

2. Calculated to interfere?

The *Sunday Herald Sun* and its then editor have been cleared of contempt of court for editorialising that Victorians would look with special interest at the jail term imposed on a double killer

Justice David Harper's decision in the Victorian Supreme Court on March 20 gives some valuable insight into the relationship between the courts and the press.

His decision also contains some messages for the press about how it handles references to the courts. While the commercial considerations of the press were acknowledged, there was a note of caution about putting them above public interest.

The editorial was published between the defendant's guilty plea and sentencing.

Its last paragraph said: "Justice Bernard Bongiorno will make his sentencing decision soon. Given the climate of community concern over what are perceived to be soft penalties for serious crimes, Victorians will be watching with special interest".

The day after publication, Justice Bongiorno directed contempt charges be laid against the then editor, Alan Howe, and the Herald & Weekly Times Pty Ltd.

He said at the time: "Yesterday, on page 38, the *Sunday Herald Sun* published an editorial concerning the case of *R v Sharpe*, which was heard before me on Friday afternoon last, 20 May, in Melbourne. I adjourned the case part heard to 6 June next. The publication of that editorial would appear to have constituted a *prima facie* case of *sub judice* contempt of this court. The case had not been completed. It is part heard and, particularly, Sharpe has not been sentenced."

The resultant contempt of court charge was particularised as follows:

The publication of the editorial constituted a contempt of the Supreme Court in that it had a tendency or was calculated (in that it was objectively likely) to interfere with the due administration of justice in that:

- (i) The editorial had a tendency or was calculated (in that it was objectively likely) to undermine confidence in the administration of justice by giving rise to a serious risk that the Supreme Court of Victoria (constituted by the Honourable Justice Bongiorno) would appear not to have been free from any extraneous influence; and
- (ii) The editorial had a tendency or was calculated (in that it was objectively likely) to influence the Honourable Justice Bongiorno in his decision-making process."

The word "calculated" in the context of contempt does not mean "intended".

The prosecution did not allege that there was actual interference with the administration of justice, instead alleging that the editorial had a tendency to interfere. It argued that the editorial would give rise to a serious risk that the court would not appear to have been free from any extraneous influence – that even if the editorial wasn't likely to influence Justice Bongiorno the public might think that it did.

Justice Harper set out the issue this way: "A charge of contempt must be proved beyond reasonable doubt; and the test is whether there is either an actual interference with the administration of justice or a real risk, as opposed to a remote possibility, that justice will be interfered with.

A gruesome case

The Sharpe case was particularly gruesome. Evidence revealed about the killing of his wife and jury would have turned the stomach of most readers. The editorial set out the facts simply and succinctly, without sensationalism. Said Justice Harper:

The account it gave of the prisoner's crimes was restrained and, within the limits imposed by its restraint, accurate. For this, the respondents are to be commended.

But would readers think that the *Sunday Herald Sun* was trying to tell Justice Bongiorno what to do? Justice Harper:

Editorials in the *Sunday Herald Sun*, directed to the pending result of a particular case, are extraneous to the considerations to which the courts may have regard in considering that particular case. The respondents know this; or, if they do not, their knowledge of the theory of democratic governance is sadly deficient. They nevertheless chose to publish the editorial between the plea and the sentence.

I have no reasonable doubt that by doing so they intended to influence their readers into thinking that, unless the court imposed upon Mr Sharpe imprisonment for life without remissions, its sentence would be less than adequate; and if this opinion were brought to the attention of the judge, so much the better for the respondents. To that extent, they put the commercial interests of the first respondent (HWT) – which are generally well served by the generation of controversy, fear and (so long as it is not directed at itself, or those it favours) "outrage" – above the public interest.

The public did of course have a legitimate interest in the imposition of appropriate punishment upon Mr Sharpe, as upon all offenders. So did the *Sunday Herald Sun*. The problem is that the two interests are not the same, although – in common with the media in general – the *Sunday Herald Sun* likes to portray the two as in alignment.

The public interest

Justice Harper referred to public interest in the case as this:

The public interest is in a measured and fully informed discussion about sentences and sentencing policies both in the broad and in the particular case, including a dispassionate analysis of the correctness or otherwise of an individual sentence, and of the costs and benefits of punishment for the individual offender, for his or her family and dependants, and for the general community. Above all, the public interest is in the imposition of sentences which are based upon such an analysis by a judge beholden to nothing else but those matters to which he or she must by law have regard. To the extent that these interests do not coincide with the commercial interests of the first respondent, it will be tempted to prefer the latter.

Doubtless it will often succumb to that temptation, as it did in this case. In any event, the respondents are entitled to express their views, informed and balanced or otherwise, provided they are not in the process guilty of an actual interference with the administration of justice, or behaviour which gives rise to a real risk, as opposed to a remote possibility, of such interference.

In this case, the editorial in question was informed and balanced - except for its timing.

And of the possibility of contempt in this case?

I am not satisfied beyond reasonable doubt that the editorial had a tendency or was objectively likely to influence Bongiorno J in his decision-making process. Nor am I satisfied beyond reasonable doubt that the editorial had a tendency or was objectively likely to undermine public confidence in the administration of justice by giving rise to a serious risk that the Court would appear not to be free from any extraneous influence.

And, significantly, he pointed to the public's role:

Each case must be judged against its particular circumstances. One relevant consideration is whether the editorial was so strident that, if its message was ignored by the judge when sentencing the accused, there would arise a real possibility of uninformed public clamour of the kind which would bring the courts, and therefore the administration of justice, into disrepute.

This was not such an editorial. Not only was it a measured recitation of the facts, but the facts were such that a severe punishment, involving a long period of incarceration, was, one would have thought, inevitable. Had it not been imposed (as in fact it was) the public would have been entitled to a careful and thorough explanation from the judge of his reasons for deciding otherwise. The public could then - assuming that the sentencing remarks were reported carefully and in appropriate detail - make an informed decision about the merits of the sentence. A public expression of dissent that did not descend into a personal attack on the judge would in those circumstances have been entirely within the democratic right of those who disagreed with him.

Strident views

And to the question of whether the press could ever be in contempt for expressing strident views about cases and sentences. Yes, said Justice Harper, it was possible that such a case could arise:

An editorial published between conviction and sentence, in which the mitigating circumstances were ignored and the severest possible sentence stridently demanded, might well amount to a very serious contempt.

That's a clue for editors: when proffering criticism or analysis of decisions and options, don't ignore any mitigating circumstances that had been presented to the court.

While suggesting it was inappropriate for the newspaper to recommend a particular sentence, he said this did not amount to contempt, saying not every wrongful act was a crime.

He observed:

A sentencing judge reading the editorial would not, I think, be influenced in the slightest by it, while acknowledging with wry appreciation the respondents' skill in testing the boundaries of the law of contempt. The *Sunday Herald Sun's* reading public would, I also think:

- (a) accept that here was a sentence to watch;
- (b) be reinforced in its assumption that there was in the community a climate of concern over what are perceived to be soft penalties for serious crimes;
- (c) give not a second's thought about whether that concern was warranted;
- (d) make a mental note to expect outrage were anything much less than life without parole to be imposed; but
- (e) not conclude that the judge had already been trapped, or even affected, by any extraneous influence.

Justice Harper said he had noted previous litigation involving HWT in which contempt of court had been alleged but not found.

The appropriate conclusion is that there was not a serious risk that the court would appear by reason of this editorial to be subject to outside influence.

And in dismissing the application for a contempt conviction, he concluded:

I am satisfied that no judge faithful to his or her oath would have been swayed consciously or unconsciously by the editorial in question into doing other than that which his or her conscience dictated.

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