IN THE CHILDREN'S COURT OF VICTORIA

CRIMINAL DIVISION

Herald and Weekly Times Pty Ltd — Applicant

v

AB — Respondent

JUDGE:	Grant
WHERE HELD:	Melbourne
DATE OF HEARING:	13 May 2008
DATE OF JUDGMENT:	20 May 2008
CASE MAY BE CITED AS:	HWT v AB
MEDIUM NEUTRAL CITATION:	[2008] VChC 3

REASONS FOR JUDGMENT

Criminal charges - application to identify offender - s.534 *Children, Youth and Families Act* 2005 - ruling.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Ms. G.L Schoff of Counsel	Corrs Chambers Westgarth
For the Respondent	Mr. D. Dann of Counsel	Gibsons

HIS HONOUR:

1. AB is now 17 years old. He was born on the 21 March 1991.

2. On the 16 January 2008, (when aged sixteen) he was charged with two criminal offences. In summary they are –

(i) causing a public nuisance on 12 January 2008 and

(ii) making child pornography on 13 January 2008

3. He was bailed to appear at the Children's Court at (location removed) on 22 February 2008.

4. The initial bail has been varied on a number of occasions. At different times the bail has been varied to permit him to live interstate. The charges are now listed for a contest mention at the Melbourne Children's Court on 1 July 2008.

5. The most recent bail variation on 23 April 2008 continued AB's bail on his own undertaking with conditions. One of the conditions requires AB "to provide the informant with 48 hours notice of any proposed travel interstate and to advise the informant within 48 hours of the defendant's return to Victoria following such travel". Another condition requires the defendant, while interstate, "to be under the substantial supervision of his parents or their responsible nominee".

6. The Herald and Weekly Times (HWT) makes an application for an order pursuant to section 534(1) of the *Children, Youth & Families Act* 2005 that it be permitted to publish a report of the application to vary bail that proceeded on 21 (sic) April 2008. The application seeks permission to –

(a) identify the defendant AB;

(b) identify the charges giving rise to the proceeding;

(c) identify the venue of the court in which the application was heard;

(d) include a picture of the defendant AB; and

(e) identify the orders made by the court on the application in respect of the defendant A B.

7. The reference to a bail variation on the 21 April is not correct. It should read 23 April. I will amend the application accordingly.

8. Clearly the catalyst for this application was AB's entry into the "Big Brother" household in late April 2008. This exposes AB to a national television audience for the period that he remains within the "house".

9. The application is undoubtedly correct in maintaining AB's application to vary bail was motivated by his desire to participate in the Big Brother program. The submission on behalf of the HWT that AB "has been granted bail in order that he can meet his contractual obligations to appear on the BB program" is poorly expressed. Bail was granted and entered on the 16 January 2008. The application on 23 April 2008 was to allow the bail to be varied. That application was granted. A consequence of the granting of the application to vary bail was that AB would be able to participate in the Big Brother program if he so desired.

10. The submission by the HWT argues that AB seeks to benefit from his notoriety as host of a party that attracted police attention and, subsequently, media attention. He has received much publicity and the Herald and Weekly Times is concerned that the public only knows "half the story." According to the submission, what the public needs to know is that he has also been charged with criminal offences. The argument is framed, therefore, around the issue of "public interest." Particular reference was made to remarks of Justice Adams in *R v Robinson* (2000) NSWSC 1157. It should be noted that they were made in regard to legislative provisions that are different to section 534 of the Victorian Act. Section 11(4) (B) of the New South Wales *Children (Criminal Proceedings) Act* 1987 relates to what is described as a serious children's indictable offence. This explains his Honour's remarks about authorising publication of the name of a child offender "where the crime renders that appropriate".

11. Mr Dann, who appears for AB, opposes the application. He referred to the Children's Court website which contains the following paragraph –

> "It is rare for the President to give permission for identifying material to be published pursuant to ss.26(1)(a) or 26(1)(b) of the CYPA and it is likely to be equally rare under ss.534(1)(a), 534(1)(b) or 534(1)(c) of the CYFA. In the past 7 years, the only cases in which such permission has been given have involved:
>
> - Abandoned children where details were permitted to be published in an attempt to locate a parent;
> - Children who were missing or had absconded in an attempt to locate them;

and

- A case in which a TV channel was permitted to identify a child – with consent of child and family – in a program highlighting the success of the child's rehabilitation."

12. These cases, according to Mr Dann, indicate the proper application of discretion under s.534 (1).

13. Mr Dann also submitted that the Court pay particular heed to the comments made by Justice Gillard in *The Queen v SJK & GAS* [2006] VSC 335 at paragraphs 39 to 43. It was submitted that these paragraphs contain a clear statement of the principles to be applied in determining an application of this type. In paragraph 39 his Honour stated - "The principle protecting a young person from being identified in a criminal proceeding is well established, and applies throughout the common law world." His Honour quoted extracts of the decision of Justice Rehnquist of the Supreme Court of the United States in the case of *Smith v Daily Mail Publishing Company* (1979) 443 US 97. For the purpose of this case Mr Dann submits the court should note Justice Gillard's approval of these remarks – "… a prohibition against publication of the names of youthful offenders only represents a minimal interference with the freedom of the press."

14. Prior to the commencement of the *Children and Young Persons Act* 1989 matters heard in the Children's Court of Victoria were heard in closed court. This is still the case in some jurisdictions throughout the world.

15. The United Nations Standard Minimum Rules for the Administration of Justice (also known as the Beijing Rules) of November 1985 state –

> "8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published."

16. The official commentary to the Rules recognises how young people are particularly susceptible to stigmatization. There is reference to criminological research into labelling processes. This research has provided evidence of the detrimental effects resulting from the permanent identification of young people as criminal or delinquent.

17. *The Child Welfare Practice and Legislation Review Report* of 1984 (often referred to as

the Carney Report) recommended that proceedings in the Children's Court should be open to both the public and the media. The "trade off" for opening the court was to recommend a bar on reporting or disseminating any identifying information of children and families. At page 409 of the report there is the following analysis – "The mischief which it is unanimously agreed must be avoided at all costs is the dissemination of information which would, or which could, identify and embarrass individual children and families appearing before the court."

18. The recommendations in the Carney Report were influential in the development of the *Children and Young Persons Act* 1989. The changes to law introduced by that Act opened the Children's Court to the public for the first time in its history. There were, however, two important riders on the open justice principle. In s.19 the court was provided with a wide unfettered power to close the court in appropriate circumstances. Section 26 contained a prohibition as to the publication of identifying information of the children and parties and witnesses involved in the court's proceedings without the permission of the head of the Children's Court.

19. In the Criminal Division of the court the limit on identification of the child/young person subject to proceedings was in line with established principle. It was designed to protect a young person appearing in the Criminal Division from the indignity of being labelled a criminal and the stigma that attaches to that description. In the Second Reading Speech for the *Children and Young Persons Act* 1989 the then Minister stated "The rights of children and young people who come before the court are clearly established in the proposed legislation. The Bill provides that proceedings must be comprehensible to children and their families, respect cultural identity and minimise stigma." Section 534 of the *Children, Youth and Families Act* 2005 significantly reproduces the old section 26. One sub-section not found in the old Act is Section 534(5). It allows publication of accounts of proceedings of the court where those accounts have been approved by the President. There was some discussion during the submission of Ms Schoff about the meaning of s.534(5). In the Second Reading Speech for the current legislation the then Minister explained its purpose as follows – "The Children's Court will be authorised to publish its decisions on its website, provided that the decision does not identify a child or any other party." Section 534(5) was included in the legislation at the request of the court and I am satisfied that its intended purpose was limited to the court's use of its own website for the publishing of de-identified decisions.

20. The importance of protecting children or young people within the court from identification is soundly based in legal principle and is consistent with human rights covenants. This explains why the President is only rarely called upon to determine an application under section 534(1). Applications in the Family Division are determined in accordance with the "best interests" principle. These applications generally relate to children who have been abandoned and there is a need to publish details of identity in the hope that a parent or family member may be located or alternatively, involve children who, having been identified at risk by the Child Protection Division of the Department of Human Services, have gone missing and need to be located.

21. As far as the Criminal Division is concerned, I am not aware of any orders having been made under s.534(1). I am aware of two orders having been made under the older s.26 equivalent. They were both made by my predecessor, Judge Coate. In one case a young person, undergoing sentence of detention for a serious indictable offence, escaped from the place where he was being held. He was regarded as a risk to members of the community. In that case the application to permit identification was granted. The need to ensure the community was properly protected outweighed the need to protect the rights of the young person. In another case a young person was permitted to be identified on television in a program that was to highlight his rehabilitation. It is important to note that this was done with the consent of the young person and his family. I do not mean to imply that these two cases are the only type of cases where an order permitting publication would be made. They are, however, examples, of cases that move beyond mere "public interest."

22. There is no doubt that AB is a young man who has attracted significant publicity because of a party he conducted in January 2008. He has been charged with two offences. One offence – causing a public nuisance – obviously relates to allegations arising from the party. The other charge may also relate to the party in some way but that is not immediately obvious. Following the laying of charges the press in Victoria has been careful to ensure there has been no breach of s.534.

23. At the moment the matters before the court are unproved. AB, like any other defendant in a court, is entitled to the presumption of innocence. He is also a young person appearing in the Children's Court. As such he is, unlike an adult offender, entitled to the protection against identification. I have endeavoured to set out in these reasons why the protection exists. It should only be removed where there are proper grounds for doing so. In this case there are no such proper grounds.

24. I conclude by noting what might happen in this case if the charges were to be found proved. If AB were to be found guilty of the offences he would be dealt with under a different sentencing regime to an adult. If he had no prior convictions it is highly likely that the court would make orders that focus on his rehabilitation. Section 362 of the current Act lists the matters to be taken into account in determining which sentence to impose on a young person. Section 362(1)(d) requires the court to "minimise the stigma to the child resulting from a court determination." It has been said often enough that one of the great aims of the criminal law is the rehabilitation of the young offender. That is generally the focus of orders in the Children's Court. In this respect the comments of Justice Rehnquist are particularly pertinent – "Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public." If this is an important consideration after a matter has been proved, it is an even more powerful consideration where a matter remains unproved.

25. The application is dismissed.

Judge Paul Grant
President
Children's Court of Victoria
20 May 2008