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Supreme Court of Victoria

Kyriazis v County Court of Victoria (No 1) [2017] VSC 636 (26 October 2017)

Last Updated: 26 October 2017

IN THE SUPREME COURT OF VICTORIA

Not Restricted

AT MELBOURNE

COMMON LAW DIVISION

JUDICIAL REVIEW AND APPEALS LIST

S CI 2017 00265

VASILIOS KYRIAZIS

Plain

v

COUNTY COURT OF VICTORIA

First defendant

and

RHYS DOUGHTY-COWELL

Second defendant

JUDGE: Bell J

WHERE HELD: Melbourne

DATE OF HEARING: 15 September 2017

DATE OF JUDGMENT: 26 October 2017

CASE MAY BE CITED AS: *Kyriazis v County Court of Victoria (No 1)*

MEDIUM NEUTRAL CITATION: [2017] VSC 636

PRACTICE AND PROCEDURE – application to audio-record judicial review proceeding by self-represented party – whether express written permission should be granted – open statutory discretion to give such permission – relevant considerations – ensuring court security – principles of open justice and free communication of information – human right to freedom of information including to seek, receive and impart information and ideas of all kinds – ensuring proper administration of justice – *Court Security Act 1980 (Vic) s 4A(4)(a), Charter of Human Rights and Responsibilities Act 2006 (Vic) s 15(2).*

APPEARANCES: Counsel Solicitors

For the plaintiff In person

For the first defendant No appearance

For the second defendant Mr C Carr Solicitor for the Office of Public Prosecutions

HIS HONOUR:

1 At the start of the hearing of the application in this court, Vasilios Kyriazis sought permission to audio-record the

proceeding under s 4A(4)(a)(i) of the *Court Security Act 1980* (Vic). These are my reasons for granting that permission.

2 As more fully described in the substantive judgment,^[1] the application was made by an originating motion seeking relief under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) for judicial review of orders made on 1 December 2016 by his Honour Judge Chettle, sitting in the County Court at Melbourne on appeal from the Magistrates' Court of Victoria, convicting and discharging him for committing certain motor traffic offences. Mr Kyriazis contended, among other legal grounds, that his Honour breached the rules of natural justice in conducting the hearing, and sought quashing and remittal orders. In the substantive judgment, I uphold the application and make those orders.

3 The hearing of the application was conducted in one day in which Mr Kyriazis appeared as a litigant in person and the informant (the second defendant) appeared by counsel and instructing solicitor. The County Court (the first defendant) entered a submitting appearance. The evidence was contained in affidavits and no witness gave evidence in person. No suppression, confidentiality or like orders had been made in relation to the proceeding and the hearing was conducted publicly in open court in the usual way. The subject matter of the proceeding was the legality of the orders made in the County Court by way of conviction and discharge of Mr Kyriazis for committing the road traffic offences with which he had been charged.

4 It is well to begin consideration of the application to audio-record the hearing by drawing attention to the recent judgment of *PQR v Secretary, Department of Justice and Regulation (No 1)* where it was emphasised that 'the principles of open justice and free communication of information are of fundamental importance under ... the common law and the [*Charter of Human Rights and Responsibilities Act 2006* (Vic)].'^[2] In relation to the common law, it is the case that legal proceedings in courts are presumptively heard and determined in public;^[3] further, decisions of courts must usually be supported by reasons^[4] and these must usually be given publicly. In relation to the Charter, it is the case that s 15(2) stipulates the right to freedom of expression (which includes the several rights to 'seek, receive and impart information and ideas of all kinds'), which is not absolute (see 7(2) and s 15(3)). Under s 6(2)(b) of the Charter, the right to freedom of expression in s 15(2) applies to courts (and tribunals) in relation to legal proceedings.^[5]

5 An important corollary of the principles of open justice and free communication of information is that 'absent any order by the court or legislative restrictions to the contrary, all interested persons including journalists have the right to attend and report upon the hearing and determination of legal proceedings'.^[6] This necessarily implies that all persons interested have the right (subject to law) to make a note or record of what occurs during the proceeding, which applies equally to parties to the proceeding, including an accused person in a criminal trial, and other participants and their legal representatives. For a journalist, party or other person interested, this is a means of seeking and receiving information and ideas, and facilitating the ultimate imparting of information and expression of ideas, in relation to the proceeding, which engages the human right to freedom of expression in all its elements. Traditionally, making a note or record of what occurs in a proceeding has been done in writing. In the contemporary age, new technologies enable such a record to be made in audio, visual or audio-visual form, as now regulated by s 4A of the *Court Security Act*.

6 Section 4A provides:

4A Offence to record proceeding

- (1) A person must not intentionally make a recording of a proceeding except in accordance with subsection (2), (3) or (4).

Penalty: 20 penalty units.

- (2) An officer, employee or agent, or any person authorised by or on behalf, of Court Services Victoria may make a recording of a proceeding if that person does so in the course of the person's engagement, employment or contract.

Example

To enable the preparation of an official transcript of a court proceeding.

- (3) Subject to any direction of a judicial officer—
 - (a) a representative of a news media organisation may make an audio recording of a proceeding for the

purpose of preparing a media report; and

(b) an Australian legal practitioner or other prescribed person may make an audio recording of a proceeding for the purposes of the legal representation of a person in that proceeding.

(4) A person may make a recording of a proceeding if—

(a) express written permission is given by a judicial officer, whether in respect of—

(i) a specific proceeding or class of proceedings; or

(ii) generally; or

(b) required by or authorised under any other Act or subordinate instrument; or

(c) the recording is of a prescribed class of recordings.

7 As can be seen, it is a criminal offence against s 4A(1) intentionally to make a recording^[7] of a proceeding^[8] except in accordance with sub-ss (2), (3) or (4). Section 4A(2) covers recordings of any or all of the three kinds made by official court personnel. Section 4A(3) covers audio-recordings (only) by media organisations for the purpose of preparing a media report and by legal practitioners for the purpose of legal representation of a person in the proceeding, subject to any direction by a judicial officer.^[9] Section 4A(4)(a),^[10] which is relevant in relation to Mr Kyriazis, covers persons given express written permission by a judicial officer to make any or all of the three kinds of recording. Any 'person' may make application for such permission, including therefore not only the participants but also other persons interested in a legal proceeding, and media organisations or legal practitioners who wish to make a visual or audio-visual recording of the proceeding.

8 Section 4A(4) confers discretion on the judicial officer to give or refuse express written permission. The requirement for the permission to be express and written removes any doubt that it might be implied from circumstances or oral. The permission may be given to the person in respect of a specific proceeding (as in the present case) or class of proceedings or in respect of proceedings generally (that is, in respect of proceedings generally in the jurisdiction of the judicial officer concerned).

9 No relevant considerations are expressly specified in the *Court Security Act* in relation to exercising the discretion in s 4A(4)(a). The kinds of proceedings and circumstances in which a court or tribunal might be asked to permit a person to make a recording of a proceeding are so widely variable that relevant considerations could not sensibly be stipulated in advance. According to general principles, the discretion must be exercised reasonably,^[11] it must be exercised by reference to the subject matter, scope and purpose^[12] of the *Court Security Act*, which are relevantly focussed upon ensuring the safety and security of courts and tribunals in relation to legal proceedings (including ensuring that such proceedings, if and when recorded, are not secretly recorded), it must be exercised upon the proper interpretation of the provisions of that Act^[13] and it must not be exercised arbitrarily or by reference to a rule or policy without proper regard to the merits of the individual case.^[14] Because giving permission to make a recording may upon impact upon the instant or some other proceeding in a way that is not related to ensuring the safety or security of the court or tribunal, it may be necessary to exercise the discretion by reference to the purpose of ensuring the due administration of justice as well (see further below).

10 There is no question that maintaining court or tribunal security is a matter of fundamental importance which the judicial officer of the court or tribunal has both the power and the responsibility to ensure. I make this point in the judgment in the substantive proceeding:^[15]

Now a judge has power, indeed a responsibility, to ensure that the courtroom is safe and secure for all participants in the trial process, court personnel and the public. As was held by Street CJ (Nagle CJ at CL and Maxwell J agreeing) in *R v EJ Smith*, 'within the courtroom itself the authority of the presiding judge in respect of security matters is absolute'.^[16] But this authority must always be exercised according to law having regard to the court's fundamental judicial function. As Bongiorno J held in *R v Benbrika* (*Ruling No 12*), 'judicial authority with respect to court security must always be exercised having regard to the paramount obligation on the Court to ensure, as far as possible, that the accused [has] a fair trial'.^[17]

The applicable provisions of the *Court Security Act* enhance the powers of the judicial officer of the court or tribunal in this regard, but likewise not so as to override his or her function of ensuring a fair hearing or trial.

11 In determining how to exercise the discretion in s 4A(4)(a), much will depend upon what kind of recording is

contemplated, how the recording is to be made, the purpose of the recording and the use to which it might be put, the nature of the proceeding in question, the potential impact (if any) of the fact and manner of the making of the recording upon the conduct of the proceeding and any related or possible future proceedings, among other matters. A court may need to give due assistance in relation to these matters to an applicant who appears as a litigant in person,^[18] as I did in the present case.

12 In various respects, the provisions of s 4A of the *Court Security Act* might actually or potentially qualify the operation of the principles of open justice and free communication of information as effected through the common law, and enjoyment of the right to freedom of expression in all its elements stipulated in s 15(2) of the Charter as it may apply to legal proceedings in courts and tribunals. Noting that neither those principles nor that right are absolute, I proceed upon the basis that the discretion in s 4A(4)(a) is intended to be exercised so as to ensure that any such qualification occurs only for the purpose of ensuring the security of courts and tribunals in relation to legal proceedings and another legitimate purpose (see below) and then only to the extent that is reasonably necessary for that purpose.

13 The *Court Security Act* would be read harmoniously with and so as not to qualify other powers and functions of courts and tribunals in relation to the conduct and management of legal proceedings and the courtroom environment. For example, it would be read with and so as not to qualify the provisions of the *Open Courts Act 2013* (Vic) in relation to making suppression orders and the inherent powers of this court in that connection. As noted above, s 4A(4)(a) permits judicial officers to give or refuse permission to make a recording having regard to the scope, object and purpose of the *Court Security Act*, which relate to ensuring the safety and security of courts and tribunals. It does not prevent refusal of permission where this is necessary not for that purpose for purposes related to the court or tribunal's other powers and functions or for ensuring the due administration of justice. Where, for example, refusing permission to make a recording is necessary to prevent frustration of the administration of justice in the instant or some other proceeding^[19] for reasons not related to ensuring the safety and security of a court or tribunal, the judicial officer can refuse to give permission upon this basis.^[20]

14 When exercising the discretion in s 4A(4)(a)(i) to grant Mr Kyriazis permission to audio-record the proceeding in this court, I therefore took into account the subject matter, scope and purpose of the *Court Security Act*, the fundamental importance of ensuring court security, the principles of open justice and free communication of information under the common law and the right to freedom of expression in all of its elements in s 15(2) of the Charter, and ensuring the due administration of justice. No purpose related to ensuring the security of the court in the legal proceeding would be served by refusing to grant the permission. The recording would be made pursuant to that permission and not secretly. Mr Kyriazis was seeking to audio-record a proceeding in which he had a direct interest as a party (I am not suggesting that permission cannot be sought by non-parties) for the purpose of the proceeding. It also appeared to be one way by which he could exercise a measure of dignified control over his personal affairs. Such a recording is an accurate, inexpensive, relatively unobtrusive and convenient way of making a record of what occurs during a proceeding and is a functional analogue of making a note or record in writing. Mr Kyriazis appeared as a litigant in person in the proceeding in circumstances in which the other party was legally represented by a solicitor and barrister having standing permission under s 4A(3)(b) to audio-record the proceeding. Granting permission would help to ensure 'equality of arms'.^[21]

15 Further, no suppression, confidentiality or like orders had been made in the proceeding and making an audio-recording would not be unlawful or restricted under specific legislation.^[22] It was not necessary to refuse permission to prevent frustration of the administration of justice. There were no relevant third-party privacy or like interests to consider (such as the interests of children, vulnerable participants or other persons who might reasonably expect protection against the proceeding being audio-recorded) and the application was not opposed, nor could it reasonably have been opposed, by the informant. There was nothing in the subject-matter of or evidence in the proceeding to suggest that permission should not be granted. The evidence was wholly in affidavit form and therefore no oral evidence was to be given. It was not a case in which making an audio-recording might impair the due administration of justice or the fair conduct of this or any other proceeding.

16 In summary, there was no justification for refusing Mr Kyriazis express written permission to audio-record the proceeding under s 4A(4)(a)(i) of the *Court Security Act*. Accordingly, the permission was granted.

[1] *Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)* [2017] 646 (26 October 2017).

[2] [2017] VSC 513 (26 September 2017) [34] (Bell J) ('PQR (No 1)').

[3] *Ibid* [36].

[4] *Fletcher Constructions Australia Ltd v Lines Macfarlane & Marshall (No 2)* [2002] VSCA 189; (2002) 6 VR 1, 30–4

[99]–[106] (Charles, Buchanan and Chernov JJA); *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666–7 (Gibbs CJ, Brennan, Deane and Dawson JJ agreeing).

[5] *X v General Television Corporation Pty Ltd* [2008] VSC 344 (8 September 2008) [34]–[45] (Vickery J); *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51; (2010) 30 VR 248, 259 [38] (Warren CJ and Byrne AJA); *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (28 February 2017) [37]–[39] (Bell J) ('Matsoukatidou').

[6] *PQR (No 1)* [2017] VSC 513 (26 September 2017) [39] (Bell J), referring to *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506, 532 [22] n 165 (French CJ).

[7] 'Recording' is defined in s 2(1) to mean 'all or part of an audio, visual or audiovisual recording and includes a photograph'.

[8] 'Proceeding' is defined in s 2(1) to mean 'a proceeding in the Supreme Court, the County Court, the Magistrates' Court, the Children's Court, the Coroners Court, VCAT or the Victims of Crime Assistance Tribunal'.

[9] 'Judicial officer' is defined in s 2(1) to include 'a non-judicial member of VCAT'.

[10] It is not necessary to discuss s 4A(4)(b) or (c).

[11] See generally *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (French CJ, Hayne, Kiefel, Bell and Gageler JJ) ('Li').

[12] See the authorities discussed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 40; *Li* (2013) 249 CLR 332, 363–4 [67] (Hayne, Kiefel, Bell JJ).

[13] *Li* (2013) 249 CLR 332, 364 [67] (Hayne, Kiefel, Bell JJ).

[14] See the discussion and authorities cited in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 3rd ed, 2004) 275–82.

[15] *Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)* [2017] 646 (26 October 2017) [51].

[16] [1982] 2 NSWLR 608, 616.

[17] [2007] VSC 524 (12 December 2007) [24].

[18] See generally *Tomasevic v Travaglini* [2007] VSC 337; (2007) 17 VR 100, 129–30 [139]–[142] (Bell J); *Matsoukatidou* [2017] VSC 61 (28 February 2017) [178]–[182] (Bell J).

[19] See, eg, *PQR (No 1)* [2017] VSC 513 (26 September 2017) [59] ff (Bell J).

[20] The function of making suppression orders to prevent frustration of the administration of justice itself requires consideration of the principles of open justice and free communication of information: *ibid* [34]–[43].

[21] See *Matsoukatidou* [2017] VSC 61 (28 February 2017) [122] ff (Bell J).

[22] See *PQR (No 1)* [2017] VSC 513 (26 September 2017) [21] (Bell J).