**IN THE SUPREME COURT OF VICTORIA**
**AT MELBOURNE**

COMMON LAW DIVISION

BETWEEN

No. 5928 of 2001

**THE QUEEN**
**(Ex Parte THE ATTORNEY-GENERAL for the STATE OF VICTORIA)**

Applicant

- and -

**RAYMOND TERRENCE HOSER**

First Respondent

- and -

**KOTABI PTY LTD (ACN 007 395 048)**

Second Respondent

**APPLICANT'S AND RESPONDENTS' LIST OF AUTHORITIES**

*Ambard v Attorney-General for Trinidad and Tobago* [19361 AC 322 *Anissa*

*Pty Ltd v Parsons* [1999] VSC 430 (8 November 1999)

*Attorney-General New South Wales v Mundey* [1972] 2 NSWLR 887

*Attorney-General v Times Newspapers Limited* [1974] AC 273

*Bell v Stewart (1* 920) 28 CLR 419

*Colina v Torney* (Family Court, Ellis J, 2 March 2000)

*Davis v Baillie* [1946] VLR 486

*Exparte BreadManufacturers Ltd,. re Truth and Sportsman Ltd* (1937) 37 SR

(NSW)

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*Gallagher vdurack* (1983) **152** CLR 238

*Gilbert Ahnee* **vdirector** *ofpublic Prosecutions* [1999] 2 AC 294; [1999] 2 WLR
**1305**
***Giyt'llan v*** County ***Court*** of ***Victoria*** and anor [2001] VSC 360 (13

September 2001)

*Hammersley Iron Pty Ltd v Lovell* [1998 19 WAR 316

*John Fairfax and Sons v McRac (1* **954)** 93 CLR 3 51

*John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198

*John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81

*Keeley v Brooking (1* 979) 143 CLR 162
*Lange v Australian Broadcasting Corporation (1* 997) 189 CLR 520

*Levy v The State of Victoria* (1997) 189 CLR 579

*Lewis v Ogden* (1984) 153 CLR 682
*Magistrates' Court at Heidelberg v Robinson* [20001 VSCA 198

*Maslen v The Official Receiver (1* 947) 74 CLR 602

*Nationwide News Pty Ltd v Wills (1* 992) 177 CLR 1

*Pennekamp v State offlorida* (1946) 328 US 331
*R v Brett [* 1 950] VLR 226
*R v Crockett* [2001] VSCA 95
*R v Dunbabin* (1935) 53 CLR 434
*R vfletcher,. expartekische* (1935) 52 CLR 248
*R v Gray* [1900] 2 QB 36
*R v Kopyto (1* 987) 47 DLR (4th) 213; (1987) 62 OR (2d) 449

*R v Nicholls (1* 911) 12 CLR 280
*Rann v Olsen* [2000] SASC 83
*Re Borowski* 91971) 19 DLR (No.3d) 537
*Re Colina & Anor,. Ex Parte Torney* [1999] 200 CLR 386

*Re Perkins* (unreported, Victorian Court of Appeal, 3 April 1998)

*Re: Special Referencefrom Bahaman Islands [1* 8931 AC 138

*Registrar of the Court ofappeal v Willesee* [1984] 2 NSWLR 378

*Saltalamacchia v Parsons* [2000] VSCA 83 (15 May 2000)

*Solicitor General v Radio Avon Ltd* [1978] 225
*Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211

*Theophanous v Herald and Weekly Times Ltd (1* 994) 182 CLR 104

*Witham v Holloway (1* 995) 183 CLR 525

ATTORNEY-GENERAL v. HOSER

RESPONDENTS' LIST OF AUTHORITIES

1 *R v. Nicholls* (1911) 12 CLR 280.

2. *R v. Fletcher,. ex parte Kisch* (1935) 52 CLR 248.

3. *R v. Dunbabin; ex parte Williams* (1935) 53 CLR 434.

4. *Ambard v. Attorney-Generalfor Trinidad and Tobago* [19361 AC 322.

5. *Pennekamp v. State of Florida (1* 946) 328 US 33 1.

6. *Maslen v. Official Receiver* (1947) 74 CLR 603.

7. *R v. Brett* [19501 VLR 228.

8. *John Fai@ & Sons v. McRae* (1955) 93 CLR 351.

9. *Attomey-General (NSW9 v. Mundey* [19721 2 NSWLR 887.

10. *Gallagher v. Durack* (1983) 152 CLR 238.

11. *Registrar of Court of Appeal v. Willesee* [19841 2 NSWLR 378.

12. *Lewis v. Ogden* (1984) 153 CLR 682.

13. *R. v. Kopyto* (1987) 24 OAC 81; 39 CCC (3d) 1.

14. *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1.

15. *Witham v. Holloway* (1995) 183 CLR 525.

16. *Lange* (1995) 182 CLR 104.

17. *Anissa Pty Ltd v. Parsons* [1999] VSC 430 (8 November 1999).

18. *Re Colina; exparte Torney* (1992) 200 CLR 386.

19. *Ahnee v. Director of Public Prosecutions* [19991 2 AC 294.

20. *Saltalamacchia v. Parsons* [20001 VSCA 83 (15 May 2000).

21. *Magistrates' Court at Heidelberg v. Robinson* [20001 VSCA 198.

22. *Colina v. Torney* (Faniily Court, Ellis J, 2 March 2000).

23. *R v. Crockett* [20011 VSCA 95.

24. *Giffillan v. County Court of Victoria* [20011 VSC 360 (13 September 2001).

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OUTLINE OF RESPONDENTS' SUBMISSIONS

Sunnuary

1 . The publication of the books did not constitute the offence of scandalising the

Court.

2. Alternatively, if the conduct of the respondents would otherwise contravene the law of contempt, then that law is invalid *pro tanto* since it -

(a) iinpairs freedom of conununication on matters of government and politics;

(b) is not "reasonably appropriate and adapted" to achieving the legitimate object of protecting the administration of justice; and

(c) accordingly, infringes the implied constitutional freedom of communication, and is therefore invalid.

**The offence of "scandalising the Court"**

3 The offence of scandalising the Court is, or should be, narrowly defined.'

4. The very notion of "scandalising" is archaic. According to The Australian Concise Oxford Dictionary,' "scandalise" means ~

> *"offend moral feelings, sense of propriety, or ideas of etiquette ".*

*5 .* In the United Kingdom, as long ago as 1899, the offence was said to be obsolete.' In 1999, the House of Lords, while recognising the existence of the offence, noted that such proceedings were rare and none had been successfully brought for more than 60 years.'

6. The law of contempt is, of course, not concerned with hurt feelings, but with the protection of the administration of justice.'

7. The offence is, or should be, confined to those cases where the publication has a clear tendency to damage the administration of justice and where, as a result, protection is required.

8. The test developed in the United States, albeit in a different constitutional setting, is of assistance. A publication should not be punishable unless it creates-

> *"a clear and present danger [of damage to the administration ofjusticel of high imminence".'*

***GilbertAhneevDirectorofPublicProsectaions[1999]2AC294at306E;*** cf.Nationwide *News Pty* **Ltd** *v* **Wills** at **3 1.**

. **Oxford University Press, 1987 p** 994.
. ***McLeodvStAubyn[1899]AC549at561;*** secalsoBrettat228.
. ***Ahnee*** (supra) at 305H.
**5** ***Pennekamp*** v ***State*** of F7otida (1946) 328 **US** 331 at *Ahnee* (supra) **at** 306B.
6 *Pennekamp* **(supra).**

9. The entire rationale for the availability, and utilisation, of the summary procedure is that the publication is such as to create an urgent need to protect the administration of justice.'

10. The test of "impairing" or "undermining" public confidence in the administration of justice is unacceptably imprecise, subjective and uncertain.

There is no damage

11. Robust criticism of particular courts, judges and magistrates is a cormonplace.'

12. Some of the most trenchant criticism comes from within the justice system itself.'

13. There is nothing to suggest that criticism of this kind damages the administration of justice, in the sense of iinpairing the ability of judges and magistrates to carry out their duties in accordance with law. Nor is there any basis for asserting that public confidence is affected.

14. The same applies to criticisms contained in the relevant books. The books were published in August 1999, more than two years ago."

*15.* The delay in the bringing of these proceedings bears eloquent testimony to the lack of any relevant effect on the administration of justice.

7 *Attorney-General New Sotah Wales v Mundey* [19721 2 NSWLR 887 at 912A-B; *Maslen v. The Official receiver* (1947) 74 CLR 602. *Mundey* (supra) at 910.

. See eg. *Crockett; Giffillan v County Court of Victopla and anor* [20011 VSC 360 at *Magistrates' Court at Heidelberg v Robinson* [2000] VSCA 198 at para 12 per Brooking SA; *Suttin(?)* at paras 6 & 7 per Tadgell JA.

The tendency **of** the publication

16. Whether or not a publication is calculated to cause damage of the requisite kind to the administration of justice must be judged by reference to all of the circumstances, in particular -

(a) the form, content, presentation and circulation of the work;

(b) the status of the author in relation to the subject-matter;

(c) the purpose of the publication.

17. In the present case, the following circumstances are relevant:

(a) the work is self-published;

(b) its circulation is very limited;

(c) the author is writing not as an expert on law or criminal justice but as someone who has been subjected to its processes;

(d) the author has a long-standing, demonstrated commitment to investigating and exposing what he perceives to be impropriety in the administration of justice;

(c) his expressed intent is to secure improvements in the administration of justice, by drawing attention to its perceived deficiencies."

**Criticisms of the courts is necessary in** a **democracy**

18. It has long been recognised that -

*"it is in the public interest, and particularly in the interest*
*of the administration ofjustice, that members of the public*

Hoser **affidavit** para 5.
Victoria Police Corruption - 2 p. 18.

> *should have the right publicly to criticise the public acts of judges and courts".*"

19. Moreover -

> *'criticism does not become contempt because it is 'wrong-headed' or based on the mistaken view of the facts or of the law. Nor, in my opinion need it be respectfully courteous or cool the unemotional. 7here is no more reason why the acts of courts should not be trenchantly criticised than the acts of other public institutions, including parliaments. ""*

20. The law of contempt of court will only be attracted where it is shown, beyond reasonable doubt, that the criticism was made otherwise than in good faith.

21. The prosecution must fail on this ground. No such proof has been established. On the contrary, no other conclusion is open but that the respondents were acting in good faith in making the criticisms complained of.

**The implied freedom of conununication**

22. Alternatively, if the respondents would be liable to conviction at common law for the offence of scandalising the Court, then the law of contempt is in its application to the respondents invalid.

23. Since *Lange v Australian Broadcasting Corporation, 14* the operation of the law of contempt is subject to the

overriding operation of the implied constitutional freedom of political communication.

24. Since the law burdens the freedom of such communication, the question is whether the law is reasonably appropriate and adapted to achieving its object, being the protection of the system of administration of justice."

12 *Mundey* (supra) at 908A; *Nicholls* at 286; R *v Dunbabin* (1935) 53 CLR 434 at

13 *Mundey* (supra) at 908B.

14 (1997) 189 CLR 520.

is *ibid* at 561-2.

25. Care must be taken in defining the end to which the law is directed. The object of protecting administration of justice means to protect it against actual damage, in the sense of -

(a) inhibiting the ability of a judge to decide a case fairly and without external pressure;

(b) producing the level of obedience to orders of the Court.

26. The conduct in question creates no risk of any such damage. Accordingly, an application of the conunon law of contempt in relation to that conduct is not "appropriate and adapted" to the legitimate end which the law exists to serve.

**Dated:** 23 October 2001

C **M Maxwell**

**D A Perkins**

**P D Nicholas**

**J Manetta**