MCT v McKinney & Ors; McGarvie v MCT [2006] NTSC 35

PARTIES:	MCT
	v
	McKINNEY, TANIA LOUISE & ORS
	AND:
PARTIES:	McGARVIE, RENAE MOANA
	v
	MCT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	No. 4 of 2006, No. JA 6 of 2006
DELIVERED:	3 MAY 2006
HEARING DATES:	31 MARCH, 28 APRIL 2006
JUDGMENT OF:	ANGEL J
APPEAL FROM:	NT JUVENILE COURT AT DARWIN

REPRESENTATION:

Counsel:

Appellant:	L Carter
Respondent:	E Armitage

Solicitors:

Appellant:	NAAJA
Respondent:	Office of Director Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ang2006010
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

MCT v McKinney & Ors; McGarvie v MCT [2006] NTSC 35
Nos. 4 of 2006, No. JA 6 of 2006

BETWEEN:

MCT
Appellant

AND:

TANIA LOUISE McKINNEY & ORS
Respondents

AND:

RENAE MOANA McGARVIE
Appellant

AND:

MCT
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 3 May 2006)

[1] On 17 January 2006 the appellant pleaded guilty in the Juvenile Court to a number of charges. He was found guilty of the charges and was sentenced.

[2] On file 20428204, in respect of a charge of stealing on 4 October 2004 contrary to s 210 Criminal Code (NT) he was placed on a good behaviour bond for six months without conviction.

[3] On file 20500683, in respect of a charge of assault on 25 October 2005 contrary to s 188 Criminal Code (NT) he was convicted and placed on a good behaviour bond for six months.

[4] On file 20507714, in respect of a charge of stealing on 1 April 2005 contrary to s 210 Criminal Code (NT) he was convicted and placed on a good behaviour bond for six months.

[5] On file 20507728, in respect of a charge of aggravated assault (bodily harm) on 2 April 2005 contrary to s 188(2)(a) Criminal Code (NT) he was convicted and sentenced to one month's detention backdated to commence 7 October 2005.

[6] On file 20523908, in respect of a charge of unlawfully damaging property on 5 October 2005 contrary to s 251 Criminal Code (NT) and a further charge of stealing and using violence on 5 October 2005 contrary to s 211(1) Criminal Code (NT) he was convicted and sentenced to six months detention fully suspended immediately on condition that he be of good behaviour for 18 months and that he accept supervision and follow the directions of the Department of Community Services for a period of 12 months and that he reside with his aunt Helane. The appellant's aunt Helane lives in Tennant Creek and whilst the order does not specify a particular residential address the terms of the order require him to live with his aunt at Tennant Creek.

[7] Following disposition of the matters an application was made by counsel for the appellant, expressed to be pursuant to s 23 Juvenile Justice Act (NT), for

suppression of the appellant's name and image from publication. Counsel submitted that the appellant was still a very young man – he was 15 years of age – that the offences that he had been convicted of were "extremely serious", "that one of the reporters from the local newspaper has been here", "that the impact upon his name being published would be extremely detrimental and in fact he has already been named in the paper twice previously in relation to the most serious matter" and " … I submit to you that you ought … exercise your discretion to ensure that rehabilitation is assisted and that his job prospects in Tennant Creek are not harmed". It was further submitted that the appellant "ought to be given the opportunity to get back onto his feet given the fantastic opportunities that he has now ahead of him". It was further submitted as follows "Well, we don't have a problem with the court being open, we don't have a problem with there being reporting on the circumstances and on the disposition. In terms of it having an impact upon the interest of justice, I submit that it has absolutely no – it serves no purpose in addressing the interests of justice by naming young juvenile offenders, who are first time offenders, who have just had their first convictions recorded against their name, who have put up plausible arguments for rehabilitation and that the naming of such juveniles will only be detrimental to the future prospects of rehabilitation. And specifically in respect of MCT, he is going to Tennant Creek, he's looking for work, this newspaper is published and circulated in that region and it will only have a

detrimental impact, and that cannot be in the interests of justice or in the interests of rehabilitation."

[8] The application was opposed by the prosecution. The prosecution submitted, inter alia, that the appellant was no different to any other offender that comes before the Court, the hearing was in open court and there was no reason why such an order should be made.

[9] The Chief Magistrate said:

> "I am reluctant to make such orders and there is nothing which makes this young man a great deal different from anybody else, but MCT just stand up for a moment.
>
> Are you going to give this a real shot? Well, what I am going to do is this, and I want this to act as an extra incentive for you. I make an order that your name and image not be published in relation to the serious charge, that last charge, whilst you comply with the terms of the suspended sentence.
>
> OK?
>
> The Defendant: Yes.
>
> Counsel for the accused: Can I just clarify that it's only in relation to the last of the files?
>
> Chief Magistrate: The other ones are nothing out of the ordinary, every kid who comes through here is in relation to the same thing. The last one is the one which might cause, in my view unreasoning (sic) and shall I say headline grabbing publications which don't do justice to the truth of the matter. I know it's not the reporter's fault. It's always the sub–editor's fault."

[10] The appellant appeals against the failure of the Chief Magistrate to prohibit publication of his name and image in respect of the remaining four files. The prosecutor cross–appeals against the order made in respect of file 20523908 prohibiting publication of the appellant's name and image.

[11] The contested order was made in purported pursuance of s 23(1) Juvenile Justice Act (NT) towards the conclusion of a hearing in open court. In Australia elsewhere there are statutory prohibitions against publication of the names of juvenile offenders. In the Northern Territory this is not so.

[12] It is convenient to set forth the provisions of ss 22(1) and 23(1) of the Juvenile Justice Act (NT):

> "22(1) Proceedings under this Act against a juvenile shall be held in open court, but the magistrate before whom the proceedings are taken may, if it appears to him that the ends of justice will be best served by him so doing, order that the Court be closed …
>
> 23(1) A magistrate may, either by separate order or in an order under section 22, direct that a report of or information relating to proceedings in, or the result of proceedings against a juvenile before the Court, be not published except by a person in the performance of his duties under this Act."

[13] Section 57 sub–sections (1) and (2) Evidence Act (NT) relevantly provide:

> "57. Prohibition of the publication of evidence and of names of parties and witnesses
>
> (1) Where it appears to any Court -
>
> (a) …

(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) …

(ii) …

(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. ”

[14] The appellant seeks suppression of his identity both by name and image in respect of all the files dealt with by the Chief Magistrate in the Juvenile Court. Counsel for the appellant submitted that the issue of whether the name of the appellant should or should not be suppressed from publication necessarily involved the general principles governing the sentencing of juveniles. It was submitted that the emphasis in the sentencing of juveniles being on rehabilitation, both in the interests of the juvenile and of the community, *Simmonds v Hill* (1986) 38 NTR 31 at 33, *Waldron* (1988) 56

NTR 1 at [19], the discretion whether or not to suppress publication of the name of a juvenile must be exercised judicially and in a manner consistent with the purposes of the Juvenile Justice Act (NT) and sentencing of juveniles.

[15] It was submitted that it was wrong as a matter of statutory construction and principle to read down the power in s 23(1) Juvenile Justice Act (NT) to require something exceptional to be demonstrated before an order is made. Counsel for the appellant invited this Court to reject any notion that something specific had to be advanced on behalf of a juvenile offender before an order for suppression was made.

[16] Alternatively, on the material before the Chief Magistrate, it was submitted that publication posed a real risk to the appellant's rehabilitation. In particular reliance is placed on the following:

(a) the appellant was still a young man and the sentence relates to offending over a two year period whilst he was aged 14 and 15;

(b) the appellant had no prior dealings with the court having been dealt with twice previously by way of juvenile diversion;

(c) the appellant had pleaded guilty and accepted responsibility for his offending;

(d) the offences for which he was convicted and received terms of imprisonment being serious, the detrimental effect to the appellant of being named in the press was therefore greater;

(e) the primary sentencing principle in the juvenile court was rehabilitation;

(f) the sentences imposed by the Chief Magistrate supported the appellant's rehabilitation and to deny the suppression application would undermine this aim;

(g) the appellant was moving to Tennant Creek to reside with his aunt and publication of the appellant's name would hinder his prospects of re–employment.

[17] It was submitted that the proceedings having occurred in open court fair and accurate reporting of the proceedings could take place without the appellant being identified. It was submitted that open justice was not undermined by the suppression of any information leading to identification of the appellant and that there was no legitimate public interest in identifying the appellant.

[18] The appellant's argument draws a distinction between the proceedings in open court including the announcement of the result and the identification of the appellant as a party to those proceedings. The former including the reporting thereof, fulfils the fundamental importance of the openness in the administration of justice, whereas the latter, it was submitted, is not an essential ingredient of the openness in the administration of justice.

[19] I am unable to accept these submissions.

[20] In my view s 23(1) Juvenile Justice Act is directed to a report of or information relating to what has happened in court and the result of proceedings against a juvenile before the court, not to the names of the parties in proceedings before the Juvenile Court. It seems to me the relevant

statutory provision is s 57 Evidence Act (NT) not s 23(1) Juvenile Justice Act (NT).

[21] In *Nine Network Pty Ltd v McGregor & Ors* (2004) 14 NTLR 24 at para [40] the Full Court held there was no power to suppress publication of a photo or image of a party either pursuant to s 58 Evidence Act (NT) or at common law nor is any such power to be implied. The reason for this, plainly enough, is that the publication of an image or photograph of a party is covered by s 57(2) Evidence Act (NT) and there is simply no need for any order beyond that of forbidding publication of the name of a party pursuant to s 57(1)(iii). It is for this reason also that I consider s 57 Evidence Act (NT) to be the applicable provision rather than s 23(1) Juvenile Justice Act (NT). It seems to me that s 57 Evidence Act (NT) covers the field in relation to suppression orders in relation to the names of parties or witnesses to proceedings whether in the juvenile court or any other court as defined in the Evidence Act (NT). Statutory derogations from the principle of open justice are to be strictly and narrowly construed: *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 55; *Herald & Weekly Times v The Magistrates Court* [1999] 2 VR 672 at 677; *Nine Network Pty Ltd v McGregor & Ors* (2004) 14 NTLR 24 at [31]–[32]; and in my view s 23(1) Juvenile Justice Act (NT) did not enable the Chief Magistrate to make the order he did.

[22] In *David Syme & Co v General Motors Holden Ltd* [1984] 2 NSWLR 294 at 300, Street CJ quoted what he had said in an earlier unreported case as follows:

> " … It is a deeply rooted principle that justice must not be administered behind closed doors – court proceedings must be exposed *in their entirety* to the *cathartic glare of publicity*. There are limited exceptions to the observance of this principle but these are well defined and sparingly allowed." (emphasis added)

[23] In *Horsham Justices; Ex parte Farquharson* [1982] QB 762, at 798, Ackner LJ said:

> "The freedom to report trials is one of the essential freedoms."

[24] In *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court (NSW)* (1991) 26 NSWLR 131, at 143, Kirby P said:

> "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."

[25] In *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, at 481, McHugh JA said:

> "Without the publication of the reports of court proceedings, the public would be ignorant of the workings of the courts whose proceedings would inevitably become the subject of the rumours, misunderstandings, exaggerations and falsehoods which are so often associated with secret decision making. The publication of fair and accurate reports of court proceedings is therefore vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice. It is a right which can only be taken away by words of plain intendment."

[26] The suppression of the name of a party to court proceedings is an exceptional order as has been pointed out in many cases. Ordinarily matters of embarrassment, delicacy, damage to reputation, invasions of privacy and unsavoury evidence will not warrant secret justice. There is a heavy evidentiary onus on a party seeking any incursion into the notion of open justice. Any departure from the fundamental principle of openness in the administration of justice whether pursuant to s 57 Evidence Act (NT) or otherwise requires clear justification. Most particularly in relation to s 57 Evidence Act (NT) it needs to be established that an order forbidding publication of the name of a party to proceedings is "desirable". There are many cases canvassing these principles; see eg. the cases collected by Ipp J in *Re Robins; Ex parte WA Newspapers Ltd* (1999) 105 A Crim R 554.

[27] In the present case, as in *Herald & Weekly Times v The Magistrate's Court* [1999] 2 VR 672, at the time the suppression order was made the evidence in the case had concluded and the magistrate had made a final determination in the matter. The hearing had been in open court and the parties had been identified by their names. In that situation so far as the case itself was concerned the administration of justice could not be prejudiced by a failure to suppress the identity of the appellant. As in that case so in this, the substance of the case was over. However as Beach J recognised in that case (at 677) an order forbidding publication of the name of a party is not limited to securing the administration of justice in the proceeding in which the order

is made. In this regard see also *Nine Network Pty Ltd v McGregor & Ors* (2004) 14 NTLR 24.

[28] A large part of the present appellant's submissions is answered by the following passage from the judgment of Beach J in *The Herald & Weekly Times Ltd v The Magistrate's Court of Victoria & Ors* [1999] 2 VR 672, at 678–679 with which I respectfully concur:

> "If what the magistrate was saying was that the names of parties to a proceedings are not that important and for that reason can be suppressed – and a reading of the whole of his Worship's reasons would lead one to conclude that that was one of the factors which induced him to make the orders he did – then in my opinion his Worship fell into error.
>
> In *John Fairfax Group Pty Ltd*, Kirby P. said at 140:
>
> > 'The normal rule of our courts is that justice is administered in a court open to the public where the names of the parties are openly revealed and may be the subject of fair and accurate reports without fear of prosecution for contempt or action for defamation or other civil wrong. This rule, which we have inherited from the common law of England, has been described as an 'inveterate' rule of our system of justice: see Earl Loreburn in *Scott v Scott* [1913] AC 417 at 445.'
>
> A similar view was taken by Brooking J as he then was in *Re a Former Officer of the Australian Security Intelligence Organisation* [1987] VR 875. At 879 et seq. his Honour said:
>
> > 'I suppose that, generally speaking at all events, the first thing anyone would want to know about litigation is who the parties are. Should I be satisfied that the principle that there be publicity in the administration of justice should be impinged upon to the extent of allowing the applicant to bring this action while masking his identity?

> Although I am not persuaded by the material put forward of the need for the order sought, I propose, in deference to the applicant's desire for confidentiality, to make no reference to that material, except in the broadest terms. This means that I cannot state, save in an extremely general way, why I must refuse the application … The applicant's material seeks to make no case from the standpoint of national security and so I need say nothing about the relevance of this consideration. He relies on suggested danger to himself and his family and to other former officers of ASIO and their families. I have given anxious consideration to the applicant's expressed apprehension, but he has failed to satisfy me that departure from 'the general principle of open justice' (*Attorney–General v Leveller Magazine Ltd* [1979] AC 440, at p 453, per Lord Diplock) is necessary in this case, and his application must be refused.'

In *TK v Australian Red Cross Society* (1989) 1 WAR 335 Malcolm CJ said at 338:

> 'Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done. As Lord Donaldson MR said [in *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227] (at 235):
>
> > 'It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice'.

And finally in *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, Fitzgerald P and Lee J when dealing with the dangers in suppressing parties' and witnesses' names said at 45:

> 'Further, public scrutiny is a strong disincentive to false allegations and a powerful incentive to honest evidence, and publicity may attract the attention of persons with material information who are unaware of the proceeding. Again, as was pointed out by McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*, if information is suppressed 'proceedings would inevitably become the subject

> of rumours, misunderstandings, exaggerations and falsehoods …':cf: *Raybos Australia Pty Ltd v Jones* at 59 per Kirby P, citing McPherson J in *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166, 171. A particularly unsatisfactory manifestation of this difficulty occurs when uncertainty as to the particular person concerned leads to speculation concerning other members of a relevant group.'
>
> It is clear therefore that the names of parties are important and in taking the view that the identities of X and Y were not important and for that reason should be suppressed, I consider that his Worship fell into error of law."

[29] I concur with Beach J in that case that embarrassment is not a factor to be taken into account when determining whether an order forbidding publication of the name of a party should be made. That proposition is amply supported by his references to the judgment of Kirby P in *John Fairfax Pty Ltd* and that of Hedigan J in *Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 267 at [91] et seq.

[30] As Spigelman CJ said in *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 at 354:

> "The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public. Nothing should be done to discourage fair and accurate reporting of proceedings.
>
> From time to time the courts do make orders that some aspect or aspects of court proceedings not be the subject of publication. Any such order must, in the light of the principle of open justice, be regarded as exceptional." (omitting references)

[31] It is well settled that publication of the name of a party, like publication of any other aspect of court proceedings, is, speaking generally, only to be

suppressed when there is some clear justification for it. In the case of s 57 Evidence Act (NT) the court has to be satisfied that departure from the general principle of open justice is "desirable" because it is in the furtherance of, or in the interests of the administration of justice. The justification, whatever it may be, must necessarily outweigh the need for open justice and the right of free speech and of the Press to report.

[32] It is not demonstrated by any material presented to the Chief Magistrate that an order forbidding publication of the appellant's name is justified, or is "desirable", whether for the purposes of s 57 Evidence Act (NT) or otherwise. Embarrassment, fear of exposure, feelings of shame in the face of family members, even damage by publicity of proceedings are not relevant considerations. As counsel for the respondent submitted, shame about wrongdoing and acknowledgment of guilt are factors conducive to the rehabilitation process but not justification for an order forbidding publication of the name of a party to proceedings. As the Chief Magistrate said: " … there's nothing which makes this young man a great deal different from anybody else".

[33] In my view there was nothing exceptional demonstrated in respect of either the appellant or the proceedings which warranted the exercise of the discretion in favour of suppressing the name of the appellant. In particular there is nothing demonstrated to show that it was desirable or otherwise in the interests of the administration of justice to make the order the Chief

Magistrate made, or why freedom of speech, the open nature of justice, and "the cathartic glare of publicity" should not hold sway.

[34] The appellant's appeal is dismissed. The respondent's cross–appeal is allowed and the order for suppression in relation to file 20523908 is discharged.
