51/88

SUPREME COURT OF VICTORIA

McDONALD v BROTT

Crockett J

24 May, 3 June 1988 — [1989] VicRp 16; [1989] VR 177

EVIDENCE – ROYAL COMMISSION – PERSON ALLEGED TO BE IN CONTEMPT OF – PART PROCEEDINGS TAKEN IN PRIVATE – EVIDENCE GIVEN – WHETHER SUCH EVIDENCE MAY BE USED IN SUBSEQUENT PROCEEDINGS – COMMISSIONER ACTING IN DUAL FEDERAL/STATE CAPACITY – WHETHER STATE ACT PRECLUDES USE OF STATEMENTS IN A FEDERAL PROSECUTION: *ROYAL COMMISSIONS ACT* 1902 (CTH.), SS6D, 6DD, 60; *JUDICIARY ACT* 1903 (CTH.), S79; *EVIDENCE ACT* 1958 (Vic.), S30.

1. Where a Royal Commissioner made an order that part of proceedings before him be taken "in confidence" but gave no specific direction as to the non-publication of the evidence about to be given, a Magistrate was in error in dismissing an information for an offence under s60 of the *Royal Commissions Act* 1902 and in ruling that the Commissioner's order precluded the use of the evidence given in any subsequent proceedings.

2. Where evidence was given before a Royal Commissioner in his capacity as a Commonwealth and State Commissioner, notwithstanding the provisions of s30 of the *Evidence Act* 1958 (Vic.) which serve to exclude evidence given at such a hearing, the provisions of s60 of the Act when read in conjunction with s79 of the *Judiciary Act* 1903 (Cth.) provide that such evidence is admissible in proceedings for an offence against the Act.

CROCKETT J: **[1]** The respondent was charged with an offence pursuant to s60 of the *Royal Commissions Act* 1902 (Commonwealth). The offence alleged was one of contempt of a Royal Commission of Inquiry authorised by the Governor-General by Letters-Patent. The proceeding was thus a federal prosecution. The offence was said to have occurred in the course of the **[2]** respondent's giving evidence before the Royal Commissioner, Mr Costigan QC. Particulars of the alleged offence were fully set out in the information. They are obviously extracts from the transcript of the respondent's testimony.

The respondent was summoned to answer the information at the Melbourne Magistrates' Court. Counsel for each of the parties announced their respective appearances presumably upon the matter's being called on for hearing. However, the charge was not read to the respondent, nor was he asked how he pleaded. Instead, at the outset of the hearing the respondent's senior counsel said he had a preliminary submission that he wished then to make which, if accepted, would "render the information a nullity". No objection to the adoption of that course seems to have been raised by the informant's counsel and the Magistrate permitted it to be followed. The submission that was then made consisted of three arguments. They were:

(a) That, as the Royal Commission was also established by State Letters-Patent, s30 of the *Evidence Act* 1958 (Vic.) rendered inadmissible the evidence the informant intended to tender. It was conceded that s6DD of the Federal Act was inapplicable to prevent the respondent's statements being admissible in evidence against him because of the exception in the case of "proceedings for an offence against this Act." However, *R v Winneke; ex parte Gallagher & Ors* [1982] HCA 77; (1982) 152 CLR 211; 44 ALR 577; 57 ALJR 99 was said to be authority for the proposition that where **[3]** a single concurrent enquiry was conducted by a commissioner in his capacity as a Commonwealth and State Commissioner, the enquiry was conducted under the authority of both State and Commonwealth law. *Giannarelli v R* [1983] HCA 41; (1983) 154 CLR 212; 49 ALR 577; 57 ALJR 826 also was cited. In both those cases (the latter of which was a prosecution under a State Act) s6DD of the Commonwealth Act was held to be applicable so as to make the tendered evidence inadmissible. Accordingly, it was said that logically the reverse should apply so that s30 of the State Act operated to render inadmissible in a Commonwealth prosecution the respondent's statements made before the Commissioner.

(b) that s6D(3) of the Act was relevant and, accordingly, that evidence given by the respondent was immune from subsequent publication including presentation to the Magistrates' Court. The sub-section provides that:

> "The commission may direct that—
> (a) any evidence given before it;
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> (b) the contents of any document, or a description of any thing, produced before, or delivered to, the commission; or
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> (c) any information that might enable a person who has given evidence before the commission to be identified;
>
> shall not be published, or shall not be published except in such manner, and to such persons as the commission specifies."

[4] The contention relied upon in relation to this provision rested upon a passage in the transcript an extract of which was apparently shown or read to the Magistrate without objection by the informant's counsel. That passage which records what occurred immediately before the respondent began his evidence is as follows:

> "Mr Meagher: I ask that these proceedings be in confidence.
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> The Commissioner: Yes, these proceedings will be in confidence, Mr Meagher.
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> Mr Meagher: Mr Brott please.
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> The Commissioner: Mr Brott ... I have directed that these proceedings be confidential. I would like you to pay particular attention to that because it involves that you do not tell anybody outside this room what ... during the course of this hearing; do you understand that?
>
> ...Yes".

It was said for the respondent that what was said by the Commissioner amounted to a direction as to non-publication of evidence to be given to the commission so as to clothe that evidence when given with such confidentiality as to preclude its use in any subsequent proceedings. **[5]** (c) that the Crown had no power to appoint a commission to enquire whether or not any person has been guilty of a crime. It was said that such was the purpose of the commissions in the present case which were, in consequence, void and accordingly no behaviour before them could amount to punishable contempt. The argument rested upon some old English law. A like argument was, however, rejected by the High Court in *Clough v Leahy* [1904] HCA 38; (1904) 2 CLR 139; 11 ALR 32 and *McGuinness v Attorney-General* [1940] HCA 6; (1940) 63 CLR 73; [1940] ALR 110 and, as no attempt was made in this Court to rely upon it, no further reference to it need be made. After hearing argument on behalf of the informant the Magistrate rejected the respondent's first and third contentions but accepted the second. The charge was then read to the respondent. He pleaded not guilty. Counsel for the informant said that, in the light of the ruling that the statements made by the respondent before the Commissioner in the course of his evidence were non-publishable and so were inadmissible, he was without evidence to support the prosecution. The charge was then dismissed.

It is in respect of that order of dismissal that the informant obtained the order nisi to review the return of which is now before the Court. The grounds for the grant of the order nisi are:

> "1. The Magistrate erred in ruling that on 7 June 1984 the Royal Commissioner made an order pursuant to sub-section 6D(3) of the *Royal Commissions Act* 1902 ('the Act') preventing publication of the respondent's evidence before him.
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> **[6]** 2.The Magistrate erred in law by misconstruing sub-section 6D(3) of the Act in that her said ruling pre-supposed that the conduct of the Commissioner referred to in paragraph 10 of the affidavit of Wendy Elizabeth Fotheringham sworn on 20 August 1986 constituted a direction within the meaning of that sub-section.
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> 3. The Magistrate erred in ruling that on 8 June 1984 the Royal Commissioner did not revoke any

existing prohibition of the disclosure of the respondent's evidence of 7 June 1984 for the purpose of prosecution of the respondent in respect of such evidence.

4. The Magistrate was wrong in law in ruling that, even if the Royal Commissioner had on 7 June 1984 made an order pursuant to sub-section 6D(3), the evidence of the Royal Commission on 7 June 1984 was not admissible in proceedings for contempt of the Royal Commission contrary to section 60 of the Act."

I have not been able to detect any distinction of substance between grounds 1 and 2. Those grounds amount to a complaint that, having regard to the proper construction of s6D(3), what the Commissioner said at the outset of the respondent's testimony did not amount to an order pursuant to that sub-section. Ground 3 supports an argument that, even if what was said by the Commissioner prior to the respondent's testifying amounted to a prohibition against publication, the Commissioner's direction on the following day that the matter (i.e. the manner in which the respondent gave his evidence) "be referred to the authorities for his prosecution" constituted an implied revocation of the earlier given direction or, alternatively, an amendment of it so as to except publication to specified persons, namely, those responsible for the institution and carrying forward of any prosecution that might be commenced. Ground 4 argues that, **[7]** even if there were made an unqualified order as to non-publication, that order did not prevent use of the material to which the order related in a prosecution for an offence against the Act.

Upon the hearing of the return of the order nisi the respondent contended that the Magistrate's ruling was correct. If that contention should not succeed it was said that the order of dismissal could yet be defended on one or other or both of two other grounds. In the first place it was said that the first of the three arguments relied upon in the Court below, although rejected by the Magistrate, ought to have prevailed. This was the argument that led to the submission that s30 of the *Evidence Act* served to exclude evidence of what the respondent said at the Royal Commission hearing. In the second place, it was argued that, as the argument as to admissibility and the ruling on it occurred prior to the respondent's being asked to plead, they did not take place in the course of the hearing of the information. Nor were they by agreement of the parties expressly adopted so as to be treated as part of the proceedings once the respondent had pleaded to the information. Thus, all that relevantly occurred was that the respondent pleaded not guilty, no evidence was led against him and the information was, in consequence, dismissed. The order of dismissal made in such circumstances was perfectly proper and cannot now be impugned. These then are the three issues that the hearing of the return of the order nisi has presented for resolution.

The applicant relied upon a number of submissions in support of the primary proposition that there was not **[8]** relevantly in operation with respect to the respondent's evidence before the Commissioner a non-publication direction. It is unnecessary to refer to them all. I am satisfied that what the Commissioner said cannot be construed as such a direction. Sub-section (3) is concerned with retrospective, not prospective matters. With subsection (3) may be compared sub-section (2) which must operate only prospectively. The former is concerned with non-publication of evidence or material that has already been given or produced. The latter is concerned with the grant of privacy to evidence yet to be given.

Thus it can have been only to the question of privacy and not non-publication to which the Commissioner was directing himself. Moreover, the reference to "confidentiality" in the circumstances suggests to my mind that it was the question of the giving of evidence in private with which the Commissioner was concerned. This is not surprising as it appears that the respondent was a solicitor and the probability no doubt was that he was to be questioned about the affairs of certain of his clients At all events, the Commissioner simply did not give a direction in the terms of sub-section (3). At best what he said is ambiguous. That is to say he might have been intending to resort to the power conferred by that sub-section. But that is not enough to establish that he did, in fact, do so. It cannot be, and it has not been, suggested that, if the Commissioner's direction amounted to an order that the respondent's evidence be taken in private, that direction would prevent the giving of testimony in a court as to the respondent's evidence in proceedings for an offence against the *Royal Commissions Act*.

[9] I am, therefore, of opinion that the Magistrate was in error in ruling against the informant on this submission. Accordingly, it becomes unnecessary to consider the two further submissions

attacking the ruling. They were first, that the later direction to refer the respondent's evidence to "the appropriate authorities" amounted to a modification of the earlier direction so as to excuse publication necessary to permit a prosecution and, second, that in any event an unqualified order as to non-publication could not prevent publication of the evidence to support a prosecution for an offence against the Act.

It remains then to deal with the respondent's dual submissions as to why the order of dismissal should stand despite the Magistrate's error. In my opinion, *Giannarelli v R, supra*, cannot assist the respondent and the Magistrate was correct in so holding. The reverse operation of what in that case was held to be the law, namely that in a State prosecution that relies upon evidence given before a Royal Commission s6DD of the *Royal Commissions Act* applies so as to make that evidence inadmissible, cannot apply so as to allow s30 of the *Evidence Act* to operate to exclude evidence given to a Royal Commission in the case of a federal prosecution. That is because in the case of a court's exercising federal jurisdiction s79 of the *Judiciary Act* 1903 provides that "except as otherwise provided by ... the laws of the Commonwealth" the laws of a State shall be binding on all courts exercising federal jurisdiction in that State. Section 6DD does otherwise provide. By it, evidence given before a commission is expressly provided to be admissible in **[10]** proceedings for an offence against the Act. The offence charged is one created by s60 of the Act. Thus the proceedings were "for an offence against this Act." The respondent's argument that s79 of the *Judiciary Act* has no application in the circumstances is, I consider, without substance. This submission must, therefore, fail.

In my opinion, the remaining point relied upon to support the Magistrate's order of dismissal can be set aside if it was made in circumstances where the Magistrate has indicated that if tendered the evidence desired to be led by the informant would be rejected. And this is so even if that indication has been given in proceedings in which the procedure followed has been irregular. See *R v Phair* [1986] 1 Qd R 136. The events that occurred can be interpreted in any one of a number of ways. It may be said that after the respondent had pleaded there was a notional tender and rejection of the prosecution's evidence. Or it may be said that, in the circumstances, after plea the parties impliedly adopted the arguments and ruling that had preceded the plea and so considered themselves to be, and, in fact, were, bound by that ruling as though regularly given. Then it may be put that the circumstances of the Magistrate's statement as to the exclusion of the evidence required that the informant be treated as though after plea he had tendered the impugned evidence; the relevant circumstances being that the irregularity was self-induced by the respondent. It was his counsel who asked that the course followed be adopted. He **[11]** should not now be allowed to take advantage of any irregularity to which that course gave rise. It is to be noted that it is the purported giving of a ruling prior to plea that is said to constitute the irregularity.

As I understand it, the respondent does not suggest that the order of dismissal would not be reviewable if there were no formal tender of evidence following a ruling adverse to the informant provided that that ruling. had been given in the course of properly constituted proceedings: Cf. *DPP v Shannon* [1975] AC 717; [1974] 2 All ER 1009; (1974) 59 Cr App R 250; (1974) 3 WLR 155. The present case is rather akin to that with which the Court of Appeal was concerned in *R v Vickers* (1975) 1 WLR 811. In that case the ruling was given before arraignment. The procedure adopted was agreed to by the Judge and counsel. The ruling being adverse to the accused he thereupon entered a plea of guilty. The Court of Appeal was of the view that the ruling was not part of the trial and in consequence there was a danger that the accused could be left without a right of appeal against the ruling. In the event, however, the Court concluded that, as the judgment of guilt following the plea of guilty was grounded on the ruling, a right of appeal as to its correctness existed notwithstanding the Court's conclusion that such a procedure ought not thereafter be followed.

Finally, it may be noted that in a licensing case – *Williams v Hobday* [1954] HCA 40; (1954) 91 CLR 193 – Dixon, CJ remarked (at p201) that "unsatisfactory as the course followed may be from a procedural point of view, if the Licensing Court and the parties were content to treat such a notional tender of the evidence as conventionally equivalent **[12]** to an actual tender and if on that basis the evidence is to be taken as rejected, there appears to be no reason why for the purposes of s115 it should not be regarded as tantamount to a rejection of evidence regularly tendered." Nor do I consider that this proposition is any less valid by reason of the statutory procedural

requirement that upon the summary hearing of an information the Court shall proceed to hear the informant "if the defendant does not admit the truth of the information" – *Magistrates (Summary Proceedings) Act* 1975, s78(1)(d).

The result of these conclusions to which I have come is that the order of dismissal cannot stand. The order nisi is made absolute, the order of dismissal is set aside and the information and summons are remitted to the Magistrates' Court at Melbourne for hearing according to law. The respondent is to pay the applicant's taxed costs. Grant the respondent an indemnity certificate pursuant to s13 of the *Appeal Costs Act* 1964.

Solicitor for the applicant: Victorian Government Solicitor.
Solicitor for the respondent: S V Winter and Co.
