

47/01; [2001] VSC 234

SUPREME COURT OF VICTORIA

KIRSCH v DOLMAN and ANOR

Gillard J

13, 19 July 2001 — 123 A Crim R 331

PRACTICE AND PROCEDURE – APPLICATION FOR COMPULSORY PROCEDURE – PERSON NOT GIVEN NOTICE OF APPLICATION – PERSON NOT PRESENT WHEN ORDER FOR COMPULSORY PROCEDURE MADE – WHETHER PERSON DENIED NATURAL JUSTICE – WHETHER FAILURE TO COMPLY WITH PROVISIONS OF ACT AMOUNTED TO JURISDICTIONAL ERROR: *CRIMES ACT 1958, S464T*.

Section 464T(4) of the *Crimes Act 1958* provides that a Magistrates' Court must not make an order directing a person to undergo a compulsory procedure unless the person is present. The person should be given notice of the application and the order should not be made until the person is present at Court. Where an order for a compulsory procedure was made in the absence of the person to whom the order was directed, the person was denied natural justice and the failure to comply with the express terms of s464T(4) amounted to jurisdictional error.

Lednar v Magistrates' Court of Victoria and Anor, unrep, Gillard J, 22 December 2000, referred to.

GILLARD J:

TABLE OF CONTENTS

1. This is the return of a summons, in a proceeding instituted by originating motion, seeking judicial review of an order made by a Magistrate on 4 May 2001, requiring the plaintiff to undergo a compulsory procedure pursuant to s464T of the *Crimes Act 1958* ("the Act"). A compulsory procedure is the taking of an intimate or non-intimate sample from a person suspected of a crime, or the conduct of a physical examination of such a person — see s464(1). Section 464T is found in sub-division 30A of the Act, which is concerned with custody and investigation.

Parties

2. The plaintiff, Helmut Kirsch ("the plaintiff"), is an elderly person who, in February this year, was residing at 302 Arden Street, North Melbourne.

3. The first named defendant, Jason Kenneth Dolman ("the defendant"), is a member of the Victorian Police Force.

4. The second named defendant, the Magistrates' Court of Victoria, is joined as a necessary party pursuant to Rule 56.01(3) of the Rules of Court, representing the Magistrate who made the order. In accordance with the normal practice, the Court informed this Court that it did not propose to participate in the judicial review and has informed the Court that it will abide the decision.

The Decision

5. On 4 May 2001, the defendant made application to the Magistrates' Court, pursuant to s464T of the Act, for an order directing the plaintiff to undergo a compulsory procedure. The plaintiff was not informed that application was to be made, and was not present when the order was made.

6. Section 464T(4) provides –

"(4) Except on an application made in accordance with s464V or 464W, the Magistrates' Court must not make an order directing a person to undergo a compulsory procedure unless the person is present."

Sections 464V and 464W did not apply.

7. Clearly, there has been a breach of sub-section (4) of s464T.

8. In the case of *Garry Stephen Lednar & Ors v The Magistrates' Court of Victoria and the Chief Commissioner of Police*, I considered the various provisions of sub-division 30A of the Act. I was concerned with s464ZF of the Act. In my reasons delivered on 22 December 2000, I found that members of the police force applying for orders and the Magistrates' Court overlooked a number of important matters with respect to applications for DNA samples. In addition to finding that a number of orders were made contrary to s125 of the *Magistrates' Court Act* 1989, in that the orders were not made in open court, I also drew attention to the fact that there had been a failure to comply with some of the provisions of s464ZF.

9. Despite the criticisms made, it appears that some members of the force and some Magistrates are still failing to comply with the provisions of the Act.

10. The provisions in sub-division 30A substantially encroach upon the rights of the individual. The legislation has been carefully drawn to ensure that the interference with the rights of the individual are kept to a minimum. It is absolutely vital that members of the force and Magistrates ensure that, before any orders are made under any of the sections in sub-division 30A, all statutory requirements have been satisfied. This present matter is another example where insufficient attention was paid, by both the defendant and the Magistrates' Court, in respect of the application concerning the plaintiff.

11. The plaintiff should have been given notice of the application, and the order should not have been made until he was present at the Court.

12. Indeed, this is made very clear by s464T(7)(d) which requires the Court, making the order, to inform the person ordered to undergo the procedure, that a member of the force may use reasonable force to enable the procedure to be carried out.

No Opposition

13. The plaintiff issued an originating motion on 30 May 2001, seeking a review of the order and an order, in the nature of *certiorari*, quashing the decision.

14. No issue was raised as to whether the application should have been made by way of appeal from an order of the Magistrates' Court pursuant to the *Magistrates' Court Act* 1989 – see s92.

15. The jurisdiction of this Court to review decisions of inferior courts is limited. The jurisdiction is supervisory, and does not entitle the Court to canvass matters that it would on an appeal. In a judicial review, the Court is exercising its common law jurisdiction. The Court is concerned with the legality of what was done by the Court, and is not concerned with the merits of the decision under review. There are a number of well-established grounds for the exercise of the jurisdiction, most importantly, jurisdictional error, failing to observe some applicable requirement of procedural fairness, fraud, or an error of law on the face of the record. See *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175-76; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.

16. The order was made in the absence of the plaintiff, and contrary to the express provision of s464T(4). Accordingly, the plaintiff has been denied natural justice to which he was entitled pursuant to the Act. Further, the failure to comply with the express terms of s464T(4) amounted to a jurisdictional error.

17. Not surprisingly, the defendant did not oppose an order that the order made on 4 May 2001 be quashed. [After dealing with matters under the *Appeal Costs Act* 1998, His Honour continued] ... I propose to make the following orders—

- (i) That the order of the Magistrates' Court of Victoria made at Melbourne on 4 May 2001 in which Jason K. Dolman is the applicant and Helmut Kirsch is the respondent, be quashed.
- (ii) That the first defendant Jason Kenneth Dolman pay the plaintiff's costs of the proceeding including reserved costs.

APPEARANCES: The Plaintiff Kirsch appeared in person. For the first-named Defendant Dolman: Mr A Burns, solicitor. Victorian Government Solicitor.