MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Police v Baden-Clay* [2013] QMC 6
PARTIES:	**POLICE** (Prosecution) **v** **GERARD ROBERT BADEN-CLAY** (Defendant)
FILE NO/S:	MAG 108004/12(6)
DIVISION:	Magistrates Courts
PROCEEDING:	Application in a Committal Proceeding
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	20 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2013
MAGISTRATE:	Judge Butler SC, Chief Magistrate
ORDER:	**1. The application is allowed in respect of photographs upon which witnesses were questioned in the course of the proceedings.** **2. The application is dismissed in respect of other images sought.**
CATCHWORDS:	CRIMINAL LAW – PRACTICE AND PROCEDURE – COMMITTAL PROCEEDINGS – APPLICATION – Release of photographic exhibits for publication – Open justice principle
COUNSEL:	D Boyle for the prosecution J Hunter (Senior Counsel) for the applicant media organizations P Davis (Senior Counsel) for the defendant
SOLICITORS:	Thynne & Macartney, Solicitors for applicant Director of Public Prosecutions (Qld) for the prosecution Jacobson Mahony, Solicitors for the defendant

Introduction

[1] This is an application made by six media organisations during the course of the committal hearing of charges against Gerard Robert Baden-Clay seeking the release for publication of a number of photographic exhibits tendered during those proceedings.

[2] Mr Hunter of Senior Counsel on behalf of the applicants, Australian Broadcasting Corporation, Seven Network Operations Ltd, Nine Network Australia Pty Ltd, Network Ten Pty Ltd, Fairfax Digital Ltd and Queensland Newspapers Pty Ltd, seeks the release of photographs of injuries to the defendant and any video recording of the conduct of any examination of the defendant.

[3] A limited number of photographs were the subject of cross-examination of witnesses and were at that time displayed on wide screen monitors in the court room within view of the large number of members of the public, including media representatives, who were present. Those photographs were a sub-set of 29 photographs of Mr Baden-Clay tendered by the prosecution as exhibits upon the committal proceedings. The tendered photographs were in two groups, the first group of 6 having been taken by police on 20 April 2012 and the second group of 23 taken by police on 21 April 2012. The first group consists of photographs of the face and hands of the defendant. The second group is photographs of the naked torso of the defendant from the waist up and of the head and face of the defendant.

[4] I am advised by the parties that there is no video recording of an examination of the defendant.

[5] Mr Davis of Senior Counsel representing the defendant opposes the application.

[6] The Crown Prosecutor declined to be heard on the application.

Applicant's submissions

[7] The applicants do not rely on any statutory basis but rather submit that the court has power at common law to make the orders they seek.

[8] As the application was brought as a matter of urgency both counsel understandably were not in a position to assist the court with detailed submissions. I reserved the matter overnight to deliver a decision the following morning.

[9] Mr Hunter drew my attention to s 56A of the *Criminal Practice Rules 1999* which I understood him to say were not directly applicable but capable of providing guidance. He directed me to a number of case citations. He submitted that the open justice principle weighed in favour of the release of the photographic exhibits. Mr Hunter argued that a number of the photographs had been the subject of cross-examination and had already been viewed by those in the court and that open justice required that they be available for dissemination to the general public.

Defendant's submissions

[10] The defendant submitted that this court has no power to make the order sought. It is argued that there is no statutory provision or common law basis empowering the court to release the exhibits for publication. Furthermore, if there was a power at common law it was argued that guidance should be taken from s 56A(e) of the *Criminal Practice Rules 1999* and that likelihood of prejudice to the fair trial of the defendant must be taken into account. It was further submitted that only the trial court could adjudicate on whether release of the exhibits is likely to prejudice a fair trial and that a magistrate hearing committal proceedings lacked jurisdiction to determine that issue. In the alternative it was argued that I should refuse the application in the exercise of my discretion.

The open justice principle

[11] The principle of open justice is fundamental to our legal system.[1] The common law has established limited exceptions to the obligation of courts to sit in public and the freedom to report proceedings but the list of exceptions is limited. Parliament can, of course, legislate for further exceptions. However, in view of the importance of the principle of open justice any statutory provision should be construed strictly in accordance with its declared purpose.[2]

Statutory provisions

[12] These proceedings are being conducted under the *Justices Act 1886* so it is to that Act I first turn. The Act draws a distinction between the hearing of criminal charges on complaint and committal proceedings. Section 70 provides the former will be heard in open court with limited exception but s 71 provides that examinations of witnesses for the purpose of committal shall not be deemed an open court, but the court shall not be closed unless the "the ends of justice require".

[13] Section 154 of the *Justices Act 1886* provides for the circumstances in which a clerk of the court must with some exceptions release copies of exhibits following committal for trial or sentence. This mandatory obligation, perhaps surprisingly, applies to all documentary exhibits with the exception of photographs. The *Justices Act* does not appear to have any specific provision permitting the release of documentary exhibits in the course of proceedings.

[14] Section 56A of the Criminal Practice Rules 1999 provides that "a person who is not a party to a trial may apply to the trial judge during or after the trial for an order permitting the copying for publication of an exhibit tendered at the trial". This provision applies to the Magistrates Court and for the circumstances in which it applies sets out in subsection (4) helpful criteria guiding when an order may be made. However, the definition in Schedule 6 states:

> "**trial judge** –
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> (a) generally – means the judge who presides or presided at the court of trial; and

[1] *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324 at [17].

[2] "…, a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle."; *Hogan v Hinch* [2011] HCA 4 at [27] per French CJ.

(b) for chapters 11 and 12 – includes a magistrate and 2 justices constituting a Magistrates Court."

[15] The term "Court of Trial" is defined to mean:

"**court of trial** means any court from whose finding, sentence, or other decision a person is entitled, under the Criminal Code, to appeal or to apply for leave to appeal."

[16] No appeal is available under the Criminal Code from committal proceedings and therefore a magistrate presiding in committal proceedings does not fall within the meaning of the term "trial judge" in s 56A. It follows that s 56A is not available to empower this court to release the exhibits.

[17] I now turn to consider whether there is a common law head of power available to make the order sought.

Power to release exhibits for publication

[18] The starting point of any discussion as to whether a court should restrict public access to evidence heard or received by the court must be recognition of the open justice principle. Ordinarily courts sit in public. In so doing the court proceedings are subjected to public and professional scrutiny.[3] The common law recognizes established exceptions to the principle of open justice where suppression is necessary in the proper administration of justice.

[19] On the other hand, neither the media, nor the public at large, have a right of access to court documents:

> "The 'principle of open justice' is a *principle*, it is not a freestanding right. It does not create some form of *Freedom of Information Act* applicable to courts. As a principle, it is of significance in guiding the court in determining a range of matters including, relevantly, when an application for access should be granted pursuant to an express or implied power to grant access. However, it remains a principle not a right."[4]

[20] It follows that for the applicants to have a positive right to access court documents, it must be created by statute.[5] No such provision is identified by the applicants.

[21] For a statutory court such as the Magistrates Court the ability to exclude the public from the court room, to prohibit publication of the proceedings or to grant access to exhibits must be found either in the implied jurisdiction of the court or in an express statutory power.

[22] The better view seems to be that the Magistrates Court possesses an implied power to regulate its own proceedings where necessary to secure the proper administration of justice.[6] The existence of the power is dependent upon the test of necessity being

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[3] *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; *Hogan v Hinch* [2011] HCA 4 at [20] per French CJ.

[4] *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, per Spigelman CJ at 521.

[5] Ibid.

[6] *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324 at [38] – [48]; *Hogan v Hinch* [2011] HCA 4 at [25] – [26].

satisfied. In *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 McHugh JA said:

> "…, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient. When the court is an inferior court, the order must do no more that is 'necessary to enable it to act effectively within' its jurisdiction."

[23] It was submitted on behalf of the defendant that this court lacks an implied power to determine whether an exhibit may be released for publication. The decision of the Queensland Court of Appeal in *Higgins v Comans*[7] holding that an examining magistrate has no implied power to permanently stay committal proceedings was cited in support of this submission. In the leading judgment by Keane JA it was acknowledged that magistrates courts may exercise implied powers. The judgment rejected the existence of an implied power to stay committal proceedings because such a power would be inconsistent with the obligation imposed upon the magistrate by s 108(1) of the *Justices Act* to either commit or discharge the defendant. That reasoning does not apply to the question arising for my consideration.

[24] In my view similar considerations will apply to the decision to release exhibits for publication as apply where an order prohibiting publication is being considered. Similar considerations will also apply to exclusion of the public from the court.

[25] Where a magistrate sits to hear committal proceedings s 71 of the *Justices Act* 1886 provides a power to hear evidence in camera. That section reads:

> "Exclusion of strangers
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> The room or place in which justices take the examinations and statements of persons charged with indictable offences for the purpose of committal for trial and the depositions of the witnesses in that behalf shall not be deemed an open court, and the justices may order that no person shall be in such room or place without their permission, but they shall not make such order unless it appears to them that the ends of justice require them so to do."

[26] The test for excluding persons from attending a committal proceeding is that the order is required by "the ends of justice". In *Moularas v Nankervis* a similar provision in Victorian legislation was considered by Ormiston J. The relevant test in that case was whether the order was "desirable" in the "interests of justice".[8] The explanation by Ormiston J as to the extent of the power and the limitations upon it was approved by McPherson SPJ in *Rocket v Smith, ex parte Smith.*[9] Ormiston J held that the well accepted principles as to the desirability of open hearings are applicable as a general rule to committal proceedings. He considered that

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[7] (2005) 153 A Crim R 565.
[8] [1985] VR 369.
[9] [1992] 1 QdR 660 at 664, Moynihan J agreeing.

circumstances covered by the "interests of justice" must be related to the proper administration of justice. In my view, when applying the terms of s 71 there is no difference of substance between a test that the action is required by the "ends of justice" and the test adopted by McHugh JA in *John Fairfax & Sons* that action is "necessary in the proper administration of justice".

[27] While these remarks relate to whether a court should be closed, but in my view the same test applies to the exercise of an implied power to allow or to limit the publication of documentary exhibits.

[28] In summary, I conclude that a magistrate sitting to hear committal proceedings has an implied power to determine whether the copy of an exhibit should be released for publication.

[29] Spigelman CJ in *John Fairfax Publications v Ryde Local Court*[10] found, applying the test of necessity, that the Local Court lacked power to grant access to filed documents in apprehended violence order proceedings. His Honour concluded that the public interest in facilitating a fair and accurate report of those proceedings, although desirable, was not necessary to serve the objectives of the principle of open justice.

[30] In declining to follow his Honour's conclusion in this regard I note that it was not necessary to the decision in the case and that it appears to run contrary to the trend of authorities on the open court principle. Contrast the following statement by French CJ in *Hogan v Hinch:*

> "It is a common law corollary of the open-court principle that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the proceedings, including the names of the parties and witnesses, and the evidence, testimonial, documentary or physical that has been given in the proceedings."[11]

[31] Importantly, the test of necessity was applied in *Ryde Local Court* in relation to domestic violence proceedings where the objects of the legislation applied considerations not arising in these criminal proceedings. It was held that the power to order access was not needed to render effective the court's jurisdiction to make apprehended violence orders. That reasoning may be distinguished.

Discussion

[32] In the exercise of the implied power to grant or refuse access to the photographic exhibits the court must balance countervailing considerations. Furthermore the court should only act on material upon which it can reasonably reach the conclusion that it is necessary to make the order.[12]

[33] On the one hand there is a public interest in ensuring that through the courts being open to public scrutiny, confidence is maintained in the administration of justice.

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[10] (2005) 62 NSWLR 52 at 523-4.
[11] (2011) 243 CLR 506 at 532; see also *R v Elomar & Ors* [No 3] [2008] NSWLR 1443.
[12] *R v D1 and Ors* [No 3][2010] NSWSC 644; *New South Wales Commissioner of Police v Nationwide News Pty Ltd and Anor* [2007] NSWCA 366 at [43] per Mason P.

On the other hand an important consideration is whether permitting publication is likely to prejudice a fair trial of the defendant.

[34] The photographs sought show injuries on the face and body of the defendant which are said by the prosecution to circumstantially implicate him in the murder and which are said by the defendant to have an innocent explanation. Some of these photographs have been utilized extensively in the cross-examination of witnesses. It is true that because some of the photographs are in the nature of "mug shots" and a number show the defendant naked from the waist up, their publication may have some potential to characterize the defendant in a negative light if viewed by persons unacquainted with the broader context in which they were taken. Nevertheless I am not persuaded that after the passage of time and with suitable instruction a reasonable jury would be unable to return a fair verdict even if its members had been exposed to publication of the photographs.

[35] One relevant consideration is that certain photographs have already been displayed and examined in open court.

[36] It must be borne in mind that these are committal proceedings. In a case such as this neither the prosecution nor the defence has developed more than a fragment of their case through the testimony heard in court. Only about 40 of a possible 285 witnesses is to be examined in these committal proceedings and in most instances there has been no evidence in chief. The case is wholly based on circumstantial evidence. Any selective reporting from the 200 plus exhibits tendered but not the subject of oral examination would be likely to give a distorted view of the case.

[37] A number of authorities have identified that an appropriate "touchstone" for determining the question of access by non-parties is whether the material had been "deployed in open court."[13] The exact point at which this distinction is engaged will depend on the circumstances of the particular case. It involves more than filing documents with the court and may require some use of the document in the court such as to engage the underlying principle of open justice.

[38] In *John Fairfax* (2005) a test proposed by Lord Clyde in *Cunningham v The Scotsman Publications Ltd* was adopted as useful:

> "If it is referred to and founded upon before the court with a view to advancing the submission which is being made, it is taken as published."[14]

[39] In the circumstances of these committal proceedings I consider that questioning on the documents in the course of cross-examination ought to constitute the point of distinction.

[40] There is a public interest in facilitating a fair and accurate report of proceedings in court. Where cross-examination relies on documentary exhibits it may well be necessary for the media to access those exhibits in order to make a fair and accurate report of that cross-examination. I so find in this case.

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[13] *John Fairfax Publications Pty Ltd v Ryde Local Court* 62 NSWLR 512, per Spigelman CJ at 521; *Seven Network Limited v News Limited* (2005) FCA 1934; *R v Elomar*[No 3] [2008] NSWSC 1443 at [20].

[14] 1987 SLT 698 at 706.

[41] Balancing the abovementioned considerations in the exercise of my discretion I have determined that access should be granted to those photographs referred to in the questioning of witnesses during the proceedings. Access to the remaining images should be denied.

Orders

[42] The application is allowed in respect of photographs upon which witnesses were questioned in the course of the proceedings.

[43] The application is dismissed in respect of other images sought.

Judge Brendan Butler AM SC
Chief Magistrate