SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Dempsey (No 3)* [2017] QSC 338
PARTIES:	**R** (applicant) **v** **VINCENT O'DEMPSEY** (respondent)
FILE NO:	SC No 1046 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application for non-publication order: identity of police informant
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2017
JUDGE:	Applegarth J
ORDER:	**Subject to any affected party making an application and submissions, and until further order, there be no publication of the name or identity of the witness, [the name of the witness appears in the formal order]**
COUNSEL:	D L Meredith for the prosecution A J Glynn QC for the defendant
SOLICITORS:	Office of Director of Public Prosecutions for the prosecution Robertson O'Gorman Solicitors for the defendant

[1] At a pre-trial hearing on 16 March 2017 the prosecution sought a non-publication order in relation to the name of a witness who was to give evidence in the trial of *R v O'Dempsey*. That witness is a police informant. The defendant did not oppose the making of such an order and a non-publication order was made that day until further order. On 16 May 2017 the prosecution, with the support of the defendant, asked for the non-publication order to continue. I was persuaded to continue the order until further order. These are my reasons for that decision.

Relevant principles

[2] The principle of open justice is one of the most fundamental aspects of the justice system in Australia. Exceptions to the principle are few and are strictly defined[1].

[3] Our judicial system is based on the notion that proceedings are conducted in open court. Justice must not just be done; it must be seen to be done[2].

[4] In exceptional circumstances, a case or part of it will be heard in camera. Also, in exceptional circumstances, a non-publication order, which restricts publication of all or parts of a court proceeding, will be made. However, information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment or distress[3].

[5] The cases recognise that there is a "significant distinction between holding proceeding[s] in camera and holding proceedings in open court but with directions having the consequence of concealing the names of witnesses (with or without a further direction limiting publication of evidence)"[4].

[6] This can involve use of a pseudonym to conceal an identity. It can involve an order that certain evidence or other parts of the proceeding not be disclosed[5].

Non-publication orders

[7] In dealing with an application for a non-publication or similar order, it must be recalled that it is common for sensitive issues to be litigated and for information that is extremely personal or confidential to be disclosed. The Court of Appeal in *J v L & A Services Pty Ltd* observed:

> "it is of obvious concern that such a paramount principle as the requirement of open justice should not be whittled away on a case by case basis according to individual judges' subjective views of the merits or demerits of the claims to privacy of individual litigants."[6]

[8] In *obiter dicta* in *R v His Honour Judge Noud; Ex parte McNamara* in discussing blackmail and analogous cases, Williams J observed:

> "The court should only depart from the basic principle that proceedings take place in public, and without any limitation thereon, if it is positively established to the Court that without such direction justice could not be done

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1 *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at [17] – [20]; *J v L & A Services Pty Ltd (No 2)* (1995) 2 Qd R 10 at 44-45.
2 *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495 at 520.
3 *J v L & A Services Pty Ltd (No 2)* (1995) 2 Qd R 10 at 45.
4 *R v His Honour Judge Noud; Ex parte MacNamara* (1991) 2 Qd R 86 at 104*; R v Socialist Worker Printers and Publishers Ltd* [1975] 1 QB 637 at 651-652.
5 *David Syme and Co v General Motors Holden Ltd* [1984] 2 NSWLR 294.
6 Supra at 45.

> because of the grave difficulty in having the witnesses come forward in cases of that type." [7]

[9] There are well-established categories of cases that attract non-publication orders. One such category is police informers.[8]

Pseudonym orders

[10] Pseudonym orders restrict the disclosure of the identity of a witness or party, but allow the court to remain open and the proceedings to be reported. The use of pseudonym orders is therefore considered a minimal incursion on the principle of open justice in a case where a witness reasonably fears death, injury, unnecessary loss of liberty or some other evil[9].

[11] The recognised categories where pseudonyms have been allowed include cases to protect the identity of informers.[10]

The present case

[12] Here, the witness is a police informer, and is at risk of being imprisoned on pending, unrelated charges. As such, the risk of retaliation against this witness is substantial, especially if he returns to custody.

[13] Courts recognise risk of retaliation. In *Cain v Glass (No 2)*[11], Kirby P observed:

> "In criminal cases there are many occasions where witnesses fear, sometimes with justification sometimes without, that the giving of evidence will expose them to risks of retaliation, ostracisation and even violence. The law of contempt and specific criminal offences exist to provide protection to such witnesses and potential witnesses in this predicament. In the case of police informers, rules have developed, over many years, to protect the confidential basis upon which police deal with such informers. In part, this is for the defence of the particular witness involved. In part, it is to ensure a continuing flow of helpful information from such a witness. In part, it is to reassure the many other persons who, formally and informally, provide useful information to the police."

[14] In *R v Savvas*[12], Hunt J observed:

> "It is also in the public interest that criminals should be encouraged to give assistance to the authorities by informing on other criminals and by giving

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7 Supra at 106.

8 *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 233-234; *Jarvie v Magistrates Court of Victoria* [1995] 1 VR 84; *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1985) 5 NSWR 465 at 472; *J v L & A Services Pty Ltd (No 2)* (1995) 2 Qd R 10 at 48.

9 *Witness v Marsden* (2000) 49 NSWLR 429 at [143]–[144].

10 *R v Savvas* (1989) 43 A Crim R 331 at 336.

11 At 233-234.

12 (1989) 43 A Crim R 331 at 336.

> evidence (if necessary with an immunity from prosecution) in order to secure their convictions … In the present case, the authorities have given immunities to these two witnesses. The need to protect them from reprisals so far as it is possible to do so is just as much in the public interest because it will encourage others to give similar assistance."

[15] In *Savvas*, Hunt J ruled:

1. There is no judicial power to make an order forbidding publication by the media of the names of witnesses and other material which would serve to identify them.
2. Courts have a power to order that witnesses at a trial should be addressed and referred to in pseudonyms.
3. The onus lies on the party seeking to exclude publicity of the identities of witnesses in court to justify the need for such exclusion.
4. The exclusion turns on necessity.
5. The court must consider the public interest in conducting trials completely openly, as well as the competing public interest of securing convictions by encouraging complainants and other witnesses to come forward.

[16] Views differ about whether there is power to make non-publication orders binding on the public and the media in relation to proceedings conducted in open court. One view is that courts have no such authority. A competing view is that such a power does exist as an aspect of the inherent or implied power of the court.

[17] In *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW*[13], McHugh JA observed:

> "… Courts have no general authority, however, to make orders binding people in their conduct outside the courtroom. Judicial power is concerned with the determination of disputes and the making of orders concerning existing rights, duties and liabilities of persons involved in the proceedings before the courts. An order made in court is no doubt binding on the parties, the witnesses and other persons in the courtroom. But an order purporting to operate as a common law rule and to bind people generally is an exercise of legislative — not judicial power. Nevertheless, conduct outside the courtroom which deliberately frustrates the effect of an order made to enable a court to act effectively within its jurisdiction may constitute a contempt of court. But the conduct will be a contempt because the person involved has intentionally interfered with the proper administration of justice and not because he was bound by the order itself …"

[18] If this view is adopted, then non-publication orders may have the effect of binding people indirectly, in that a publication which interferes with such orders may constitute

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[13] (1986) 5 NSWLR 465, at 477.

a contempt. The contempt would be on the basis of an intentional interference with the proper administration of justice, which the making of the order was designed to effect[14].

[19] In considering whether or not to make a non-publication order, I am required to consider the necessity of making an order .[15]

[20] It is important that persons who assist police by providing information be protected from recriminations. This includes informants who are prisoners or who are at risk of being sent to jail, as in the present case. Courts recognise this risk in the informer's discount in sentencing, and in making pseudonym and others orders when necessary.

[21] It is in the interests of justice to encourage potential witnesses to come forward with information to the police. The need to protect the interests of justice and the public interest in that respect[16] justify an order that will limit the public disclosure of the witness' identity.

[22] In making any order, I should take the course that least restricts the principle of open justice whilst providing adequate protection to the competing interests which the order is intended to protect. A non-publication order, rather than a pseudonym order, has certain attractions. To quote a submission in *Savvas*[17]:

> "… because the witnesses would be addressed and referred to by their own names, such a procedure is said to avoid an impression being formed by the jury that these two witnesses are being treated specially upon the basis that the court itself has accepted the genuineness of their fears of reprisal and thus the veracity of their evidence against the accused."

[23] The witness' name is known to the defence, as it should be. It is known to persons who attend court. Persons who attend this trial, including the media, also know of the non-publication order which I have made.

[24] To publish the name or identity of the witness, at least at this stage, risks revealing to the general public and the prison population his identity as a police informer. Disclosure of his identity to the general public, and to prisoners, elevates the risk of reprisals against him. Disclosure of his identity will also deter others from coming forward with information to the police in the future.

[25] For these reasons, I was persuaded on 16 May 2017 to continue the order I had earlier made. Such an order was sought by the prosecution and supported by the defence until further order. Once pending charges against the witness are resolved and the witness has served any custodial period, the balance may be different, with the risk of retaliation in jail being reduced.

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[14] *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* at 477; *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 333–334; *R v Savvas* (1989) 43 A Crim R 331; *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 at 142.

[15] *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* at 477.

[16] See the observations of Pincus JA in *J v L & A Services Pty Ltd (No 2)* (1995) 2 Qd R 10 at 49.

[17] At 333-334.

[26] I will hear further submissions as to the form of the order. In my view its present form is too broad. The present order is:

> "Subject to any affected party making an application and submissions, and until further order, there be no publication of the name or identity of the witness, [the name of the witness appears in the formal order]."

[27] I will circulate to the parties and provide the Court Information Officer narrower forms of order for the consideration of the parties and affected non-parties.