IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. 5928 of 2001

BETWEEN:

THE QUEEN
(Ex parte the Attorney-General for the
STATE OF VICTORIA)

Applicant

-and-

RAYMOND TERRENCE HOSER

First respondent

and

KOTABI PTY LTD
(ACN 007 394 048) Second respondent

OUTLINE OF REPLY SUBMISSION ON BEHALF OF THE RESPONDENTS

No case to answer

1. The test to be applied is whether there is evidence which, if accepted, would provide evidence of each element of the charge.[1]

2. A person can only be convicted of contempt by scandalising if –

> *"the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice".*[2]

3. There is no evidence before the Court from which it could be concluded that the relevant books had that tendency, as a matter of practical reality.

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1 *Wilson v. Kuhl* [1979] VR 315 at 319 per McGarvie J, applying *May v O'Sullivan* (1955) 92 CLR 654 at 648; *Zanetti v Hill* (1962) 108 CLR 433 at 442, cited with approval by the Full Court of the Supreme Court of Victoria in Attorney-General's Reference (No.1 of 1983) [1983] 2 VR 410 at 414.

2 *John Fairfax & Sons Pty Ltd v. McRae* (1955) 93 CLR 351 at 370. This passage was described by the Solicitor-General as the "*locus classicus*".

"As a matter of practical reality"

4. The Crown has led no evidence, and addressed no argument, directed to the question of the effect of the publications as a matter of practical reality. This is evidently because the Crown contends that the Court should –

> *"determine the tendency of the publication by looking at the publication itself, not its impact".*

5. So to formulate the test is to misstate the applicable law in a critical respect. The point relied on by the respondents is made abundantly clear by the approach of Ellis J in *Colina v Torney*.

6. What is important about the decision in *Torney* is not the decision on the particular (very different) facts but the two-step approach which his Honour adopted[3]. That is, the first question was whether the words themselves had a tendency to bring a judge or judges into disrepute. A second, and necessary, question was whether there was the requisite tendency, as a matter of practical reality, to harm the administration of justice. In most of the instances referred to, his Honour concluded that the words had the requisite tendency, but in each case dismissed the charge on the ground that there was insufficient proof of any real risk of damage to the system of justice[4].

7. The Crown contends that the charges in *Torney* were dismissed on the issue of "publication" and that it was otherwise held that "all the other elements of the offence had been made out". It is apparent from the Reasons for Judgment of Ellis J that the charges failed precisely because the critical element – the likely practical effect on the administration of justice – was not made out[5].

8. It is not necessary, and in some instances will be impossible, to prove actual damage to the administration of justice. Indeed, in cases where a real threat to

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3 As stated at T110 in the present proceeding.
4 Paras 48-9, 57-9, 63-4, 72-4 and 83-4.
5 *ibid.*

the administration of justice is apprehended, the urgency of the consequent court action will of necessity prevent any such examination (as a matter of fact) of actual impact on the justice system.

9. But, equally, an examination of that kind is unnecessary where, as in *Gallagher*, the circumstances of the publication and its content are sufficient, without more, to enable the Court to be satisfied that the publication has the requisite tendency, as a matter of practical reality.

10. Thus, in *Gallagher*, the statement was made by a highly prominent union official to representatives of the mass media, and it was inevitable that the remarks would receive the widest circulation. Likewise in the case of *Borowski*, where the remarks were made by a Minister of the Crown to media representatives and included an actual threat of dismissal.

11. In a case such as the present, where considerable time has elapsed since the publication, the Crown could prove actual damage, or threat of damage, to the system of justice if any evidence existed. There being no such evidence before the Court, the Court is entitled to infer that there has been no such damage and that the publications did not have, as a matter of practical reality, the requisite tendency. The Court is in a better position than usual, because of the lapse of time, to make that judgment.

12. Nothing said by the Crown rebuts the inference to be drawn from the delay in the commencement of these proceedings. It cannot be seriously suggested that there was any difficulty in discovering the identity of Mr Hoser (whose photograph appears in each of the books) or his connection with the company. Indeed, the Crown has put into evidence the company search, which has been available at all relevant times and which is relied on by the Crown to show Mr Hoser's connection with the company.

13. Nor is there any evidence before the Court of any action taken by the Attorney-General to stop publication. The evidence merely discloses that Mr Lee of the

Victorian Government Solicitor sent letters in July 2000 directed to ascertaining the extent of publication.

14. The prosecution asserts that it need not be concerned with the truth or falsity of the matters relied on by the author. Yet, at the same time, the Solicitor-General made the following important concession in argument:

> *"Let it be assumed that a publication alleges that Judge X had received bribes in brown paper envelopes. If that was true, I could not suggest it was contempt".*

15. The Crown has thus acknowledged - as it should - that there is a question which arises before an allegation of contempt is made, namely, whether the criticisms are founded on fact. Yet, as Mr Lee acknowledged in evidence, there has been no investigation of the truth of the factual matters upon which Mr Hoser bases his criticisms.

16. The submissions for the respondents do not assert that the books themselves are evidence of the truth of the matters stated in them. Rather, it is the submission of the respondents that the books are to be taken at face value, in the absence of any basis for a suggestion that they should not be so treated.

In good faith

17. Where, taken at face value, a publication presents as criticism in good faith on the basis of facts and matters identified therein, then – notwithstanding that derogatory language may have been used – no contempt of court is committed unless it is shown by the prosecution that the author/publisher was acting maliciously, dishonestly or in bad faith.

18. In the present case, it is not reasonably open to a person reading the books, with ordinary good sense, to conclude that they were published otherwise than in good faith.

The relevance of context (primary submission paras 16 &17)

19. It was submitted for the respondents[6] that the propositions in paragraph 16 of the Outline were uncontentious. It is apparent from the Crown's submission that this is so.

20. In response to a formulation by the Court, the Crown did not dispute that context is a matter to which the Court should have regard.

21. The Crown calls in aid authorities which demonstrate that the purpose of a publication is always relevant.[7]

22. Likewise the status, purpose and content (in particular, reasons) of criticisms by superior courts are said to be relevant to considering their likely effect.

23. Furthermore, the prosecution relies on what is to be inferred from the books themselves about –

    (a) the expertise or otherwise of the author ("I know what I write about and I put forward the facts");

    (b) his "unbalanced and obsessed" view of the police and certain judges;

    (c) the reliability or otherwise of statements made by persons quoted in the books eg. policeman Bingley.

24. No challenge was made to subparagraphs (a), (e) or (f) of paragraph 17 of the Outline. Moreover, it appeared to be conceded that the author did have a (self-proclaimed) commitment to investigating and exposing improprieties.

25. As to circulation (Outline para 17(b)), the only evidence is that 4,500 copies of Book 1 were sold. There is no evidence whatever about the circulation of Book 2, and no basis to draw any inference about the extent of its circulation.

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6 T101.

7 *Fairfax v. McRae* at 371.

26. In a city of more than 3 million people, and by contrast with the daily newspapers[8], a circulation of 4,500 is fairly described as "limited".

The particulars

27. The respondents' submission sought, at some length to place each of the passages complained of in its proper context. The Crown's cursory response is evidently to be explained by the contention that it is the words alone to which regard should be had, regardless of their impact.

28. Some specific matters are to be noted:

- it was asserted that Mr Hoser's belief that the jury would be provided the transcript was a "complete misunderstanding". His inference was, nevertheless, a reasonable one for a lay person to draw;

- the reader of ordinary good sense would recognise immediately that references such as "(grudgingly)" in the transcript extracts were added by the author. Those additions hardly demonstrate that the transcript extracts are false, let alone wilfully false;

- in relation to Magistrate Adams, the Crown apparently accepts that the reader would ascertain that the "1995 publication" referred to was "the Hoser Files". Reference to the front cover clarifies that the "confession" of Bingley occurred after, rather than during, a court proceeding.

Dated: 25 October 2001

C M Maxwell

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[8] "The Age" asserts a weekday circulation of 190,000, the "Herald-Sun" 554,000.

Peter Nicholas

David Perkins