46/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v DIETRICH

O'Bryan, Gray and Vincent JJ

3, 4, 8 May 1989

CRIMINAL LAW – PROCEDURE – PERSON CHARGED WITH AN INDICTABLE OFFENCE – WHETHER ENTITLED TO DEFENCE COUNSEL AT STATE'S EXPENSE – EVIDENCE – SUB-POENA TO PRODUCE DOCUMENTS – DEGREE OF PARTICULARITY REQUIRED – WHETHER SUFFICIENT TO ASK FOR ALL DOCUMENTS IN A CLASS OR CATEGORY.

1. A person charged with an indictable offence has no entitlement to the provision of defence counsel at the expense of the State.

2. A sub-poena directed to a stranger to the litigation to produce documents must specify with reasonable particularity the documents which are required to be produced. It will not be sufficient to ask for production of all documents falling into a particular class or category. A subpoena which is oppressively wide or a mere fishing expedition may be set aside as an abuse of process.

***Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; 55 WN (NSW) 215; and**
***Finnie v Dalglish* (1982) 1 NSWLR 400; (1981) 1 ANZ Insurance Cases 60-438, applied.**

(See also *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234 and *R v Harris and Ors* MC35/1985. Ed.).

O'BRYAN J: [with whom Gray and Vincent, JJ agreed) *[after setting out the nature of the offences, continued]* ... **[3]** Grounds 1, 2, and 3 assert that the unwritten Constitution of the State of Victoria and the application of Division 3 of the *Imperial Acts Application Act* 1980 empowered and required the learned trial Judge to appoint counsel to make a defence for the applicant. Mr O'Doherty of counsel, who appeared for the applicant, submitted that every person charged with an indictable offence in this State is entitled to counsel provided at the expense of the State and the failure to appoint counsel to defend the applicant was a breach of the "due process" requirements of the said Act. Presumably, were this argument upheld, the verdict would be vitiated. Section 8 of the *Imperial Acts Application Act* made an enactment of the Parliament of England of 1368, 42 Edward III, Chapter 3, a law in force in Victoria. The enactment of 42 Edward III, Chapter 3, provides:

> "...It is assented and accorded, for the good governance of the commons, that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land; And if any thing from henceforth be done to the contrary, it shall be void in the law, and holden for error."

The 1368 enactment is not referred to in *Stephen's Commentaries*, 1841 Edition, nor is it referred to in Sir William Blackstone's *Commentaries on the Laws of England*, 1825 Edition.

The expression "due process" is not contained in Stroud's *Judicial Dictionary*, nor is it an expression in **[4]** usage today in either the English or Australian legal systems. So far as any researches proceeded, I found no case in Australia in which the expression "due process" has been used. In England, 42 Edward III Chapter 3 was repealed by the enactment of the *Administration of Justice (Miscellaneous Provisions) Act* in 1933. The 1933 enactment abolished Grand Juries but preserved rules of law relating to procedure in connection with indictable offences. The 1933 Act ensured that a person charged with an indictable offence will face a committal proceeding before trial. The expression "due process" in 14th Century England probably related to procedural rules before trial for indictable offences but certainly had nothing to do with the provision of counsel free of cost for a person charged with an indictable offence. The provision in 42 Edward III Chapter 3 no doubt ensured that the ordinary curial process for bringing an alleged offender to trial was followed in the case of indictable offences. In *R v Murphy* [1985] HCA 50; (1985) 158 CLR 596; (1985) 61 ALR 139; (1985) 59 ALJR 682; 16 A Crim R 203 the High Court considered the course of justice in relation to the process of bringing to justice an offender against the law of

the Commonwealth and enforcing the law against him. The Court in a joint judgment observed at 616:

> "Committal proceedings themselves traditionally constitute the first step in the curial process possibly culminating in the presentation of the indictment and trial by jury".

The "curial process" in the 20th Century Australian criminal justice system may be equated with "due process" in the **[5]** 14th Century English criminal justice system. In the present case the applicant underwent a committal proceeding in August 1987 and was committed for trial on indictment.

Before trial, the applicant unsuccessfully applied to the Legal Aid Commission for legal aid. In this State legal aid is provided pursuant to the *Legal Aid Commission Act* 1978. The Act empowers neither the Supreme Court nor the County Court to overturn a decision of the Legal Aid Review Committee not to provide legal assistance to an applicant. By s36, sub-s.(3), of the Act, it is provided:

> "The decision of a Review Committee is final and conclusive".

By s69(3) of the *Judiciary Act* 1903:

> "Any person committed for trial for an offence against the laws of the Commonwealth may at any time within 14 days after committal and before a jury is sworn apply to a justice in chambers or to a judge of the Supreme Court of a State for the appointment of counsel for his defence".

The applicant was committed for trial on a variety of charges on 10th August, 1987, and did not apply for counsel for his defence within fourteen days after committal pursuant to s69(3). In May 1988 the applicant applied to Gobbo J for a certificate. The application was refused on the around that the time limit in the sub-section is in mandatory terms. Thus, two avenues for legal assistance which were available to the applicant were unsuccessfully pursued.

The proposition that every person charged on indictment is entitled to counsel for his defence at the expense of the State is both novel and startling. No **[6]** authority in this country was cited to support it. Had the Parliament of the Commonwealth or the State wished to enact that every person be provided with counsel to make a defence to an indictable offence, it would have been easy to do so. What the Commonwealth Parliament did in 1903 was to enact s69(3) of the *Judiciary Act*. The Victorian Parliament in 1916 enacted the *Poor Persons Defence Act* to provide for the defence of accused persons who were without adequate means. Section 2 was in similar terms to s69(3) of the *Judiciary Act*. In 1928 the *Poor Persons Legal Assistance Act* replaced the 1916 Act. In 1958, the *Poor Persons Legal Assistance Act* contained in s3 a provision for legal aid for poor prisoners modelled on s69(3) of the *Judiciary Act*.

In 1969 the State Parliament enacted the *Legal Aid Act* to make provision for legal aid and repealed the *Poor Persons Legal Assistance Act* 1958. The *Legal Aid Act* enabled certain persons to make application to the Attorney-General for their defence or representation at trial within a time limited by the Act. Section 4 empowered the Attorney-General to grant such an application where the Attorney-General was of opinion that it was in the interests of justice that an applicant should have legal representation and that the applicant was without adequate means to provide legal assistance for himself.

In 1978 the *Legal Aid Commission Act* replaced the *Legal Aid Act* and conferred jurisdiction upon a Legal Aid Review Committee to finally determine whether legal aid will be provided to a person and, if so, the form such aid shall take. **[7]** In my opinion, the history of legal aid legislation in the Commonwealth and in this State shows clearly there is no substance in grounds 1, 2 and 3, and they must all fail.

Ground 4 concerns the admission of evidence at the trial by an experienced police officer that narcotic drug importers sometimes import drugs by means of internal body concealment, using plastic and a condom. Mr O'Doherty submitted that this evidence had a prejudicial effect in that the jury might consider that a person who used the method described by the witness to import narcotic drugs must be a professional drug importer. A perusal of the transcript of the

evidence given by the witness did not suggest this idea to the jury, nor did the learned Judge's charge raise such a possibility for the jury. In my opinion, the evidence was probative and prejudice created by the evidence was likely to be very slight. This ground also fails.

Grounds 7, 8, 9, 10 and 11 may be considered together, quite briefly. These grounds assert errors of misdirection in the charge by the learned Judge as to the standard of proof and the nature and use of inferential evidence. Certain passages in the charge to which exception was taken by Mr O'Doherty do not show error on the part of the learned Judge, in my opinion. All these grounds fail.

Ground 12 asserted that the learned Judge erred in permitting a defence witness, Middap, to be excused from giving evidence. The applicant desired to call Middap as a defence witness. In the absence of the jury, Middap informed the learned Judge that he wished to claim privilege from giving evidence on the ground of self-incrimination. Apparently, Middap was facing trial on a number of serious charges, including a charge of trafficking in heroin imported by the applicant on Flight TG985 on 17th December, 1986.

[8] In the course of evidence given at the trial on behalf of the Crown, it emerged that the applicant and Middap had a business relationship. In his defence, the applicant relied upon his business association with Middap to explain the reason for his trip to and from Bangkok. In the absence of the jury, Middap was sworn and immediately sought protection from giving evidence on the ground of self-incrimination. The learned Judge offered the applicant an opportunity to question Middap on the *voir dire* but the applicant declined to do so.

The applicant was asked,

> "Do you wish to ask Mr Middap any questions?"
> "Applicant: "I thought we had come over this crossroad. It means I cannot ask any questions or get any answers unless I beat the words out of him. I would love to, but I cannot."
> His Honour: "Do you want to say any more about it?"
> Applicant: "No. It is a privilege."
> His Honour: "He has got the right that any person has not to incriminate themselves."
> Applicant: "We have crossed the bridge with Mr McArdle earlier and if Mr Middap claims certain privileges in that area and if I cannot compel him to answer any questions I will not ask them."

The witness was not sworn before the jury but allowed to leave. At the request of the applicant, the learned Judge informed the jury that Middap had declined to give evidence in the case. Clearly, the applicant was entitled to call Middap and to question him before the jury concerning relevant matters. On the other hand, Middap was entitled to decline **[9]** to answer each question if the answer tended to expose him to self-incrimination and the learned trial Judge must uphold such objection. The correct procedure required that the witness be called before the jury and examined. The jury was entitled to hear the witness take the objection to giving evidence. Although the correct procedure was not adhered to in the trial, departure from the correct procedure was brought about with the consent of the applicant. Indeed, the applicant was given an opportunity to confer with Middap out of court and anticipated that Middap would decline to give evidence. In my opinion, no injustice was caused to the applicant by the procedure which was followed at the trial and this ground fails.

Grounds 14, 15, 16 and 17 may be considered together. Mr O'Doherty submitted that count 1 was duplex because it specified that the applicant imported heroin found in two locations. Reliance was placed upon a decision in this Court: *R v Trotter* (1982) 7 A Crim R 8. Trotter was charged with one count of indecent assault. Evidence was led at the trial of two separate and distinct actions, each capable of constituting an indecent assault. The presentment failed to specify which act of the accused was relied upon by the Crown to constitute the count in the presentment. The Court held the count was bad for duplicity.

The present case is quite different. Count 1 alleges one act of importation of narcotic goods on a specified date and identified two locations at which the imported heroin had been located. There was one offence alleged and the jury was correctly instructed that, if they were satisfied beyond reasonable doubt that heroin located at one or other or both of the two places named in count 1 of the indictment was knowingly imported by the applicant on **[10]** the date specified, the

charge would be proved. The law says that should some of the jury be satisfied to the requisite standard as to the heroin located in the kitchen of Flat 4, 96 Hotham Street, East St Kilda, and some of the jury be satisfied as to the heroin located in the hospital ward at Pentridge, the charge would be proved. Cf. *R v Clarke and Johnstone* [1986] VicRp 64; [1986] VR 643; (1986) 21 A Crim R 135. These grounds cannot succeed.

Finally, I turn to ground 13 in respect of which the applicant requires leave to argue this ground. Ground 13 reads:

> "That the learned Trial Judge erred in upholding objections by:-
> (a) The Commissioner of the Australian Federal Police
>
> (b) The Collector of Customs
> that documents called for by the applicant under the terms of Summons *duces tecum* directed to each of the aforesaid authorities should not be produced on the grounds *inter alia* that they were not relevant to the proceedings and were subject to public immunity indemnity."

A subpoena *duces tecum* was issued by the Court on behalf of the applicant directed to Australian Customs Service. Paragraph 1 of the subpoena specified that the following documents were required to be produced:

> "1. Any document which can be described as an administrative direction from the Australian Federal Police as to my proposed trip to Bangkok, Thailand (that is either prior to my departure or on the 5th December 1986) or my imminent return to Melbourne on the 17th December, 1986. This should include all drug information and/or intelligence, whether derived from investigations or other sources, relating to a possible attempt or actual breach of the Customs Barrier. This should also include the names of the investigating officers who communicated this information and/or intelligence as the case may be."

[11] Counsel appeared at the trial on behalf of Australian Customs Service and obtained leave to intervene. An affidavit made by the Acting Regional Manager was produced to the Court. Counsel also objected to the validity of the subpoena on the ground that it was unduly wide but the objection was overruled. Paragraph 4 of the affidavit reads:

> "That there is one document which can be described as an administrative direction from the Australian Federal Police as to the proposed trip of Olaf Dietrich to Bangkok, Thailand (either prior to his departure or on the 5 December 1986) or his imminent return to Melbourne on the 17 December 1986 which is in the possession of the Australian Customs Service. That document is History of PASS alert 512179."

In paragraphs 5 to 7, the deponent objected to production of this document on a number of grounds. It appears that after His Honour inspected the document, he upheld an objection on the ground of public interest immunity. His Honour applied the test prescribed by the High Court in *Alister v The Queen* [1984] HCA 85; 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97. In my opinion, nothing emerged during the hearing of this appeal to show error on the part of the learned Judge in rejecting the document.

Two further subpoenas *duces tecum* were issued by the Court on behalf of the applicant directed to the Australian Federal Police. The first is dated 24th May 1988, the second is dated 7th July 1988. Each subpoena was drawn in extremely wide terms. Mr McArdle of counsel was granted leave at the trial to appear on behalf of the Australian Federal Police. Two affidavits made by Michael Edward Kerrigan, a Detective Chief Inspector of the Australian Federal Police, were filed. Objection was taken in the **[12]** affidavits to production of most of the documents sought on the grounds of public interest immunity and relevancy. Mr McArdle argued that protection should be given to police procedures and techniques and, in particular, that police informers should not be revealed or compromised by production of the documents.

In respect of a number of the documents sought, the deponent said that the documents were not in the possession of the Australian Federal Police; in the case of other documents, no objection to their production was offered. The learned Judge was faced with a most difficult task due to the multiplicity of documents and the circumstance that the applicant was not represented by counsel. His Honour inspected a large quantity of documents and, in the case of some, determined

that they were not immune from inspection by the applicant. In the main, the documents ruled not immune from inspection were Surveillance or Running Sheets and certain portions of Police diaries. In the case of some other documents, His Honour upheld objection on the grounds that they were immune from production and inspection and not relevant to the trial under the rule enunciated by the High Court in *Alister's* case [1984] HCA 85; (1983) 50 ALR 41; (1984) 58 ALJR 97; (1984) 154 CLR 404.

It is clear from the transcript that the learned Judge went to extraordinary lengths to ensure that documents which might be favourable to the applicant's defence were allowed to go to him with appropriate deletions of informer's names. Mr O'Doherty submitted that the learned Judge determined in the case of some documents that they should not **[13]** be produced on the sole ground that the document was not relevant. When asked to support this submission by reference to the transcript of the trial, Mr O'Doherty was unable to do so. The transcript shows the extreme difficulty faced by His Honour but it also shows that the correct procedure was followed. The importance of this new ground and the circumstance that the applicant was unrepresented until recently requires, in my opinion, that leave should be granted to rely upon ground 13.

Mr O'Doherty failed to demonstrate to the Court that the learned Judge took into account anything which he was not entitled to take into account, or omitted to take into account something which he ought to have considered. The test applied by the learned Judge to determine admissibility of the documents was the correct test. The Court was unable to inspect documents for itself, save one statement which was produced, because the documents were returned to the possession of the Australian Federal Police and are no longer available. Even had the documents referred to in the Kerrigan affidavits been available to this Court, one would need to be persuaded that this Court should undertake an inspection of each document rejected by the learned Judge to ascertain whether he might possibly have been wrong in his opinion of the document.

I am not satisfied that the learned Judge erred when he dealt with the problems created by the subpoenas. Before departing from this ground it should be observed that the subpoenas represented, *prima facie*, a misuse of the Court's process. It is well established that a subpoena *duces tecum* directed to a stranger must specify with reasonable **[14]** particularity the documents which are required to be produced. If a subpoena can be seen to be oppressively wide, or a mere fishing expedition, it may be set aside as an abuse of process. The party to whom the subpoena is directed ought not to be required to go to the trouble and, perhaps, expense of ransacking records and endeavouring to form a judgment as to what documents in his possession fall into some broad category referred to in the subpoena.

These considerations are referred to in the oft cited judgment of Sir Frederick Jordan in *The Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; 55 WN (NSW) 215. After drawing a distinction between the subpoena procedure and discovery, the learned Chief Justice said at pp574-5:

> "It would greatly impede the trial of actions at *nisi prius*, and impose an intolerable burden upon the trial Judge, if he were required from time to time to suspend proceedings and wade for himself through masses of documents for the purpose of endeavouring to determine whether any of them were relevant. Especially is this so when the documents may be called for whilst the case is still at the stage when it is difficult or perhaps impossible for the Judge to know what may become relevant and what may not."

Later, on p575, His Honour also said:

> "Even if the documents are specified, a subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant."

Cf. *Waind v Hill* [1978] 1 NSWLR 372; *Lane v Registrar of the Supreme Court of New South Wales* [1981] HCA 35; (1981) 148 CLR 245 at p259; (1981) 35 ALR 322; 7 Fam LR 602; 55 ALJR 529.

The course of events in the trial in the present case suggests that the practice of issuing a subpoena *duces tecum* should be restricted to cases where the issuing party **[15]** is concerned to have documents brought to court which are identified with a sufficient degree of particularity. Ordinarily, it will not be sufficient to ask for production of all documents falling into a particular

class or category. (*Finnie v Dalglish* [1982] 1 NSWLR 400; (1981) 1 ANZ Insurance Cases 60-438.) In the present proceedings, as the transcript shows, the learned Judge was involved in a time consuming examination of a vast collection of documents which necessitated a substantial interruption to the trial. Further time was spent in dealing with piecemeal applications concerning the documents from time to time. In his ruling (at pp3076-8) the learned Judge made it clear that the subpoenas may have been set aside had he been pressed to make such an order. His Honour, in declining to do so, was clearly actuated by a desire to ensure that the applicant was in no way disadvantaged.

In my opinion, it is a mistake to depart from well settled procedural rules, whether or not the relevant party is represented by counsel. Sometimes a search for absolute purity of due process will have results which are calculated to distort and interfere with the orderly conduct of a proceeding. It might be thought the present case provides an illustration of this phenomenon. In this connection, it is useful to keep in mind that a criminal trial, despite its special characteristics, remains an adversarial proceeding.

There is no doubt that a County Court Judge has an inherent power to set aside proceedings which amount to a misuse of the Court process. (*Mason v Ryan* [1884] VicLawRp 115; (1884) **[16]** 10 VLR (L) 335; 6 ALT 152 1884). This power should be used in circumstances such as the present, whether or not the party issuing the subpoena is legally represented. The views expressed do not conflict with the judgment in *Alister v R* [1984] HCA 85; (1983) 50 ALR 41; (1984) 58 ALJR 97; (1984) 154 CLR 404. where the objection to the subpoena which was upheld by the trial Judge was based only upon public interest immunity. Ground 13 must also fail. Accordingly, as all the grounds of appeal relied upon fail, the application for leave to appeal the conviction must fail.

APPEARANCES: For the applicant Dietrich: Mr D O'Doherty, counsel. Grace & McGregor, solicitors. For the respondent Crown: Ms L Lieder, counsel. Commonwealth DPP. For the Federal Commissioner of Police. Mr JD McArdle, counsel. Commonwealth DPP.
