CITATION: *Australian Broadcasting Corporation v Director of Public Prosecutions and X* [2005] NTMC 005

PARTIES:	Australian Broadcasting Corporation (Applicant) v Director of Public Prosecutions (1st Respondent) X (2nd Respondent)
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Darwin
ILE NO(s):	20424339
DELIVERED ON:	25 January 2005
DELIVERED AT:	DARWIN
HEARING DATE(s):	20, 21 January 2005
DECISION OF:	D LOADMAN, SM

CATCHWORDS: S57 Evidence Act – Application for uplift of order for suppression of Defendant's name – Proceedings de Novo whether Magistrate's Court EMPOWERED to suppress name of Defendant in charges of possession of child pornography to ensure Defendant's fair trial in Supreme Court of charges relating to sexual assaults on juveniles – Court finds it lacks jurisdiction – Further that any implied power is not available – Suppression order to be lifted – Stay pending the Appeal.

REPRESENTATION:

Counsel:

Plaintiff:	Ms Judith Kelly
1st Respondent:	Mr Michael Carey
2nd Respondent:	Mr John Lawrence

Solicitors:

Plaintiff:	Clayton Utz
1st Respondent:	Department of Public Prosecutions
2nd Respondent:	Priestleys

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 005
Number of paragraphs:	38

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20424339

BETWEEN:

Australian Broadcasting Corporation
Plaintiff

AND:

Director of Public Prosecutions
1st Respondent

AND:

X
2nd Respondent

DECISION

(Delivered 25 January 2005)

Mr David LOADMAN SM:

1. On the 11th day of January 2005, Mr Cavenagh SM made the following order:-

> "Pursuant to S.57 Evidence Act, I forbid the publication of the name of the defendant and any details likely to lead to his identification until further order."

2. The order was made on the application of Mr Lawrence. The inscription on the file records that the Director of Public Prosecutions, represented by Mr Carey, "did not oppose the making of the order".

3. Clearly, there was absolutely no opposition to the application made by Mr Lawrence which resulted in the order being made in the terms in respect of which he had applied for the order.

4. Although Ms Kelly supplied me with the transcript of what occurred on the day the matter was ventilated before Mr Cavenagh SM, it is not my function, sitting on the application of the Australian Broadcasting Corporation to set that order aside, to make any comment on the actions of Mr Cavenagh SM.

5. This is not an appeal, or for that matter a prospective variation of Mr Cavenagh's order, it is a proceeding which is a matter commencing de novo and of course it is an application which for the first time has a contradictor to the application made by Mr Lawrence.

6. On 20 January 2005, when first seized of the matter in the bail, arrest and mention court in Darwin, given that no time for preparation had been afforded to the court, and seemingly very little more to the relevant practitioners, the Court had to make a decision as to the issue of its jurisdiction. Both the Director of Public Prosecutions and Counsel for the defendant asserted this Court had no jurisdiction to make the order that was sought by the applicant in this matter.

7. The order sought by the applicant is contained in an application dated 19 January 2005 and is in the following terms:-

> "Applicant: Australian Broadcasting Corporation
>
> C/- Clayton Utz, 19 Lindsay Street, Darwin
>
> First Respondent: The Queen
>
> C/- Director of Public Prosecutions
>
> 43 Mitchell Street, Darwin
>
> Second Respondent: X
>
> C/- Priestleys, Suite G19, 1st Floor
>
> Paspalis Centrepoint, Darwin

> The above named Applicant says that on the 11th day of January 2005 At the Darwin in the Court of Summary Jurisdiction, Mr Cavenagh SM made the following order in relation to proceeding 20424339:
>
> "pursuant to section 57 of the Evidence Act I forbid the publication of the name of the defendant and any details likely to lead to his identification until further order."
>
> And the Applicant now applies for
>
> The order set out above to be lifted and varied."

8. Firstly, in terms of the order made by Mr Cavenagh SM, intrinsically and within the parameters of the order as made, is postulated contemplation by the Court of prospective issues relating to the matter. Power is expressed in this Court's order, providing to the Court the ability to deal with the matter in any appropriate way by the words "until further order". Nothing could be clearer. The only inference to be gleaned from those words is that there is an express power reserved in terms of the original order, to vary, alter or set aside that order.

9. Further, and in any event, although as a matter of jurisprudence, it is beyond doubt that the Magistrates Court is a creature of statute and is not possessed of any inherent power in the true sense of the word, the Court held it was possessed of such power as could be implied.

10. That point having been ventilated, the matter was then stood down until the afternoon of the 20 January 2005, to enable the parties to address the Court in respect of the merits of the application.

11. Anecdotally, when an application to review the decision of Mr Cavenagh SM was mentioned before His Honour Mr Justice Mildren in the Supreme Court of the Northern Territory, it was met with the response that the appropriate forum to deal with the matter was this jurisdiction and the parties ought to deal with the matter in this jurisdiction, necessitating the adjournment sine die of the application for judicial review.

12. To the charges before the Court and the complaint against the Defendant, being charges of possessing child pornography, Mr Carey, on behalf of the Department of Public Prosecutions, conceded that there had never been an application to suppress the existence of such proceedings against any defendant that he could recall. That accords with the Court's recollection.

13. When the matter resumed ventilation on 24 January 2005, in accordance with his undertaking, Mr Carey gave the Court details of the new charges brought against the Defendant relating to 21 sexual offences alleged to have been committed by the Defendant with juveniles some 30 years ago. In fact, the information relating to those offences was duly sworn and on 24 January 2005, there was a court file created relating to those charges ("the antique charges"). The summons, in respect of the service to that information had not been either filed or served, although a copy of the information was handed to Mr Lawrence.

14. Prior to the articulation of these offences, Mr Carey said that to allow the application by the Australian Broadcasting Commission would have the result that the Defendant would be deprived of a fair trial. He said that when the antique charges now specified were eventually dealt with in the Supreme Court of the Northern Territory, if the general populace of the Northern Territory was allowed, in January 2005, to become aware that the Defendant before the Court was charged with being in possession of child pornography, it would simply result in an exercise involving adding two and two together to make four. That is, the conviction the Defendant must be guilty by association would be so universal that any juror's opinion would be tainted and a fair trial prevented. That would mean that there would be necessarily an application to stay those proceedings.

15. Essentially, Mr Lawrence on 20 January 2005 said the same thing. He added that the Defendant was at home, bedridden and undergoing rehabilitation and it would 12 to 18 months before the Defendant could stand trial on any charges. He said that the possession of child pornography charges would be fought, also the "antique" charges. He said that the

publicity of the possession of child pornography charges was essentially a blip "down south", but it would be quite a different scenario in the Northern Territory. Although perhaps emotionally put, the essence of what he said was that sensational journalism would result, the bounds of defamation laws would be tested and the Defendant would be gravely prejudiced in his expectation of having a fair trial by virtue of not obtaining an independent jury.

16. The Court's power reposes entirely within the parameters of section 57 of the *Evidence Act*, which is in the following terms:-

> "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 in, such proceeding public decency;
>
> (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 underlining of the above words is this Court's underlining which is not part of the statute as proclaimed).
>
> 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."

17. Mr Carey, supported by Mr Lawrence, propounded the empowerment contained in section 57(1)(b) "for the furtherance of, or otherwise in the interests of the administration of justice" was a power which applies in the widest possible sense and empowers this Court consequently to order suppression of the Defendant's name, so as to ensure that the Defendant receives a fair trial by virtue of having a jury empanelled to try the antique charges not tainted by the knowledge of the possession of child pornography charges before this Court.

18. The Court raised with Mr Lawrence the issue as to whether the proper construction of section 57(1)(b) of the *Evidence Act* did not constrain the Court's power to a proceeding before the Court as specified in section 57(1)(a) of the *Evidence Act*. Mr Lawrence contended such a construction was not proper and asserted that the power set out in section 57(1)(b) was a power for the furtherance of or in the interests of administration of issues which will arise in the Supreme Court proceeding concerning the antique charges.

19. Whilst he rose immediately to object at the suggestion by the Court that this amounted to a power to restrain wherever the matter was proceeding in any Court, other than the Magistrates Court in Darwin, that is the extension logically of his argument. Thus, Ms Kelly's submission that the logical end point to that argument would apply to a Court "even if it was in Tibet" is not without validity. Ms Kelly conceded that there may be an argument that because of the way section 57(1)(b) of the *Evidence Act* was punctuated at its conclusion, there was an alternative construction favouring Mr Lawrence's submission. The Court does not agree.

20. Ms Kelly then proceeded on the basis, and the Court possessed implied powers, any implied power of the Court had to be exercised for the purpose in relation to which it was conferred.

21. Ms Kelly submitted that to accede to the submissions of the Respondents, would be to exercise the power impermissibly. She referred to the decision of the *Australian Broadcasting Corporation –v- Lenah Game Meats Pty Ltd*, High Court Decision 185 ALR 1 which concerned the issue of validity of an interlocutory injunction pursuant to the inherent power conferred on the Supreme Court of Tasmania to grant an interlocutory injunction "in all cases which it shall appear to the Court or Judge to be just and convenient that such an order should be made". However, the Court found that because the ultimate relief was not available to the applicant at law, in essence the moral turpitude of the method by which, in this case, film had been taken of possums being slaughtered was an irrelevancy and the Court lacked the power to grant an interlocutory injunction for that reason.

22. She also referred to another High Court decision *PATRICK STEVEDORES OPERATIONS NO. 2 PTY LTD and OTHERS –v- MARITIME UNION OF AUSTRALIA and OTHERS*, the citation of which is 153 ALR 643 and relevantly to paragraph 35 of the decision. That added nothing additional to the principle referred to in the previous authority.

23. She contrasted the power reposing in a Court in this jurisdiction with the power reposing in a State Supreme Court. Of course in the latter case the Supreme Court physically possessed inherent powers as opposed to conferred powers.

24. She referred to the authority in respect of the issue of implied powers raised with her by the Court when her application was first mentioned before it on 20 January 2005. She referred specifically to the decision of the High Court in *GRASSBY –v- R* 87 ALR 618, where at page 628 being portion of the judgement of His Honour Mr Justice Dawson, there was contained an exposition of inherent powers of the Supreme Court and the conferred powers of a Magistrates Court.

25. Relevantly His Honour states at page 628 (contrasting a Magistrates Court jurisdiction with that of the Supreme Court in New South Wales) "on the other hand, a Magistrates Court is an inferior Court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every Court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (then follows the Latin maxim)". Those implied powers serve a function similar to that served by the inherent powers exercised by a superior Court, but they are derived from a different source and are limited in their extent.

26. Ms Kelly's submission, simply expressed, is that a Magistrate's Court would be exercising a power to suppress, improperly, if the power was aimed at an outcome of proceedings in the Supreme Court of the Northern Territory because that would be an improper exercise of the power or exceeding the power.

27. The Court raised with Ms Kelly the issue of such an order having been made in any other Court. She reminded this Court that in the case of *REED –v- RANGER* [(1992) 59 SASR 487], the Supreme Court of South Australia, in a judgement of Duggan J, allowed an appeal against a Magistrate's refusal to suppress the name of a Defendant to be tried separately in relation to two separate drug related offences. His Honour allowed the appeal and ordered the Defendant's name be suppressed on the grounds that the considerable publicity likely to be attracted to each trial, may prejudice the other of them, they being scheduled to be heard closely together in time. Whilst, said Ms Kelly, that was the proper exercise of power by a Court in which there reposed inherent jurisdiction, such a power did not repose in the Magistrates Court.

28. At page 488 of the decision, His Honour did say that suppression would not be granted automatically where there had been a separation of trials, it would depend on the circumstances of each case in any event. She said returning to the case of "Grassby" that where there was an implied power reposing in this jurisdiction, it had to be a power which is necessarily implied for the proper exercise of the Court's power as this Court was not possessed of the same powers as the Supreme Court. Further that, the power conferred by section 57 of the *Evidence Act* of the Northern Territory was never a power to supervise the interests of/or the administration of justice in the Northern Territory Supreme Court, or for that matter, the Victorian Supreme Court or the Courts in Nepal.

29. Ms Kelly said that even though presently, as opposed to 20 January 2005, in file number 20428520, there were 21 charges on information of sexual assault involving juveniles, this Court's function in relation to the "processing" of the matter, entailed conducting committal proceedings, in which of course no jury was involved. In those circumstances, it could not be argued that the suppression order was necessary, for instance in relation to the furtherance of, or the interest of administration of justice concerning those committal proceedings.

30. She referred also to the decision in *JOHN FAIRFAX AND SONS LTD –v- POLICE TRIBUNAL OF NEW SOUTH WALES and ANOTHER*, a decision of Court of Appeal New South Wales [(1986) 5 NSWLR] at page 479, where the Court at marginal letter E, referred to the fact that the inherent power where it was possessed by a Court did not mean an unlimited power and relevantly "…The only inherent power that a Court possesses is power to regulate its own proceedings for the purpose of administering justice; and apart from securing that purpose in proceedings before it, there is no power to prohibit publication of an accurate report of those proceedings if they are conducted in open Court, as in all but exceptional cases they must be."

31. In a report of another case sourced from the Internet, the full citation of which is not set out, involving *Dennis William Hart and Others*, His Honour Mr Justice Mildren adopted and cited with approval, a judgement of McHugh JEA, as he then was, in the above case. A portion of that judgement is in the following terms "Accordingly, an order of a Court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice <u>in proceedings before it</u>" (this Court's underlining). And at paragraph 406 "that authority is support for the proposition that the orders made, insofar as they relied upon this Court's inherent power, could only be properly made if really necessary to secure the proper administration of justice in these proceedings, and if they did no more than was necessary to achieve the due administration of justice".

32. Ms Kelly then referred to a decision, which was not an authorised report, but an Internet report of a decision in *John Fairfax Publication Pty Ltd and Anor –v- District Court of NSW and Ors* [2004] NSWCA 324 (15 September 2004). In that case, one Fisher was found guilty of Corporations Law breaches. Three separate groups of charges were to be tried separately in the District Court of New South Wales. Although there were variations of the initial order, the effect of orders by the District Court Judge was to suppress publicity of the guilty verdict. Ms Kelly also pointed to the exposition of the law comparing the inherent powers of the Supreme Court with statutory power of the District Court. An example of the implied

power as opposed to the express power is referred in paragraph 27 of the report. It is the fact that the District Court had power to stay proceedings, but only such proceedings which were an abuse of its own process.

33. Although the decision contains relevant dicta, in relation to a fair trial or lack of it, the contention advanced by the Respondents, in paragraph 60 of the report, the Court postulates that the power to prevent erosion or eradication of a fair trial because of a decision of an inferior Court, is a matter which ought be in an exceptional case as postulated, be handled "by the exercise of the protective inherent jurisdiction of the Supreme Court". That, it suggests, is where the Respondents ought to seek the relief they seek in this Court.

34. To summarise, it is this Court's decision that section 57 of the *Evidence Act* confines the exercise of this Court's power, in any circumstance engaging the provision, to the exercise of a power in relation to a "proceeding before the Court" and thus would preclude it making any suppression order as requested.

35. If that is wrong, then further and in any event, insofar is there may be implied power reposing in this Court, the exercise of such implied power, can in this Court's finding, only be in relation to a proceeding in the Magistrates Court of the Northern Territory. Such power does not exist to allow the suppression order sought in this matter.

36. The resulting theoretical position of the contrary, being the case, does not warrant ventilation. For the sake of completeness, and only briefly, the Court opines the law is set out in Ms Kelly's written submissions on behalf of the Applicant in paragraphs 2 to 16 inclusive. Most pertinently, in relation to the authorities recited by all parties, and bearing in mind the Court is not analysing the issue to any great extent in the light of its finding concerning its powers, it does however cite with approval from the "Fairfax – District Court" case referred to above. At paragraph 59 of the judgement of Spigelman CJ (with which Handley JA and Campbell AJA concurred) His

Honour stated "It is conceivable that media publicity may create a situation in which an accused will not be able to have a fair trial within a reasonable period or at all. In that circumstance an anticipatory non-publication order may be needed to ensure fairness to the Prosecution. However, that exceptional case is so unlikely that it cannot form the basis for an implication of a power on a test of necessity. Applications for a permanent stay have failed in the most sensational of cases: (His Honour then referred to cases such as the cases involving Anita Cobby, a brutal murder and rape; Ivan Milat, which with whom surely all are concerned; the Childers backpackers hostel fire and others) and then His Honour makes the utterance to which there has already been reference, that the need to exercise protection reposes in the Supreme Court in any event.

37. In the circumstances, the decision of the Court is to lift the decision of Mr Cavenagh SM made 11 January 2005.

38. Pursuant to intimations already made to the parties' representatives, the lifting of the order will however be stayed until the further order of the Supreme Court of the Northern Territory, to whom Mr Lawrence has indicated the Defendant will appeal. If there be some other formulation of the effective stay, referred to or agreed to between the parties, then the Court will hear the parties in relation to the terms thereof.

Dated: 25 January 2005

DAVID LOADMAN
STIPENDIARY MAGISTRATE