Names or no names?

A Judge's statement that "no names are to be published in relation to the matter" was ruled no order by the Appeals Court.

The NSW Court of Appeal has ruled that the statement of a District Court Judge made in the course of a sexual assault trial - "No names are to be published in relation to the matter" - did not amount to an order of the court.

Kirby P, Hope JA and Rogers AJA came to that unanimous conclusion on 18 August 1988 in John Fairfax and Sons Limited v District Court of NSW & Ors.

That matter arose out of the trial before Herron J in the District Court of Clive Milton Wilson; a prominent Lord Howe Island churchman, who pleaded guilty to two charges of indecently assaulting a 15-year-old girl on the island in 1987.

John Fairfax and Sons Limited sought relief in the Court of Appeal from what it believed was an order by Herron J that no names were to be published in relation to the District Court hearing of the charges against Wilson.

The Court of Appeal was told that at the committal hearings of the charges in 1987 the presiding magistrate had not made any order suppressing Wilson's name. His name and address had been published in The Sydney Morning Herald in its report of the committal proceedings, as had his connection with the church, details of the offences and the character evidence given on Wilson's behalf by the former NSW Premier, Mr Wran, and a former Supreme Court judge, Mr C.L.D. Meares.

In the District Court the following exchange occurred, according to the shorthand notes of the Herald court reporter, Mr Daniel Moore. (The Court, at the invitation of the parties, acted on Mr Moore's notes which were more elaborate than the official transcript.)

Crown Prosecutor: Seeking a non-publication order

His Honour: No names are to be published in relation to the matter.

Crown Prosecutor: Was only seeking that name of victim not be published.

His Honour: The names of the people involved are not to be published. Because once you have a name published the other can usually be identified.

Counsel for John Fairfax & Sons Limited argued that what Herron J had said amounted to an order and that such an order showed an error of law and of jurisdiction on the face of the record. Opposing the claim, counsel for the Attorney-General argued that Herron J's statement was not an order but merely a passing observation on the terms of Section 578A(2) of the Crimes Act 1900. (There was no explicit reference in either the official transcript or the reporter's notes of his Honour's statement to Section 578A or to Section 578.)

Section 578A(2), added to the Crimes Act in 1987, says in part:

"A person shall not publish any matter which identifies the complainant in prescribed sexual offence proceedings identification of the complainant."

In the leading judgment Kirby P closely examined the words used by Herron J. He conceded that "No names are to be published in relation to the matter" did amount to "emphatic and even imperative language". However, he thought the explanation "Because once you have a name published the other can usually be identified" allowed the possibility that what Herron J was doing was attempting to describe his perception of the effect of Section 578A(2). If the latter interpretation was the correct one, Kirby P said, then it appeared Herron J had gone beyond the terms authorised by the sub-section.

"It would be to overstate the effect of Section 578A, and to distort the sensitive balance of our law against the background of which that subsection is written, to accept an operation of Section 578A as of right, in the terms in which Herron DCJ expressed it. To that extent, I am inclined to consider that Herron DCJ may have mis-stated the operation of the subsection. By his statement "No names are to be published" and "the names of people involved are not to be published", his Honour appears to have contemplated a wider embargo on publication of the names of persons involved in the case than ever Section 578A contemplated."

Kirby P said it was not entirely clear whether Herron J's words should be characterised as an order or as a partly erroneous description of the operation of Section 578A. He said it should not be readily imputed that a judge had gone beyond jurisdiction. Where there was ambiguity, it might be more readily inferred that the judge had not gone beyond jurisdiction. He noted that his Honour had not used the word "order". He said the reference to names and the nature of the case suggested that Herron J had Section 578A in mind. In the end he preferred to conclude that what Herron J had said was not an order.

Accordingly, Kirby P declined to make the first of the declaration sought by John Fairfax & Sons Limited, that the District Court had been in error in making the order. He also declined to make the second declaration sought, that John Fairfax & Sons Limited was at liberty to publish Wilson's name in connection with the proceedings before Herron J, because the Court did not normally give advisory opinions, especially where the criminal law or the law of contempt were concerned. He thought it undesirable that the Court should "invade unnecessarily" the functions of the criminal courts.

Nevertheless, Kirby P decided to make a declaration in the form that was ultimately sought by John Fairfax & Sons. He made this decision because of the "justifiable confusion" in the effect of what Herron J had said, because that confusion had initiated the proceedings in the Court of Appeal and because he considered what his Honour had said had gone beyond the terms of operation of Section 578A. He therefore proposed that the Court:

"Declare that what his Honour Judge Herron said on 8 August 1988 of and concerning these proceedings was not, and did not purport to be, an order under Section 578 or Section 578A of the Crimes Act 1900 or otherwise."

Hope JA, agreeing with Kirby P, concluded:

"Especially where, as in the present case, nobody is present to make submissions on the public interest in knowing what goes on in court, judges should be very careful and hesitate long before making comments of this kind."

Rogers AJA agreed with the orders proposed. He said all his Honour had been concerned to do was to protect the victim of the criminal offence, not, as had been suggested, to hide the offender behind a screen of secrecy. He thought it was very difficult for the Court to say whether his Honour should have expressed the view he did, because his Honour had been in possession of considerably more information than had members of the Court of Appeal.

John Fairfax and Sons Limited was ordered to pay its own costs as well as the costs of Wilson's submitting appearance.

Richard Coleman specialises in defamation law with Mallesons Stephen Jaques.