IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE

Suitable for publishing

CRIMINAL DIVISION

Case No. Z01423273
Z01423320
Z01423309

IN THE MATTER of applications pursuant to section 4(1C) of the *Judicial Proceedings Reports Act* 1958

On the applications of:

Hadassa ERLICH
Nechama MEYER
Elisheva SAPPER

MAGISTRATE:	HER HONOUR MAGISTRATE METCALF
WHERE HELD:	Melbourne
DATE OF HEARING:	2 September 2020
DATE OF RULING:	17 September 2020
CASE MAY BE CITED AS:	The applications of Erlich, Meyer and Sapper pursuant to section 4(1C) of the *Judicial Proceedings Reports Act* 1958

RULING

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr Strauch	Mazzeo Lawyers
For the Director of Public Prosecutions	Ms Ruddle	Abbey Hogan Solicitor for Public Prosecutions

HER HONOUR:

1. On 2 September 2020 I heard these three applications.

2. On that day I granted each application, made appropriate orders and indicated that written reasons would be provided at a later date. These are those reasons.

Introduction

3. Ms Hadassa Erlich, Ms Nechama Meyer and Ms Elisheva Sapper (the applicants) apply under section 4(1C) of the *Judicial Proceedings Reports Act* 1958 (the JPR Act) for an order of this court allowing publication of their identity.

4. The applicants were represented by Mr Strauch of counsel. The applicants each filed an Affidavit affirmed on 31 August 2020 setting out the grounds for the application. The applicants are complainants in relation to a number of charges laid against Ms Malka Leifer in 2012, the proceedings for which form the basis of an extradition request currently before the courts in Israel.

5. Although the Director of Public Prosecutions (DPP) is not a party to this matter, Ms Ruddle of counsel appeared on behalf of the DPP to assist the court with relevant information.

6. Ms Ruddle filed written submissions dated 1 September 2020, which were adopted and supported by Mr Strauch. Ms Ruddle also tendered an Affidavit of Ms Kirsten Aaskov, a legal practitioner employed as Deputy Manager in the Policy & Specialised Legal Division at the Office of Public Prosecutions, affirmed 1 September 2020. This sets out information regarding the criminal charges that have been filed in Victoria against Ms Leifer, information relating to the preparation of international extradition requests and information about the status of the extradition proceedings for Ms Leifer in Israel.

Section 4 of the Judicial Proceedings Reports Act 1958

7. Section 4(1A) of the JPR Act prohibits the publishing of details likely to identify a person against whom a sexual offence is alleged to have been committed. The provision makes it an offence for a person to publish or cause to be published identifying details whether or not a proceeding for the alleged offence is pending in a court. The offence is one of strict liability. Under section 4 (4), a prosecution for this offence can only be commenced with the DPP's approval.

8. The JPR Act provides defences to a charge laid under section 4(1A) that differ depending on whether or not a charge for a sexual offence is pending in a court.

9. If no proceedings are pending when the identifying material is published, section 4(1B) makes it a defence to a charge if any of the following apply:

    - No complaint about the alleged offence has been made to a police officer; or
    - The matter is published with the court's permission; or
    - The matter was published with the permission of the person likely to be identified.

10. If a proceeding is pending in a court when the identifying material is published, section 4(1C) makes it a defence to a charge if the publication occurred with the permission of that court, granted on application by a person. This is the provision under which the applicants seek an order of the court.

11. If proceedings have concluded and an accused has been convicted when the identifying material is published, section 4(1CA) makes it a defence to a charge if the matter was published with permission of the court (granted on application by a person, or on the court's own motion) and also with the permission of a victim of the offence who is aged 18 years or older. Section 4(1CB) prevents the court from granting permission under section 4(1CA) if to allow identification would disclose the identity of another complainant in the same proceeding who does not consent to being identified, or who is a child, or "if it is not appropriate in all the circumstances for the identity to be disclosed."

The applications

12. As these applications are brought under section 4(1C) of the JPR Act, the court must first be satisfied that:

    - The applicants are persons against whom a sexual offence is alleged to have been committed; and

    - A proceeding for the offence is pending in this court.

13. If these matters are established, then the remaining issue concerns the matters to be considered by the court in determining whether or not to grant permission for the publication of particulars likely to lead to the identification of the complainants.

Are the applicants persons against whom a sexual offence is alleged to have been committed?

14. Under section 4(1) of the JPR Act, a sexual offence is defined as "an offence under subdivision (8A),(8B),(8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part 1 of the *Crimes Act* 1958 or under any corresponding enactment or an attempt to commit any such offence or an assault to commit any such offence."

15. Ms Aaskov's Affadavit details that charges have been issued for Ms Leifer for a total of 74 alleged sexual offences between January 2004 and March 2008.

16. I am satisfied that the three applicants are the complainants in those charges and that the offences fall within the provisions cited in the definition of "sexual offence" under section 4(1) of the JPR Act.

Are proceedings pending?

17. The Act does not define the meaning of "pending in a court".

18. In her submissions, Ms Ruddle urged the court to adopt the approach applied in sub judice contempt cases when considering whether proceedings are "pending". She submitted that the question of whether a case is "pending" rests with whether the criminal law "has been set in motion"[1]. Examples found in the authorities include when a person has been arrested and charged, when a warrant has been issued and when a person has been arrested overseas and extradition proceedings are pending.

19. She argued that this interpretation of "pending" is also consistent with how the *Criminal Procedure Act* 2009 defines the commencement of a criminal proceeding under sections 5 and 6, which refer to the filing of a charge sheet with a registrar of the Magistrates' Court.

20. In the absence of specific guidance under the JPR Act, in my view it is appropriate to approach the question of whether proceedings are "pending" by considering whether the criminal law has been "set in motion" in the sense already referred to, and by also having regard to the definition of when a criminal proceeding has commenced under the *Criminal Procedure Act* 1958 .

21. I am satisfied that a proceeding is pending in this court under section (41C) of the JPR Act having regard to the following matters as set out in Ms Aaskov's Affadavit:

- On 14 March 2012 a Victorian magistrate issued charge sheets containing 74 charges and a warrant to arrest Ms Leifer;
- In July 2013 the Australian Government made a request to the Government of Israel for Ms Leifer's extradition to Australia to face prosecution for the 74 offences listed in the charge sheets;
- Ms Leifer was arrested in Israel in August 2014 pursuant to the extradition request; and;
- The extradition proceedings in Israel remain on foot.

[1] *James v Robinson* (1963) 109 CLR 593; *R v The Herald and Weekly Times Ltd* (2007) VR 248, 271

22. For the sake of completeness, if I am wrong in categorising the status of the criminal proceedings against Ms Leifer as "pending", then section 4(1B) would apply to these applications. Under this provision, the applicants' permission alone for the publication would be sufficient to found a defence to any charge brought under section 4(1A) – while noting that section 4(1B) in the alternative also allows a court to grant permission upon an application.

What criteria should the Court have regard to in considering whether to grant permission under section 4(1C)?

23. Section 4 of the JPR Act is silent about the criteria that should guide the court in deciding whether or not to grant permission. Further, there are no higher court authorities dealing with section 4(1C) of the Act, despite it having been in operation since 1991.

24. Mr Strauch submitted that the only threshold for success in these applications should be that each applicant chooses to identify herself publicly. He submitted that for the court to require anything further would be to risk causing the applicants additional grief, trauma and stigmatisation, and would be counterproductive to their ability to share their experience and advocate for positive change.

25. Similarly, Ms Ruddle submitted that the paramount consideration for the court in determining these applications should be the choice of the complainants. She argued that this flows from a consideration of the history and intent of the JPR Act in general, and of section 4 in particular.

26. She submitted that the purpose of the prohibition against publication is solely protective in nature, rather than being a measure aimed at ensuring the integrity and fairness of court proceedings for an accused person.

27. She referred the court to the discussion about identifying complainants in sexual offence matters in the report of the Vincent Review, and also to obiter dicta of Kaye J in *The Queen v Hinch (No 2)*[2]:

> "….while section 4 of the *Judicial Proceedings Reports Act* is designed to protect the identity of victims of sexual offences, and thus to spare them from suffering further anguish, it is clear that a second purpose of that provision is to provide an assurance to victims of such offences that, if they report the offence committed against them, and if they give evidence in court, their identity will be fully protected by the law."

28. Bearing in mind the protective purpose of section 4, Ms Ruddle submitted that a complainant's decision to remain anonymous or to be identified should rest with them and that the Court should only curtail their choice in very limited circumstances – such as those referred to in section 4(1CB) – none of which considerations are relevant in the present applications.

[2] [2013] VSC 554

Conclusion

29. In the absence of explicit guidance in the JPR Act or from higher court authority, I must look to the intent of the statute to assist in guiding the appropriate exercise of discretion under section 4(1C).

30. It seems clear that the underpinning rationale for the ban on the publication of identifying details found in section 4(1A) is to protect the privacy of victims and complainants in sexual offence matters, and to encourage the reporting and prosecution of sexual offences more broadly. It is a purely protective provision that has no relevance to other laws and processes that exist to ensure the integrity of the criminal process. Allowing or disallowing the identification of a complainant in a sex offence matter does not impact on the law governing the appropriate reporting of court proceedings, including the rules of sub judice contempt and any orders that a court may make under the *Open Courts Act* 2013*.*

31. In my opinion it follows that the views of an accused person about an application under section 4 of the JPR Act are irrelevant, and an accused person lacks standing to be heard on the issue.

32. It also follows that the granting of permission under the JPR Act to identify a complainant in a sexual offence matter does not in any way sanction the publication of material which has a tendency to interfere with the administration of justice or breach other prohibitions on publication, such as a suppression order. It simply removes a statutory prohibition against publishing identifying information that would otherwise apply.

33. Given the above, in my view the paramount consideration for the court in the present applications is to have regard to the wishes of the applicants.

34. In this case, there are no other relevant considerations that need to be weighed, such as whether allowing their identification might in turn identify a separate complainant who either does not want their identity disclosed, or who is a child.

35. In this case, each applicant's request is a considered one, as reflected in the Affidavit material. In my view the applicants well understand the implications of their identities being publicly known. They have each made an informed decision to waive the right to have their identity protected, and this decision ought to be respected.

36. For the above reasons, permission under section 4(1C) in each application was granted and appropriate orders were made.