TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION

MELBOURNE

THURSDAY, 6 DECEMBER 2001
BEFORE THE HONOURABLE JUSTICE EAMES

No 5928 of 2001

B E T W E E N: THE QUEEN (ex parte ATTORNEY-GENERAL FOR THE STATE OF VICTORIA)

Applicant

V.

RAYMOND TERRENCE HOSER
First Respondent
- and

KOTABI PTY LTD
Second Respondent

MR H.JOHN LANGMEAD, SC, appeared on behalf of the Applicant.

MR C.M. MAXWELL, QC, with MR D. PERKINS, appeared on behalf of the Respondents.

S E N T E N C E

HIS HONOUR: I have found both respondents, Raymond Terrence Hoser and Kotabi Pty Ltd, guilty on one count of contempt by scandalising the court. It is now my task to impose sentence upon them.

The contempt in this case relates to the book titled "Victoria Police Corruption 2", written by the first respondent and published by the second respondent. The Particulars of contempt relate to statements made concerning two County Court Judges

before whom the first respondent appeared in criminal proceedings. The details of the statements published and the circumstances in which they were published are fully set in my written Reasons for Decision given on 29 November 2001, and it is therefore unnecessary that I deal with them again now.

I conclude that, as to both Judges, the published statements did not constitute fair comment made in good faith. The comments amounted to serious and baseless allegations of bias and impropriety against the Judges, the material being published with malice.

These proceedings were brought pursuant to r.75 of the Supreme Court Rules. Punishment is prescribed by r.75.11 which prescribes that for a natural person the sentence may be by way of imprisonment or a fine, or both. In the case of a company punishment may be by way of a fine or sequestration, or both.

The Crown has proved two prior offences against the first respondent: a conviction for Perjury in the County Court on the 4 October 1995 at which time he was sentenced to six months' imprisonment with two months suspended for two years; the second prior offence was at Melbourne Magistrates' Court on 9 November 1994 when, without proceeding to a conviction, he was fined $400 with costs on a charge of assaulting police.

In his submissions on penalty Mr Maxwell QC, Senior Counsel for the respondents, stressed the fact that many of the passages which had been relied on by the Crown as Particulars of the

offences were found by me not to constitute contempt, and that in the course of examining the Particulars I had identified a number of important issues concerning the administration of justice. Thus, he submitted Hoser's criticisms had served a public interest in this way. Mr maxwell submitted that whilst I found that the publications had a tendency to undermine the administration of justice, there was no evidence that they had actually done so.

Counsel submitted that the first respondent had been penalised to a significant degree by the mere fact of my adverse findings as to the credibility and integrity of the published statements in his book. He submitted that the contempt was committed in circumstances where Hoser felt a deep sense of grievance as to the convictions which led to the publication of the criticisms which constituted. the contempt.

The instances of contempt in this case are serious, in my opinion. They were calculated, and were widely. disseminated, and Hoser and his company earned substantial profits from publication of the book in which they were published.

Contempt proceedings are not brought in order to

soothe hurt feelings of judges or magistrates. The enforcement of the contempt power is for the benefit of the community, not the judges or magistrates. The rule,of law depends, to a substantial degree, on public trust in the integrity and impartiality of its judicial officers.

Prom time to time judicial officers may make decisions which are wrong or unfair, and the appeal system is intended to correct injustice. No-one would pretend that the appeal system is infallible, and the system of law in a democracy must allow for close scrutiny and robust criticisms of the failings of the system. But no system of justice can be unaffected by baseless and malicious allegations of bias and impropriety made against judicial officers who, by virtue of their position, are unable to respond to the criticism. People who make such baseless criticisms are not performing a public service. They are undermining a vital public institution.

In this case, I have concluded that Mr Hoser's primary motive in making these baseless comments was not the public interest, but self-interest, in seeking to cast doubt on his conviction for perjury.

There are a number of reasons why a sentence of imprisonment would seem appropriate in this case. The Solicitor-General submitted that this was a case where personal and general deterrence were important considerations, because of the risk of

there being re-offending behaviour by these respondents and to discourage any other persons tempted to commit such contempt.

The first respondent does not offer any apology for his contempt. He makes no claim of remorse. He maintains the position that his comments were made in good faith and were fair comment. Through his counsel, however, Mr Hoser has given an undertaking to the court that he will ensure that the five passages to which this offence relates will be blacked out in any future copies of the book before it is sold. He did not offer any undertaking to remove those other passages which I identified as being untrue or unfair statements, but which did not cross the line from defamatory abuse into contempt of court.

It seems to me that, notwithstanding what I am sure will be good legal advice, Mr Hoser may continue to publish material in the sort of reckless manner that has brought him to court an this occasion, and will be at risk of committing further contempts.

I had tendered before me statements made by Mr Hoser on his Internet site on the day I gave my Reasons for Decision. As he there made clear, he had received legal advice not to publish such statements about the case in that way; but he chose to do so and in the process demonstrated, once again, his inability to accurately report the findings or rulings of courts, which displease him, and his willingness to employ ill-considered language to make those inaccurate points. Such a response gives

me very little confidence that he will avoid committing further acts of contempt in the future.

The Solicitor-General submitted that the first respondent should be sentenced to imprisonment, but that such a sentence might appropriately be wholly suspended. He submitted that upon such a sentence for Hoser and upon an order for costs being made on an indemnity basis as against both respondents, the company should be convicted without further penalty. Mr Maxwell, for the respondents, submitted that there should be no order as to costs, and that both defendants should only be fined.

Notwithstanding the risk of further offending, and those aggravating factors which I have identified, the factors identified by Mr Maxwell in mitigation persuade me that imprisonment is not the appropriate punishment in this case. The principle that imprisonment be a last resort is no less important with respect to contempt than with respect to other offences, in my opinion. That being my conclusion, I also do not consider that it would be appropriate to impose a sentence of imprisonment even if I intended to then wholly suspend that sentence, and whether or not that suspended sentence was to be imposed in addition to a fine. I have concluded that as to both defendants a fine is the appropriate punishment.

The first defendant is aged 39 years and is married with two small children. The respondent's taxation returns for the financial year 1999/2000 disclose that Kotabi had income from

sales of books of $112,775, and gross profit after deduction of costs of sales of $62,734. The taxation return for the company lists expenses which reduce that gross profit to a zero net profit.

When questioned, Mr Hoser claimed a total lack of knowledge of the accounts of his company, even being uncertain initially whether his wife drew a wage from the company in that financial year. The records show that Mr Hoser drew a salary of $25,000 per annum from his company, Kotabi, and that an employee (whom I conclude was his wife) earned a salary,of $10,000 from the company. In addition, there was an unexplained sum of $10,000 shown as having been paid to a "related entity". Notwithstanding the fact that he is the sole director and shareholder of the company, Mr Hoser professed that he had no knowledge of any related company or of the circumstances of such payment.

I was not shown any financial records for the financial year 2000/2001. Mr Hoser claimed that the income at Kotabi will be substantially reduced in that financial year, with sales of books being in the order of 30 to 40 per cent less than in the previous year. In the absence of any records, I place little weight on his assertion in that respect. I was given no information as to any significant debts which he might have, or as to his asset situation. In my view, Mr Hoser should be regarded as being a successful author and publisher of books, and to have a family income of not less than $45,000 per annum.

I do not consider that he has provided me with a full and frank disclosure of his financial situation.

In my view, whilst punishment by way of fine rather than imprisonment is the appropriate penalty, any fines must be of such severity as to provide strong discouragement for repetition of such an offence. In imposing fines on both respondents I will take into account that I propose to make an order of costs as against both respondents.

The usual order as to costs where contempt is established is that costs be awarded on a solicitor/client basis. The Solicitor-General sought costs on that basis.

Mr Maxwell submitted that I should treat this case in the same manner as any other criminal case, where costs would not usually be awarded against the accused person upon conviction.

In my view it has long been held (and r.75 expressly provides for it) that costs are appropriate where contempt of court has been proved, as the prosecution is brought in the public interest to protect the administration of justice. In my view it is appropriate that costs be awarded in this case.

As to the level of costs, Mr Maxwell stressed that one count of contempt was dismissed, and that I had ruled that there was no case to answer on many of the Particulars of contempt included in the first count. Those are relevant factors in determining what order of costs should be made.

However, I do not accept the contention that the Crown has failed to a significant extent in its prosecution. In my view, serious contempt has been proved and costs should follow that event. In the circumstances, however, costs should be limited to party/party costs.

0 R D E R

My orders will be as follows
.#(1) On the count of contempt:
the first respondent, Raymond Terrence Hoser,
will be convicted and fined $3,000;
the second respondent, Kotabi Pty Ltd, will be
convicted and fined $2,000.
.#(2) I order that the respondents pay the plaintiffs
costs to be taxed as between party-and-party.

HIS HONOUR: Is time sought as to payment of the fines

Mr Maxwell?

MR MAXWELL: Would Your Honour just permit me to get some instructions in that regard?

HIS HONOUR: Yes.

MR MAXWELL: Would Your Honour be minded to provide a period of three months for payment?

HIS HONOUR: Yes. Any objection?
MR LANGMEAD: No, there is no objection.

MR MAXWELL: If Your Honour pleases.

HIS HONOUR: Yes.
#(j) I will grant a stay of three months to pay.

That is as to both respondents.

MR MAXWELL: If Your Honour please.