari is refused. I will hear the parties as to costs.
