HIGH COURT OF AUSTRALIA

GAGELER J

EDWARD MOSES OBEID APPLICANT

AND

THE QUEEN RESPONDENT

Obeid v The Queen [No 2]
[2016] HCA 10
Date of Order: 20 January 2016
Date of Publication of Reasons: 4 April 2016
S265/2015

ORDER

1. *Pursuant to s 77RE(1)(a) of the* Judiciary Act *1903 (Cth), it being necessary to prevent prejudice to the proper administration of justice, until 11 March 2016, there be no publication of information tending to reveal the identity of the applicant in relation to:*

   (a) the application for special leave to appeal;

   (b) the application to stay the trial proceedings; and

   (c) the application for non-publication orders.

2. *On or before 11 March 2016, either party or any person listed in s 77RG(2) of the* Judiciary Act *have liberty to apply by summons and supporting affidavit for an order varying order 1.*

Representation

G O'L Reynolds SC with D P Hume for the applicant (instructed by Breene and Breene Solicitors)

W J Abraham QC with S F Beckett for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Obeid v The Queen [No 2]

Practice and procedure – High Court of Australia – Non-publication order – Application for non-publication order under s 77RE of *Judiciary Act* 1903 (Cth) – Application for special leave to appeal from orders of Court of Criminal Appeal of Supreme Court of New South Wales dismissing appeal from refusal of single judge to quash indictment or permanently stay criminal proceeding – Application in High Court for stay of criminal proceeding pending determination of special leave application – Respondent applies for non-publication order concerning information tending to reveal identity of applicant – Whether non-publication order should be made.

Judiciary Act 1903 (Cth), ss 77RE, 77RG.

1 GAGELER J. On 20 January 2016, I heard and determined an application for a non-publication order under s 77RE of the *Judiciary Act* 1903 (Cth) in respect of information in connection with an application filed on 15 December 2015 for special leave to appeal. These are the reasons for the orders then made.

2 The underlying application for special leave to appeal was from an order of the Court of Criminal Appeal of New South Wales, which dismissed an appeal from an order of a single judge of the Supreme Court of New South Wales. That single judge refused either to quash an indictment on which the applicant, a former Member of the Legislative Council of New South Wales, faced trial on the charge of wilfully misconducting himself in public office, or to stay permanently the criminal proceeding against him.

3 The application for a non-publication order was made by summons and supporting affidavit filed by the respondent prosecutor on 19 January 2016, just shortly before the time scheduled for the hearing by me of the applicant's application for a stay of the criminal proceeding against him pending the determination of his application for special leave to appeal. My reasons for refusing the stay given on that day have been separately published.

4 The precise orders sought in the prosecutor's summons were: first, that "there be no publication of information tending to reveal the identity of the applicant in relation to the application to stay the trial proceedings; the application for special leave; and the application for non-publication orders" on the ground that such an order is "necessary to prevent prejudice to the proper administration of justice"; and secondly, that such order remain "in force until the determination of the trial, or the matter is disposed of in this Court, whichever is the sooner".

5 On 19 January 2016, I made an interim non-publication order under s 77RH(1) to allow for the giving of notice of the application. The orders I then made were in the following terms:

> 1. Until noon tomorrow, there be no publication of information tending to reveal the identity of the applicant in relation to the application to stay the trial proceedings; the application for special leave; and the application for non-publication orders.
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> 2. The respondent's summons dated 19 January 2016 be listed for hearing at 11am on 20 January 2016.

6 Counsel for the applicant indicated on 19 January that the applicant did not wish to be heard as to the non-publication order and maintained that position at the resumed hearing on 20 January. The trial was at that time scheduled to commence on 10 February 2016, and I was informed that it was expected to be

concluded within either two or four weeks, depending on whether agreement could be reached on some questions of fact.

7 Before dealing specifically with the application in the present case, it is appropriate to say something generally about the practice of this Court in relation to non-publication orders in respect of information in connection with applications for special leave to appeal.

8 Ordinarily, an application for such a non-publication order should be made to the court from whose judgment the application for special leave to appeal is brought, and should be made to that court promptly after the application for special leave to appeal is filed. That court will ordinarily be better placed than this Court efficiently to consider the merits of the application and to tailor any order that may be appropriate. Any order made by that court would generally be expected to extend to the time of the determination of the application for special leave to appeal by this Court.

9 Where an application for a non-publication order is made to this Court, it is to be made by summons and supporting affidavit, and should always be made as promptly as circumstances permit. That is so whether or not other parties to the proceeding in this Court consent to the making of the order.

10 In most instances, such an application will be heard and determined in open court. That will, again, be so whether or not other parties to the proceeding consent to the making of the order. The Court's listing procedures will ordinarily ensure that the court list for that hearing, as routinely posted on the Court's website and notified to media officers the day before the hearing, indicates the nature of the application that is to be made as one for a non-publication order. Those listing procedures will ordinarily be sufficient to ensure that adequate notice is given to permit effective exercise by a person listed in s 77RG(2) of the entitlement conferred by that provision to appear and be heard on the application. A person who chooses to exercise that entitlement need not file a summons or notice of appearance but should notify the Registry of this Court of an intention to appear.

11 The hearing of the application made on 19 January by summons and supporting affidavit having been adjourned until 20 January, the court list for 20 January indicated the nature of the application to be made as one for a non-publication order. No person appeared at the resumed hearing in opposition to the orders sought.

12 The question on the resumed hearing of the application was whether, on the material then before the Court, in terms of s 77RF(1)(a), the non-publication order sought, or some version of it, was "necessary to prevent prejudice to the proper administration of justice".

13 The judgment of the Court of Criminal Appeal from which special leave to appeal was sought was the subject of an order made by that Court under s 8(1)(a) of the *Court Suppression and Non-publication Orders Act* 2010 (NSW) to the effect that "it being necessary to prevent prejudice to the proper administration of justice, [that] judgment not be published pending the determination of the trial"[1].

14 The evidence indicated that between May and December 2015, non-publication orders were made or continued on at least 12 occasions in relation to various interlocutory aspects of the criminal proceeding against the applicant that is pending in the Supreme Court.

15 The first non-publication orders were made in May and July 2015 in anticipation of, and then following, the hearing of an application by the applicant for a trial by judge alone pursuant to s 132 of the *Criminal Procedure Act* 1986 (NSW). The applicant sought a trial by judge alone on the basis that there existed a large volume of adverse pre-trial publicity concerning the applicant over a number of years which would prejudice a jury[2].

16 The initial application for non-publication orders was made by the applicant, not opposed by the prosecution, and granted by a single judge of the Supreme Court on the basis that the interests of justice were served by reducing the "material in the public arena of a controversial type concerning the [applicant], which itself will bear upon the question of a jury trial". The orders only extended to publication of the fact that the applicant had made an application for trial by judge alone and the hearing of that application for non-publication orders.

17 More comprehensive non-publication orders were made the day after the application for a trial by judge alone was refused. The bases upon which the application was refused and the non-publication orders were granted were linked. The judge-alone application was refused on the primary basis that there had been a "falling off" in relation to the volume of adverse publicity concerning the applicant since 2013, which the judge hearing the application referred to as the "fade factor"[3]. In order to guard against a reversal of the fade factor, the judge indicated that non-publication orders in relation to the interlocutory phase of the

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1 *Obeid v The Queen* [2015] NSWCCA 309 at [153].

2 *R v Obeid* [2015] NSWSC 897 at [34], [40].

3 *R v Obeid* [2015] NSWSC 897 at [65].

criminal proceedings against the applicant may assist in the reduction of adverse publicity prior to the empanelment of the jury[4].

18 The same judge proceeded to make those more extensive non-publication orders which continued the earlier non-publication orders regarding the application for a judge-alone trial, and further stipulated that there be no publication of the judgment refusing that application, the evidence and submissions on that application and the listing of the applicant's trial. The final stipulation was sought by the prosecution and unopposed by the applicant and was made on the basis that "there is ... a risk that any publicity concerning the [applicant] between now and the trial, which refers to the trial date, will create a link which will in itself increase the prospect of publicity about him which ... would tend to undermine the operation of the 'fade factor'". The orders were expressed to remain in force until such time as a different order is made by the trial judge.

19 The rationale for similar non-publication orders made by single judges of the Supreme Court and by the Court of Criminal Appeal over the next four months harkened back to that expressed by the judge who refused the application for a trial by judge alone. The orders made by single judges varied as to their duration, in some cases being expressed to take effect until further order of the Supreme Court and in some cases being made without express temporal qualification. The order made by the Court of Criminal Appeal, as already noted, was expressed to apply pending the determination of the trial.

20 In light of the procedural history, I was satisfied that a non-publication order was necessary to prevent prejudice to the proper administration of justice. I reached that state of satisfaction on a different basis from the Supreme Court.

21 This Court's jurisdiction was not invoked to supervise the course of the prosecution of the indictable offence for which the applicant was to be tried[5]. That jurisdiction was exercised by the Supreme Court and had been exercised in relation to the interlocutory phase of the applicant's trial by the making of the non-publication orders to which I have referred. The special leave application to enliven this Court's appellate jurisdiction did not seek to disturb or review those orders.

22 For this Court to publish, or permit the publication of, information which would tend to undermine the efficacy of those existing non-publication orders would have had the potential to prejudice the proper course of the administration

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4 *R v Obeid* [2015] NSWSC 897 at [74]-[76].

5 Cf *Beljajev v Director of Public Prosecutions* (1991) 173 CLR 28 at 32; [1991] HCA 16.

of justice in accordance with the procedure which had been adopted by the Supreme Court and which had not been challenged in this Court. It was on that basis that I considered that the making of an appropriately tailored order by this Court was necessary to prevent prejudice to the proper administration of justice. It nevertheless remained to ensure that the precise order to be made was reasonably certain in its operation and did not overreach in its scope and duration.

23 The practical effect of non-publication might have been achieved at an earlier stage by orders simply requiring the applicant to be referred to by a pseudonym in court documents and restricting access to the whole or part of the court file. The difficulty was that the listing of the applicant's application for a stay of the criminal proceeding against him without those measures having been put in place, combined with the conduct of the hearing of that application in open court, meant that the time had passed when orders of that less restrictive nature could confidently be expected to have had the practical effect of preventing publication of the applicant's identity. An order which in terms prohibited publication was necessary.

24 The order made by the Court of Criminal Appeal having been expressed to prohibit publication until the determination of the trial, I considered that it was appropriate that the order of this Court have a similar scope and duration. That was so notwithstanding my own inclination to think that the reasons underlying that and the other non-publication orders which had been made in the Supreme Court would be likely to abate once the jury was empanelled so as to become subject to the direction of the trial judge[6].

25 In those circumstances, I considered it appropriate to make a non-publication order substantially in the form sought by the prosecutor but to limit the duration of the order to a fixed date shortly after the trial was expected to be concluded. Given the potential for that date to be different, or for there to be some material variation, in the interim, of the non-publication orders that had been made in the Supreme Court, it was appropriate to reserve liberty to apply.

26 The orders were therefore as follows:

1. Pursuant to s 77RE(1)(a) of the *Judiciary Act* 1903 (Cth), it being necessary to prevent prejudice to the proper administration of justice, until 11 March 2016, there be no publication of information tending to reveal the identity of the applicant in relation to:

    (a) the application for special leave to appeal;

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6 Cf *Dupas v The Queen* (2010) 241 CLR 237 at 246-247 [21]-[22], 250-251 [35]-[39]; [2010] HCA 20.

(b) the application to stay the trial proceedings; and

(c) the application for non-publication orders.

2. On or before 11 March 2016, either party or any person listed in s 77RG(2) of the *Judiciary Act* have liberty to apply by summons and supporting affidavit for an order varying order 1.