

HIGH COURT OF AUSTRALIA

NETTLE J

Matter No M73/2018

AB (A PSEUDONYM)

APPELLANT

AND

CD (A PSEUDONYM) & ORS

RESPONDENTS

Matter No M74/2018

EF (A PSEUDONYM)

APPELLANT

AND

CD (A PSEUDONYM) & ORS

RESPONDENTS

AB (a pseudonym) v CD (a pseudonym)

EF (a pseudonym) v CD (a pseudonym)

[2019] HCA 6

27 February 2019

M73/2018 & M74/2018

ORDER

Pursuant to s 77RE(1)(a) of the Judiciary Act 1903 (Cth), by reason of the necessity to protect the safety of a person or persons within the meaning of s 77RF(1)(c) of the Judiciary Act, there be no publication of the real names or images of EF's children or either of them in connection with EF, or in connection with these proceedings or the subject matter of these proceedings, until publication of the final report of the Royal Commission into the Management of Police Informants and thereafter for a period of not less than 15 years.

Representation

P J Hanks QC with E M Nekvapil and D P McCredden for AB in both matters (instructed by Victorian Government Solicitor)

T K Jeffrie for CD in both matters (instructed by Solicitor for Public Prosecutions (Vic))

P W Collinson QC with C M Harris QC for EF in both matters (instructed by MinterEllison)

R J Sharp with M R Wilson for the Commonwealth Director of Public Prosecutions in both matters (instructed by Director of Public Prosecutions (Cth))

No appearance for the Victorian Equal Opportunity and Human Rights Commission

W B Zichy-Woinarski QC with J M Davidson appearing as amici curiae in both matters (instructed by Russell Kennedy Lawyers)

S Mukerjea for the Royal Commission into the Management of Police Informants, intervening (instructed by Holding Redlich)

O P Holdenson QC for The Herald and Weekly Times Pty Ltd, The Age Company Ltd, Nationwide News Pty Ltd and Seven Network (Operations) Limited, intervening (instructed by Macpherson Kelley)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

AB (a pseudonym) v CD (a pseudonym)

EF (a pseudonym) v CD (a pseudonym)

Practice and procedure – High Court – Suppression and non-publication orders – Power to make – Where risk of harm to persons associated with party to proceeding "acute" – Whether non-publication order necessary to protect safety of persons.

Words and phrases – "administration of justice", "necessary to protect the safety of any person", "non-publication order", "public interest in open justice".

Judiciary Act 1903 (Cth), ss 77RE, 77RF(1)(c).

1 NETTLE J. This is an application by EF for orders pursuant to s 77RE of the
2 *Judiciary Act 1903* (Cth) ("the Judiciary Act") to prohibit publication of the
names and images of her children ("HI" and "JK") in connection with these
proceedings or the subject matter of these proceedings.

2 The application is supported by a substantial body of affidavit evidence of
which, relevantly, the effect is that, because of EF's previous role as a police
informant, she and her children are now at grave risk of harm from persons
disaffected by her actions.

The application to the Court of Appeal

3 Substantially the same evidence was recently tendered in support of an
application by AB in the Court of Appeal of the Supreme Court of Victoria,
pursuant to ss 17 and 18(1)(c) of the *Open Courts Act 2013* (Vic) ("the Open
Courts Act") and the inherent jurisdiction of the Supreme Court, for orders
including that there be no publication of the real names or images of EF, HI or
JK in connection with the Supreme Court proceedings.

4 The Court of Appeal rejected the application to prohibit publication of
EF's name and image, for reasons which included the presumption under s 4 of
the Open Courts Act in favour of disclosure of material to which the court must
have regard, and the requirement under s 18(1) of the Open Courts Act that such
an order be "necessary to prevent a real and substantial risk of prejudice to the
proper administration of justice that cannot be prevented by other reasonably
available means" (s 18(1)(a)), or, alternatively, "necessary to protect the safety of
any person" (s 18(1)(c)). The Court of Appeal held in substance that, far from
prejudicing the proper administration of justice, publication of EF's name and
image by the Royal Commission into the Management of Police Informants
would be calculated to ensure to the greatest extent possible that the
administration of justice is advanced by identification of cases which may be
affected by EF's previous conduct, and that a non-publication order with an
exception that permitted the Royal Commission to do its job would be ineffective
and unenforceable. The Court of Appeal were also not satisfied that the orders
sought were necessary to protect the safety of EF, because, in substance, their
Honours said, given previous publication of EF's name and image, their Honours
were not persuaded that the increase in publication of EF's name and image likely
to occur upon termination of existing suppression orders would materially
increase any risk to EF's safety.

5 The Court of Appeal similarly rejected the application to prohibit
publication of the names and images of HI and JK, but for less extensive reasons.
The Court of Appeal observed that the names and images of HI and JK are not
relevant to the Royal Commission's inquiry, the details had been redacted from
the court files, and the media interests had stated that it was unlikely that they
would wish to publish those details. But, as against that, the Court of Appeal

stated that the assessment of risk of harm to EF and her children involved an element of speculation, and it was relevant that, although a number of people with convictions for serious offending had known for some time about EF's previous activities, there was no evidence to date of any attempt having been made to harm EF or her children. On that basis, the Court of Appeal concluded that they were not satisfied that the orders sought were necessary to protect the children's safety.

- 6 The application to this Court is not in any sense an appeal from the orders of the Court of Appeal. It is a new and different application for orders under different statutory provisions. But it is significant that the relevant statutory criteria are not dissimilar to some of those considered by the Court of Appeal. For that reason, their Honours' reasons are pertinent.

Relevant statutory provisions

- 7 Section 77RD of the Judiciary Act provides that in deciding whether to make a suppression order or non-publication order, the High Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

- 8 Section 77RE of the Judiciary Act provides so far as is relevant that the Court, by making a suppression order or non-publication order on grounds hereafter mentioned, may prohibit or restrict the publication or other disclosure of information tending to reveal the identity of or otherwise concerning any person associated with any party to or witness in a proceeding before the Court, or of information that relates to a proceeding before the Court and is information that comprises evidence, or of information about evidence, or of information lodged with or filed in the Court.

- 9 "Publish" is defined in s 77RA of the Judiciary Act in substance as disseminating or providing access to the public or a sector of the public by any means including publication in a newspaper or other written publication, broadcast by radio or television, public exhibition, or broadcast or publication by means of the internet.

- 10 "Non-publication order" is defined in the same section in substance as an order that prohibits or restricts publication of information.

- 11 "Suppression order" is defined in the same section in substance as an order that prohibits or restricts disclosure of information by publication or otherwise.

- 12 Section 77RF(1) of the Judiciary Act provides so far as is relevant that the grounds for making a suppression order or non-publication order include that:

"(a) the order is necessary to prevent prejudice to the proper administration of justice;

3.

(b) ...

(c) the order is necessary to protect the safety of any person".

13 Section 77RI of the Judiciary Act provides so far as is relevant that, in deciding the period for which a suppression order or non-publication order is to operate, "the High Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made".

Necessary to protect the safety of HI and JK

14 This application is made on the basis that the orders sought are *necessary* to protect the safety of HI and JK. As this Court has observed, "necessary" is a word which denotes more than what is merely convenient, reasonable or sensible¹. As a constituent of the collocation "necessary to protect the safety of any person", "necessary" connotes that the Parliament is not concerned with trivialities². It has been suggested that "necessary" in this context permits of two possible constructions: either that it must be established on the balance of probabilities that, absent the order sought, the person would suffer harm; or alternatively, satisfaction on the balance of probabilities that the order is necessary to protect the person's safety, the latter being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm³. As it appears to me, the latter construction is to be preferred.

15 The criterion is not one of necessity to prevent harm to a person but of necessity to protect the safety of a person. And safety is a protean conception which is certainly informed by the nature and gravity of apprehended harm and the risk of its occurrence. To take but one, prosaic example, no one today rationally doubts that the wearing of seat belts while travelling in a motor car is necessary to protect the safety of drivers and passengers. At the same time, it is certainly not the case that, but for wearing a seat belt, it is more probable than not that an occupant of a moving motor car will suffer harm. That is not to suggest that just any risk of harm will suffice. To repeat, the provision is not concerned with trivialities. But what it is intended to convey is that, because the idea of safety invariably entails the assessment of risk, it should be regarded as sufficient

1 *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [31]-[32] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ; [2010] HCA 21.

2 See and compare *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 234 per Bowen CJ; *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [31]-[32] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

3 *DI v PI* [2012] NSWCA 314 at [49]-[51] per Bathurst CJ (McColl JA and McClellan CJ at CL agreeing at [92], [93]).

to satisfy the test of "necessary to protect the safety of any person" that, upon the evidence, the court is satisfied of the existence of a possibility of harm of such gravity and likelihood that, without the order sought, the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable.

16 As was submitted on behalf of The Age Company Ltd, which opposed the application, EF faces the difficulty that the Court of Appeal found that it was not necessary in order to protect the safety of HI and JK to make an order prohibiting publication of their names and images in connection with the Supreme Court proceedings. Other things being equal, I should be hesitant to depart from that finding. But, as it appears to me, there are a number of compelling considerations which lead to the conclusion that it is necessary in order to protect HI and JK's safety to make an order prohibiting publication of their names and images in connection with these proceedings.

17 I agree with respect with the Court of Appeal that any assessment of the risk to HI and JK involves a degree of conjecture. In this case, however, it is a degree of conjecture that is informed by the unchallenged opinion evidence of very senior and appropriately experienced police officers that the current level of risk to the safety of HI and JK is "acute" and will further increase with publication of EF's name and image upon expiration of current non-publication orders on 1 March 2019. It was contended on behalf of The Age Company Ltd that the police evidence was "undermined" by evidence that, so far, there has been relatively limited interest shown in the matter abroad as measured by reference to the number of overseas computer searches of and in relation to the matter conducted since the revocation of special leave in November 2018. I note, however, that The Age Company Ltd eschewed an opportunity to cross-examine the police deponents and, in any event, as is explained in the police evidence, public interest in the matter is predicted to surge once the identity of EF is publicly disclosed.

18 It is true that those persons most likely to be disaffected by EF's conduct as a police informant have known for some time of what she did in that capacity, and either have known or could easily have ascertained the fact that she has children. And to date no harm has been done to her or to them. Unlike the Court of Appeal, however, I do not regard that as a particularly significant consideration, and certainly not as something sufficient to undermine the unchallenged police assessment of the risk to HI and JK. Some of EF's former clients most affected by her activities as a police informant are still in gaol and likely to be so for a considerable time. Others with a motive for revenge may well have reason to wait, as it were, until the smoke has cleared. Even now, the Royal Commission is only beginning its inquiry, and common sense and ordinary experience suggest that the risk of retaliatory action will remain and very possibly increase during the inquiry and for a substantial period of time

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thereafter. As was observed at the time of revocation of special leave in November 2018, this is a wholly exceptional case.

19 Naturally, orders of the kind sought will not entirely eliminate the risk to HI and JK. But as is disclosed in one of the confidential affidavits filed in support of the application, which was not before the Court of Appeal, unless publication of HI and JK's names and images is prohibited, the publication of that information will surely aid in identifying HI and JK's location, erode the effectiveness of measures likely to be implemented to protect HI and JK, and thus maintain, and potentially increase, the risk of harm being done to them.

20 To that must be added that HI and JK are children of relatively tender years who were not and are not involved in any manner in the Supreme Court proceedings or these proceedings. It is not suggested that the interests or administration of justice would be at all compromised by non-publication of their names and images. There is no evident basis to suppose that public understanding of the judgments of the trial court or the Court of Appeal, or of this Court, would be affected. Nor is there any legitimate public interest in the publication of the details of EF's children in connection with the subject matter of the Supreme Court proceedings or these proceedings. The Royal Commission acknowledges that the names and images of the children are not relevant to its inquiry and that it has no interest in opposing the application. Neither CD nor the Commonwealth Director of Public Prosecutions opposes the application. And apart from The Age Company Ltd, responsible sections of the press and electronic media, represented in this Court pursuant to s 77RG(2) of the Judiciary Act under the rubric of the media interests, have rightly not sought to say anything against it.

21 Subject, therefore, to one further consideration, I consider that it is necessary to make an order to protect the safety of HI and JK. That one further consideration is the duration of the order. As I have noticed, s 77RI of the Judiciary Act requires the Court to ensure that such an order operate for no longer than is necessary to protect the safety of HI and JK. Exactly how long is necessary is difficult to say. Like the assessment of risk to HI and JK, it involves an element of conjecture. It is also essential to bear in mind that a primary objective of the administration of justice is to safeguard the public interest in open justice. Doing the best I can, however, in light of the seriousness of EF's previous infractions of her obligations to persons who, it is thought, are most likely to seek retribution; the time that some of them may remain in gaol before having free opportunity to take revenge; and HI and JK's ages, I have concluded that it is necessary that the order operate until publication of the final report of the Royal Commission into the Management of Police Informants and thereafter for a period of not less than 15 years.

Conclusion

22 I shall make orders accordingly.

