IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-05-01420

IN THE MATTER OF THE SERIOUS SEX OFFENDERS DETENTION AND SUPERVISION ACT 2009

BETWEEN

HERALD AND WEEKLY TIMES PTY LTD — Applicant

v

BRIAN KEITH JONES — First named respondent

and

SECRETARY TO THE DEPARTMENT OF JUSTICE AND REGULATION — Second named respondent

JUDGE:	HER HONOUR JUDGE PATRICK
WHERE HELD:	Melbourne
DATE OF HEARING:	
DATE OF SENTENCE:	15 July 2015
CASE MAY BE CITED AS:	Herald and Weekly Times Pty Ltd v Jones & Anor
MEDIUM NEUTRAL CITATION:	[2015] VCC

APPLICATION TO VARY A SUPPRESSION ORDER
REASONS FOR DECISION

Subject:
Catchwords:
Legislation Cited:
Cases Cited:
Sentence:

APPEARANCES:	Counsel	Solicitors
For the Applicant (Herald & Weekly Times)	Mr H. R. Hassan	
For the first named Respondent (Brian Keith Jones)	Ms R. Avis	

For the second named Respondent (Secretary to the Department of Justice & Regulation) Mr D. Grace QC

HER HONOUR:

Background

1. The Herald & Weekly Times Pty Ltd seeks to vary a suppression order made on 17 December 2014 to enable publication of information which would identify the respondent. The current suppression order was made pursuant to s.184 of the *Serious Sex Offenders (Detention and Supervision) Act* 2009 ("the Act"), by Her Honour Judge Wilmoth. The applicant also seeks an order pursuant to s.183 of the Act authorising the publication of the reasons of Her Honour Judge Wilmoth delivered on 26 June 2015 (or parts thereof), and the transcript of the hearing on 25 June 2015, subject to proposed redactions. It is necessary to set out some of the history of this matter to explain why I am dealing with this application, and the context in which the application has been made.

2. The respondent has been subject to a non-custodial supervision order under the Act for many years. All offenders subject to supervision orders have committed serious criminal offences and have completed their sentences. An offender is placed on a supervision order because the offender constitutes an unacceptable risk of further relevant sexual offending if a supervision order is not made and the offender is in the community (s.9).

3. The purposes of the Act are set out in s.1 which says:

   (1) "The main purpose of this Act is to enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences, and who present an unacceptable risk of harm to the community, to be subject to ongoing detention or supervision."

   (2) "The secondary purpose of this Act is to facilitate the treatment and rehabilitation of such offenders." The Act also provides for periodic review of a supervision order. The primary purpose of conditions to a supervision order is

to reduce the risk of re-offending by the offender (s.15(3)).

4. An application for a Review of the Supervision Order in respect of the respondent was filed on behalf of the Secretary to the Department of Justice on 5 June 2014. The review came before Her Honour Judge Wilmoth on 17 December 2014. The respondent did not contest the continuation of the supervision order. No breaches of the order were alleged. The risk of the respondent re-offending is assessed as having reduced over the time he has been on the supervision order. Certain changes to conditions were agreed.

5. An existing condition provided for the respondent to be accompanied at all times when away from his residence. The respondent sought a change to that condition to allow him to be unaccompanied in certain defined circumstances when away from his residence. Her Honour heard evidence and determined not to make the change sought. She made an order that there be a temporary condition providing for the respondent to be accompanied at all times, and for observations to be made as to his conduct while travelling to and from destinations. The review was adjourned to 18 May 2015 to allow for those observations to be made, and for the respondent's progress to be further assessed.

6. Her Honour also made an order that day prohibiting the publication of "any information before the court in this proceeding that might enable the respondent or his whereabouts to be identified". The order applied to any publication within Australia. The order further provided that: "This order shall expire on 18 May 2015, or following the conclusion of the next hearing of the review of supervision order, whichever is the later."

7. It was the respondent's application that a suppression order be made in the same terms as the order made on 23 June 2011 by Her Honour. Later in 2011 the Secretary sought to lift the suppression order in respect of the respondent's identity. Her Honour confirmed the order.

8. On 17 December 2014 there was only brief discussion of the matter, with Her Honour agreeing with the proposition that it was perhaps even more important that the order be continued, as the respondent was going to be moving around in public more. The Secretary neither opposed nor consented to the order being made. The order signed by Her Honour says: "This order is made for the purpose of preventing a real and substantial risk of prejudice to the proper administration of justice."

9. On 18 May 2015 a timetable was set for the provision of materials and the review was adjourned to 4 June 2015. Evidence was heard on 4 June and 26 June 2015. On 26 June 2015 Her Honour made an order that the temporary condition be continued until 14 December 2015. The review of the supervision order was adjourned to that date.

10. On 26 June 2015 the Herald & Weekly Times made application for release of certain material. Her Honour ordered that certain material be provided to counsel and legal representatives for the purposes of making the application with which I am dealing. Her Honour was unable to deal with the application as she was due to go on leave, and said to the applicant that the application would be placed in the sex offences list to be dealt with there. It was on that basis that I, as the judge at that time in the sex offences list, became seized of the matter. In discussion with the parties there was no objection to me dealing with the matter, rather than adjourning the matter to be dealt with at a later date by Her Honour Judge Wilmoth.

Legislation

11. The applicant seeks a variation of the order made pursuant to s.184 of the Act, and a new order to be made pursuant to s.183 of the Act. The respondent opposes the application. The Secretary does not oppose publication in respect of the respondent's identity, and otherwise made submissions on the application of the relevant provisions.

12. Section 183(1) provides that: “In any circumstances before a court under this Act, the court, if satisfied that exceptional circumstances exist, may make an order authorising the publication of any material referred to in s.182(1)." Section 183(2) provides that: “Nothing in s.182 prevents the court from publishing the reasons for a decision under this section.”

13. Section 182 provides that it is an offence to publish certain information; including evidence given in the proceeding, or the contents of any report provided to the court. The prohibited matters do not include the identity or whereabouts of the offender.

14. Section 184 provides that: “In any proceedings before a court under this Act, the court, if satisfied that it is in the public interest to do so, may order that any information that might enable an offender, or his or her whereabouts to be identified, must not be published, except in a manner, and to the extent (if any), specified in the order.” Such an order can be made on the application of the offender, or on the court’s own initiative. Section 65(4) requires that an order under s.184 must be reviewed when the supervision order is reviewed.

15. Section 185 says that in making a decision under s.183 or 184, the court must have regard to the following:

(a) whether the publication would endanger the safety of any person;

(b) the interests of any victims of the offender;

(c) the protection of children, families and the community;

(d) the offender's compliance with any order made under this Act;

(e) the location of the residential address of the offender.

Submissions

17. Counsel for the respondent submitted that the applicant was not a party to the substantive proceeding and did not have standing to make the application. I am satisfied that the applicant does have standing to make application and be

heard in respect of any orders made by the court pursuant to s.183 or s.184 of the Act. A media organisation affected by a suppression order has a clear interest in the making of such orders.

18. The proposition that a media organisation has standing to make such an application is supported by the remarks made by His Honour Chief Justice French in *Hogan v Hinch* [2011] HCA 4 at paragraph 43. I consider that the provision of a right of appeal given in s.103 of the Act to any person affected by a decision relating to the publication of information also supports that conclusion.

19. Counsel for the applicant, and for the respondent, each made written and oral submissions. The applicant submitted that the court could not be satisfied that it is in the public interest to prohibit publication of the respondent's identity. The applicant submitted that the granting of a suppression order to safeguard the proper administration of justice would require the satisfaction of a number of requirements such as necessity, real and substantial risk, and other matters which are factors which are consistent with the common law and statutory requirements under the *Open Courts Act*. I reject the argument that the reason given by Her Honour for the making of the order imports those requirements. In view of Her Honour's reasons for making the suppression order in 2011, and the brief discussion on 17 December 2014, I consider that Her Honour interpreted the public interest in accordance with the s.185 matters, and the objects of the Act, without being confined to the more technical requirements proposed by the applicant.

20. The applicant submitted that the principles of open justice and freedom of expression support the release of the information sought. The applicant submitted that the administration of justice and objects of the Act would not be prejudiced by publication of the material sought. It was submitted that the publication of the material would promote the objects of the Act, as well as the

public interest in open justice, by permitting a fair and accurate report of the relevant proceedings. The applicant relied on the decision in *Hogan v Hinch*, with particular reference to the reasons of the Chief Justice.

21. The applicant relied on affidavit material to demonstrate that considerable information identifying the respondent was already available; particularly on the internet.

22. In respect of the material sought under s.183, the applicant submits that exceptional circumstances have been established by evidence given about the current conditions. The applicant submits that publication would be in the public interest in reflecting open justice, it would allow important debate "about the risks posed to the community by the respondent and the current … supervision regime he is being subjected to under the Act". The applicant submitted that publication would permit discussion and debate about potential regulatory shortcomings and "the adequacy of the statutory mechanisms under the Act to protect highly vulnerable members of the community (children) from serious sex offenders such as the respondent".

23. The respondent submitted that it would be in the public interest to continue the current Suppression Order made pursuant to s.184, and that the relevant considerations are the safety of the respondent, and those accompanying him, and the promotion of the purposes of the Act. The respondent submitted that there was a distinction between the material available on the internet, with somewhat dated photographs, and material that would be likely to be published if the respondent were named. The respondent argues that there would be a real likelihood of recognition and vigilante action. Counsel also referred to the adverse impact on the respondent if matters were published in newspapers which would be more likely to be seen by general members of the public, including people at places that he attends. The respondent submitted that identification of the accused in connection with these proceedings would

have an adverse impact on his rehabilitation, and increase, rather than decrease, the risk of re-offending.

24. The respondent submitted that the court should balance the matters in s.185; the principle of open justice and the public interest in the protection of the community and rehabilitation of the offender. The respondent submitted that in this case the court should be satisfied that it would be in the public interest to continue the order.

25. The respondent submitted that exceptional circumstances had not been established and that publication of the s.182 matters ought not be authorised pursuant to s.183. The respondent took issue with contentions made by the applicant as to conclusions that could be drawn from the evidence given. The respondent submitted that public discussion about the legislation and its operation could take place without disclosure of the material sought. The respondent also submitted that considerations of community protection were being judicially monitored and conditions were in place for that purpose. The respondent submitted that publication of the matters sought in respect of the respondent would not enhance that protection.

26. Counsel for the Secretary suggested that the prima facie position would be that the offender's name would be disclosed. Counsel said that the offender's name was not suppressed for the first six years, but had been since. The Secretary did not object to publication of the identity of the respondent. In respect of the reasons, counsel for the Secretary submitted that prima facie reasons ought to be published, but that the prohibitions in s.182 ought to be complied with; which would mean that any reasons would have to be edited - and to go beyond that, would require the exceptional circumstances test to be satisfied.

Discussion

54. The principle of open justice is clearly a very important one. It is part of the principle of open justice that the press be allowed to report matters in court. It should, however, be borne in mind that the Act provides for severe restrictions on certain persons who have served their sentences of imprisonment and who are subject to restrictions because of the risk of future offending. The restrictions on an offender's liberty are justified on the basis that the offender presents an unacceptable risk of harm to the community. It is clear that the rehabilitation of such offenders is desirable in order to reduce re-offending, and accordingly, enhance protection of the community. The two purposes of the legislation are inter-connected. The main purpose remains to provide for the enhancement of the protection of the community.

55. I accept the applicant's submissions that the management of serious sex offenders after they have served a custodial sentence is a "highly difficult area of law and social policy". I accept that discussion and debate about potential regulatory shortcomings, and the adequacy of the statutory mechanisms, are matters about which the community is appropriately concerned and interested in. I also accept that it is desirable that matters be able to be reported fairly, accurately and comprehensively. I also accept the Secretary's submissions as to the interpretation of s.183 and 184.

56. It is clear that the respondent's name, and nickname, has been published widely in connection with his criminal past. That much is evident from the material attached to the affidavit material provided by the applicant. It is also clear from an article published by the Herald Sun on 14 June 2015 that the respondent's name has been reported with reference to his current circumstances, together with a photograph. A further article from the Herald Sun on Friday 26 June 2015 does not name the respondent, but refers to his current circumstances. The current application is also referred to.

57. Putting aside any inaccuracies in the reports, the tone of the articles and

descriptions of the respondent provide, in my view, considerable support for the proposition that the respondent would have a realistic fear of vigilante action against him should his name and contemporary photo be published. That would constitute a risk to him and anyone accompanying him. In saying that, I do not suggest that the Herald Sun supports any form of violence, or threatening behaviour, but the articles and submissions made suggest that increased community concern and vigilance is part of what is expected if the identity of the respondent and information about his supervision order is published.

58. In addition to the risk to the respondent and those accompanying him is the perhaps more important consideration of the impact of media exposure on the respondent's prospects of rehabilitation. I am satisfied that exposure to the stress of media reporting would increase, rather than reduce, the risk of the respondent re-offending. That would clearly not be in the interests of community protection. That is a particularly concerning matter in view of the fact that the current review of the supervision order has not been completed. Her Honour Judge Wilmoth has not yet made a final decision on the supervision order and its conditions. Her Honour is required to review the suppression order pursuant to s.65(4), and will be able to do so in the light of all the relevant material.

59. The reasons advanced in argument by the applicant in respect of the application proceed on the basis that if granted, information would be published to enable community debate about the respondent and the way in which he is being supervised. It is submitted that community protection would be enhanced. The respondent is not at large in the community. He is always accompanied when outside his residence. No risk has been identified which could be reduced by that type of community debate. As I have said, I am satisfied his rehabilitation would be significantly harmed by the prospect of details of his situation being published.

60. The circumstances dealt with in the review proceedings are not exceptional in the context of supervision orders for serious sexual offenders. The court must be able to frankly discuss the complex details of the offender's treatment, conduct and supervision with report providers without such matters being published unless there are, in reality, exceptional circumstances.

61. Again, Her Honour has not finalised the review or determined the appropriate conditions. In my view it would be premature to have public discussion at this stage about the details of evidence given about the conduct of the respondent whilst on the current supervision order, given that it is currently the subject of review. There is no suggestion that in any time in the near future the respondent will not be subject to a supervision order. The current conditions continue and the respondent is accompanied at all times away from his residence. In that situation I am not satisfied that publication of the details of the evidence would in any way enhance community protection.

Conclusion

62. I have taken into account the matters set out in s.185 of the Act, particularly the protection of children, families and the community. I have considered the public interest in the light of what was said in in *Hogan v Hinch*; especially at paragraph 50, where His Honour Chief Justice French says in respect of the precursor provision: "The making of orders under s.42 requires consideration by the court of the public interest in light of the purposes of the Act, the open-court principle, the common law freedom of speech and the freedom of expression referred to in the Charter."

63. I am satisfied that it remains in the public interest to have the suppression order made by Her Honour in place, and I refuse the application to vary it.

64. I am not satisfied that exceptional circumstances exist such that publication of s.182 matters in Her Honour's reasons of 26 June 2015, or the transcript from

25 June 2015, ought be authorised. The application for an order authorising publication of any parts of those reasons or transcript covered by s.182 is refused.

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