IN THE CHILDREN'S COURT OF VICTORIA

CRIMINAL DIVISION

HERALD & WEEKLY TIMES PTY LTD — Applicant

v

DM (a child), RS (a child) & RJ (a child) — Respondents

--- --- ---

| | |
|---|---|
| JUDGE: | HER HONOUR JUDGE CHAMBERS |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 18 July 2016 |
| DATE OF SENTENCE: | 19 July 2016 |
| CASE MAY BE CITED AS: | HWT v DM & Ors |
| MEDIUM NEUTRAL CITATION: | [2016] VChC3 |

--- --- ---

REASONS FOR DECISION

Catchwords: media application to publish pixilated images pursuant to s534(1)(b) of the *Children, Youth and Families Act 2005* - ruling

| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the HWT | Mr T Moritz | |
| For the first respondent | Mr Imrie | |
| For the second respondent | Mr Smallwood | |
| For the third respondent | Mr Cass | |

HER HONOUR:

1. This is an application by the Herald & Weekly Times Pty Ltd (HWT) for permission to publish pictures and video recordings of children who have been involved in proceedings in the Criminal Division of the Children's Court and in respect of whom the Court has sentenced, or has deferred sentencing under the provisions of the *Children, Youth and Families Act 2005* (the Act).

2. The application is made pursuant to s534(1) of the Act which, relevantly, provides as follows:

   ***534 Restriction on publication of proceedings***

   *(1) A person must not publish or cause to be published –*

   *(a) except with the permission of the President, or of a magistrate under subsection (1A), a report of a proceeding in the Court or of a proceeding in any other court arising out of a proceeding in the Court that contains any particulars likely to lead to the identification of-*

   *(i) the particular venue of the Children's Court, other than the Koori Court (Criminal Division) or the Neighbourhood Justice Division, in which the proceeding was heard; or*

   *(ii) a child or other party to the proceeding; or*

   *(iii) a witness to the proceeding; or*

   *(b) except with the permission of the President, or of a magistrate under subsection (1A), a picture as being or including a picture of a child or other party to, or a witness in, a proceeding referred to in paragraph (a); or*

   *(c) …*

3. The application is made in the context of the involvement of the HWT in a "Youth Summit" being convened by the Chief Commissioner of Police on 21 July, 2016

regarding issues associated with youth crime in Victoria. According to the Affidavit of Fiona Hudson, a journalist with the HWT that has been filed in support of the application, Victoria Police has requested the HWT to assist in raising awareness of the issues the Youth Summit seeks to address. The HWT proposes to do so, according to Ms Hudson's affidavit, by publishing a series of articles in the lead up to the Summit including a feature article which details the criminal offences committed by the respondents to this application, described in the Affidavit as "repeat" youth offenders.

4. In her Affidavit, Ms Hudson deposes that the articles are primarily based on information provided by Victoria Police and include a chronological narrative of the offending, how it progressed across a period of weeks, and will include "details of the sentencing (and any subsequent appeals)". I am proceeding on the basis that the information provided by police to the HWT is an accurate representation of the factual basis upon which the Court sentenced or otherwise dealt with each of the Respondents.

5. Relevant to the application, it is proposed to accompany the print and online articles with images (stills) taken from the CCTV footage of the offending. It is further intended to publish the actual CCTV footage as part of the online content, to be published on the HWT website. In all cases, the HWT proposes to pixelate or distort the faces of the offenders so that, it is submitted, they are unable to be identified.

6. To assist in consideration of this application, the HWT has provided the Court with copies of three draft articles, including the proposed feature article. Mr Moritz, Counsel appearing for the HWT, emphasised that the drafts articles may be subject to further revision and editing, but have been made available to assist the Court in considering the material the HWT intends to publish to inform and advance public debate regarding serious criminal offending committed by young offenders in the lead up to the Youth Summit.

7. In its draft form, the feature article provides a graphic and detailed description of the offending committed by the respondents, presumably as a sample of the type of offending the Youth Summit seeks to address. Whilst I do not intend to repeat the entirety of the proposed article, it will suffice that I outline a portion of what is intended to be published:

*"THE POSSE pull out into the fast food joint about 11am – four thugs aged just 15, 16, 17, 18 crammed into a stolen Subaru Liberty.*

*Armed with a baseball bat, the 17-year-old jumps the counter and storms down a corridor chasing and cornering two young female workers aged 15 and 19, shouting "Give us the ***ing money".*

*The older worker cops a whack in the back with a baseball bat when an incensed offender finds the register empty of cash. The thug grabs her shirt, and drags her to another register, shattering its screen with the bat.*

*"Open the till", he roars. With her hands shaking in fright, it takes the girl several seconds to comply.*

*Bravely, she dashes back to shield her younger colleague, who is curled up on the ground in fear, hands over her head.*

*In another room, the disguised 15-year-old bandit brandishes a tyre lever and rips a phone out of the male store manager's hand before he can call police.*

*He opens the safe and the bandits grab $2500 cash, but clumsily drop a cardboard charity collection box they also try to snaffle, sending coins scattering across the floor.*

*The four bandits flee, reaching warp speed to evade an unmarked police car, and retreat to plot another attack."*

**Submissions on behalf of the respondents**

8. The application is opposed by each of the Respondents.

9. Mr Smallwood, appearing for the Second Respondent, relied on the following extract of the Children's Court website where it deals with s534(1) of the Act:

   *"It is rare for the President to give permission for identifying material to be published pursuant to ss534(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;*
   - *children believed to be in need of protection but whose whereabouts are currently unknown; and*
   - *in a case in which a TV channel was permitted to indentify a child – with consent of child and family – in a program highlighting the success of the child's rehabilitation.*

10. Counsel for the respondents contend that the purpose of publication of the images in this case is in marked contrast with those where publication has been allowed where no issue of child safety or child welfare is demonstrated. The cases summarised in the website, according to the respondents, indicate a proper application of the discretion under s534(1) of the Act.

11. I was further referred to the decision of Judge Grant in *Herald & Weekly Times Pty Ltd v AB* [2008] VChC3 where His Honour outlined the legislative background and rationale for s534 and its predecessor provisions. Notably, 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. The changes brought about by that Act, opening the Children's Court to the public, were balanced by

two important riders to the principles of open justice. One was the ability to close the court in appropriate circumstances. The other was the prohibition contained in s26, the predecessor provision to s534 of the Act. As outlined by His Honour, this caveat 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".

12. Counsel appearing for the respondents submitted that they fear being identified by family members, friends and associates who are not aware of their role in this offending, or by other members of their community, including other young people held in detention, if their images (even where pixilated) accompany the feature article. Moreover, that the respondents are ashamed of their offending behaviour, and submit that the shame and embarrassment to them and to their families will be exacerbated by the publication of the images. They fear becoming the "face" of the problems leading to the Youth Summit being convened.

13. Relevant to the application before me is the decision of Judge Couzens in *Australian Broadcasting Corporation v Department of Human Services & others* [2014] VChC1. In part, that decision necessitated a consideration of the legislative provision where, as here, the application related to a pixilated/distorted picture of a child who in the accompanying narrative is identified as the child the subject of a proceeding (in that case, a proceeding in the family division of the Court). His Honour held [at page 12-13] that a pixilated/distorted /partial picture of a child or other party or witness in a proceeding in the Children's Court was subject to the prohibition in s534(1)(b) whether or not publication of the picture was likely to lead to the identification of the child, party or witness.

14. Judge Couzens reached this conclusion having regard to the language used in s534(1)(b), and in particular the absence of the words appearing in s534(1)(a) and (c) prohibiting material "that contains any particulars likely to lead to the identification [of the child]", stating:

*"In my view, if the legislature had intended to limit the prohibition to only pictures that were likely to lead to the identification of a child, other party or witness, it would have been expected to include those words as it did with (1)(a) and (c)".*

15. Mr Moritz, appearing for the HWT, sought in his submissions to emphasise that the pixilation of the images protects the respondents from being identified or identifiable. He did not however make any detailed submissions urging an alternate construction of s534(1)(b) to that articulated by Judge Couzens in *ABC v DHS.* In the absence of good reason to depart from this decision, and noting that this was a considered decision of a former President of the Children's Court, I intend to adopt the approach of Judge Couzens to my consideration of this application. In doing so, it is instructive that Parliament has not utilised the language it purposely adopted for s534(1)(a) and (1)(c). Section 534(1)(b) does not limit the prohibition of images of a child, a party or a witness involved in proceedings in the Children's Court to those likely to lead to their identification. It is a broader prohibition; prohibiting the publication of such images without the permission of the President, even where the images may not lead to the identification of those whose image is represented in picture.

**Consideration**

16. Clearly, in exercising my discretion under s534(1) of the Act, I must have regard to a number of competing interests.

17. First, in considering any proceedings under the Act, it is necessary to have regard to and, to the extent possible, give effect to the purposes of the Act contained in s3, which includes making provision in relation to children who have been charged with or been found guilty of offences. Parliament has sought to achieve this objective by creating a distinct sentencing regime for children with discrete sentencing considerations set out at s362 of the Act, in marked contrast to the sentencing considerations applicable to adults under the *Sentencing Act 1991.* These considerations include those aimed at achieving the important objective of

rehabilitating the child whilst minimising the stigma to the child resulting from a Court determination.

18. The distinctive nature of the Children's Court criminal jurisdiction was recently considered by the Victorian Court of Appeal in the decision of *Webster (a Pseudonym) v The Queen* [2016] VSCA 66 where President Maxwell and Redlich JA observed at [7] –[9]:

*" …What is so distinctive, and so important, about juvenile justice is that it requires a radically different balancing of the purposes of punishment. The punitive or retributive considerations which are appropriately applied to adults must be largely set to one side.*

*There are three reasons for this. First, the young offender's immaturity is seen as markedly reducing his/her moral culpability; secondly, custody can be particularly criminogenic for a young person, whose brain is still developing; and thirdly, the very process of development and maturation which is underway is seen as providing a unique opportunity for rehabilitation and – hence – for minimising the risk of reoffending."*

19. The desirability of avoiding stigma to a child is also emphasised in the procedural guidelines set out at s522 of the Act which requires the Court, as far as practicable, to minimise the stigma to the child and his or her family in any proceeding, including an application under Part 7.5. The Court is also to have regard to the expressed wishes of the child.

20. Against this, the case of the applicant is framed in the context of the public interest in promoting an understanding of and facilitating public debate surrounding the nature and extent of criminal offending by a small cohort of young offenders.

21. In my view, this application must be considered in the context of the harm sought to be ameliorated by s534(1) of the Act. As stated in *Howe v Harvey (2008) 20 VR 638 at 651* the provision is intended to protect against "the stigmatisation and

interference with the privacy of the child and his or her family caused by identifying them as participants in court proceedings". In so stating, the Court echoed the fundamental rights of a child as outlined in Article 40 of the UN Convention of the Rights of the Child to "have his or her rights to privacy fully respected at all stages of the proceedings".

22. Here, even where the facial images of the offenders are pixilated or distorted, there are other identifying features of the offenders that are relevant to my consideration. These include, but are not limited to, distinctive clothing or clothing generally worn by the offender or their physical characteristics including their height, build, gait and particular mannerisms that may otherwise lead to identification. This is relevant to my consideration of the potential stigmatising impact of publication of the images on the respondents.

23. The HWT is able to report, in the manner outlined in paragraph 7 on the nature and extent of the offending conduct leading to the charges before the Court, provided it does so in a manner that is not likely to lead to their identification. A question arises whether the public interest in understanding the nature and extent of the offending is furthered by the incorporation of the images and CCTV footage. Moreover, that the public interest in being so informed overrides the competing interest in avoiding stigma to the child, protecting the child's privacy and facilitating the important objective of furthering the child's rehabilitation to achieve the twin objectives of reducing the risk of further offending and promoting community safety.

24. In respect of this application, having the benefit of considering the draft feature article and the detail contained in that article regarding the offences, I do not consider that the public interest or public understanding is significantly advanced by the incorporation of even heavily redacted images of the offending. Certainly, not to the extent that it overrides the legislative objective of protecting child offenders from stigmatisation and promoting the rehabilitation of those who are the

subject of proceedings in the 'distinctive'[1] criminal jurisdiction of this Court.

25. The applications are refused.

**Judge Amanda Chambers**

**President, Children's Court of Victoria**

[1] See Webster (a Pseudonym) v the Queen [2016] VSCA 66