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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v CERRAH

Young CJ, Crockett and Vincent JJ

6 October 1988

EVIDENCE – POLICE INFORMER – REFUSAL TO DISCLOSE IDENTITY OF – CLAIM FOR PRIVILEGE - EVIDENTIARY BURDEN ON ACCUSED – NATURE AND EXTENT OF BURDEN.

Before an apparently legitimate claim for privilege in respect of the identity of a police informer can be rejected, the accused must show that disclosure is at the very least capable of being, if not likely to be, of some real assistance in answering the case. A speculative possibility is not sufficient.
***Signorotto v Nicholson* [1982] VicRp 40; (1982) VR 413; (1981) 46 LGRA 141; and**
***D. v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1; (1978) AC 171; (1977) 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5, applied.**

VINCENT J: [with whom Young CJ and Crockett J agreed] **[1]** Before the Court are applications for leave to appeal against both the convictions and sentences imposed upon the applicant who had been found guilty, following a trial lasting twelve days, of four counts of trafficking in a drug of dependence, namely, heroin, and which had been committed on various dates between 12th May 1986, and 4th June of that year.

The sentences imposed upon the applicant in respect of these offences were terms of imprisonment of four years, five years and six years, respectively, and reflected the increasing amounts of narcotic material trafficked. After certain orders for concurrency were made **[2]** by the sentencing Judge, the resultant effective sentence became one of nine years' imprisonment, with a minimum period of seven years before the applicant would become eligible for release on parole being fixed.

Before us the applicant relied upon a single ground in support of his application for leave to appeal against conviction, namely, that the learned trial Judge erred in allowing a witness, Sergeant JJ Blayney, to claim privilege and refuse to answer defence counsel's questions on the basis that the answers may reveal the identity of an informer.

In order that this ground may be considered in context, it is necessary to refer briefly to the nature of the Crown case presented at the trial. Evidence was given that in May and June 1986, the witness Blayney was a detective senior constable in the Victorian Police force, engaged in undercover work as a member of the Drug Squad. Some time prior to May 1986 he received information from another police officer concerning the possible trafficking of heroin in the Richmond area and subsequently met an informer in relation to that matter. According to the evidence, the informer was made aware that Blayney was a member of the Police Force.

During the trial, and particularly in cross-examination, Blayney refused to divulge the identity of this informer and refused to answer questions which he said he believed may have led to the identification of that person. He claimed that the provision of this information could possibly endanger the informer's life. It was said that as a result of the information received, Blayney went to a shop operated by a man named **[3]** Rasim Akarsu, who was referred to throughout the proceedings as "Sam". Those premises were used for the manufacture and sale of leather goods. It was at that location that the witness met the applicant, who was introduced to him by the man named "Sam". After some discussion concerning the purchase of material described as "something", the witness stated that the applicant offered to sell a quantity of this substance, and indicated that he did not deal in amounts of less than five grams. A price of $250 a gram was mentioned, and it was indicated that the material could be cut or diluted (apparently for use or resale) two and a half or perhaps three times.

According to the evidence, the witness obtained some $1,200 and at a later point an exchange of that sum was made for a small package in which a quantity of heroin was found. In the course of the conversation with the applicant on that day, the applicant, according to the witness, stated that he was a purveyor of "good white". Further arrangements were subsequently made for the purchase of material and on 20th May 1986, Blayney attended at the same leather shop and had with him a sum of $5,000. This was in due course also exchanged for a packet which was found to contain heroin.

A further transaction took place on 26th May, at which a quantity of 40 grams of heroin was secured in exchange for the payment of $10,000. The final transaction occurred some days later and on this occasion the purchase involved the payment of $25,000. It would also appear, according to the evidence, that the applicant said to Blayney that he **[4]** had access to 3 kilos of "white". The defence case was, as I understand it, that the applicant was an unknowing dupe who believed that he had been engaged in the sale of quantities of precious stones and that the elaborate security arrangements which were adopted were designed to avoid the possibility of robbery. It was on the basis of this defence that the argument in this Court, on behalf of the applicant has been presented.

Mr Barnett of counsel, who appeared for him, contended that it was of critical importance to his client that the precise nature of the role played by the man "Sam" should be explored. This necessitated the revelation of the name of the informer upon whose information the witness Blayney had apparently acted, and an investigation of the precise circumstances under which Blayney was introduced to the applicant was required. Mr Barnett appeared to concede that at best the identification of the informer might possibly have proved to have been of assistance to his client in the presentation of his defence. However, he was unable to specify any particular way in which it may have been so. He argued that the applicant was in a difficult position in that until he became possessed of all of the relevant information, which included the name of the informer, he was unable to ascertain what benefit may have been derived from it.

The principles upon which a trial Judge should act in dealing with an objection taken to the answering of a question on the ground that it might lead to the identification of a police informer have been considered in a number of **[5]** cases, of which it is necessary to refer to only two. In the first of these, *Signorotto v Nicholson* [1982] VicRp 40; [1982] VR 413; (1981) 46 LGRA 141, Fullagar J at p423, stated:

> "In my opinion the rule of the common law, which of course relates to legal proceedings and not to acts of the executive, is that the identity of a police informer may not be disclosed in proceedings, except where the tribunal is of opinion that non-disclosure is calculated to lead to the wrongful conviction in the proceedings of a person on trial before the tribunal for an alleged crime."

In that judgment he had earlier referred to the views expressed by Lord Diplock in *D. v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1; [1978] AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5:

> "The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal 'to ascertain facts relevant to an issue on which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges, which by the time of *Marks v Beyfus* (1890) 25 QBD 494 had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where, upon the trial of a defendant for a criminal offence, disclosure of the identity of the informer could help to show that the defendant was innocent of the offence."

It is, in my view, clear that before what appears to be a legitimate claim against the disclosure of the name of a police informer is rejected, the accused must demonstrate that the evidence is at the very least capable of being, if not likely to be, of some real assistance to him in answering the case made out against him. A speculative possibility of the kind for which the present applicant contends would certainly not suffice. It is in this context important to note that the **[6]** applicant gave evidence on this matter in the course of the hearing on the *voir dire*, and that the learned trial Judge found him to be evasive and inconsistent and by no means credible

in his evidence. Although some criticism has been directed to these findings, and to the course adopted by His Honour, after perusal of the transcript I should state that I find this criticism to be entirely without foundation.

In the particular circumstances of this case, and in a situation where the accused had to demonstrate that the circumstances justified a refusal of the claim for privilege, it would appear that the only material upon which the trial Judge could have acted to determine the question was the evidence of the accused man himself, considered of course in the context of the other evidence before him. It is clear again in my view that neither the circumstances nor the evidence of the applicant which the trial Judge in fact found to be totally unacceptable, raised even a serious possibility that the disputed evidence may have been of real assistance to him, accepting for present purposes, although it is not necessary to decide the matter in the present case, that this would suffice to satisfy the onus borne by an accused in such a situation. There is certainly no foundation for the view that His Honour was in error in so deciding. I consider that the application for leave to appeal against the conviction should be refused... *[His Honour then dealt with the application for leave to appeal against the sentences imposed].*

APPEARANCES: For the applicant Cerrah: Mr J Barnett, counsel. Coates McLennan & Co, solicitors. For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP.
