35/07; [2007] VSC 244

SUPREME COURT OF VICTORIA

DPP v SELWAY (Reasons for Ruling No 2)

Cummins J

2 July 2007 — (2007) 16 VR 508; (2007) 212 FLR 243; (2007) 172 A Crim R 359

CRIMINAL LAW AND PROCEDURE – EVIDENCE – SUBPOENA SEEKING MATERIAL AS TO POLICE SURVEILLANCE METHODOLOGY – CLAIM OF PUBLIC INTEREST IMMUNITY – TEST TO BE APPLIED IN DETERMINING CLAIM – WHETHER "ON THE CARDS" TEST IS APPROPRIATE – CONVERSATIONS BETWEEN PERSONS RECORDED BY POLICE OFFICERS PURSUANT TO WARRANTS ISSUED UNDER *LISTENING DEVICES ACT* 1969 – WHETHER THE CONVERSATIONS RECORDED WERE COMMUNICATIONS PASSING OVER THE TELECOMMUNICATIONS SYSTEM – WHETHER THERE WAS ANY INTERCEPTION OF THE CONVERSATIONS – WHETHER ANY FORENSIC PURPOSE MADE OUT FOR PRODUCTION OF THE SOUGHT-FOR MATERIAL: *TELECOMMUNICATIONS (INTERCEPTION) ACT* 1979 (CTH), S7; *LISTENING DEVICES ACT* 1969 (VIC), S4A.

Warrants issued under the *Listening Devices* Act 1969 (Vic) allowed for the installation of listening devices in premises and a motor vehicle used by S. Conversations between S. and the deceased's wife in a room or vehicle were recorded and at the subsequent trial of S. for murder, application was made to exclude the evidence on the ground that the transmission contravened s7 of the *Telecommunications (Interception) Act* 1979 (Cth) ('Act'). That provision proscribes interception of a communication passing over a telecommunications system unless a Commonwealth warrant has been first obtained to permit such interception.

HELD: Application for provision of material refused.

1. Frequently it has been said that the test to be applied for the order of production or refusal of material in respect of which a claim of public interest immunity is made is whether it is "on the cards" that the sought-for material would materially assist the defence. Although that expression has judicial authority it is unhelpful and should not be used. Metaphor illumines; it does not define. The test is whether it is reasonably possible that the sought-for material would materially assist the defence.

2. Legal definition should not be measured by the company one keeps when fishing or playing cards. On the basis of the authorities, the true test is whether there is a reasonable possibility that the sought-for information would materially assist the defence. Probability is too high a standard. Mere possibility is too low. The adverb "reasonably" gives proper scope to the judge to determine the issue responsibly and objectively. Such a standard also is consonant with the principles of open justice.

3. The impugned conversation, principally between the accused and the deceased's wife, occurred in residential premises. They were received at a police listening post and there recorded. The defence submission foundered at the outset because it confused hearing with communication. In law there was no communication passing over the telecommunications system. A face to face conversation between two persons in a room or vehicle is not a communication over the telecommunications system. It is a conversation in a room or vehicle. Eavesdropping is not communicating: it is listening. What was heard and recorded in Melbourne was third-hand listening; it was not a communication. Further, in law there was no interception. Interception, as the prefix 'inter' connotes, involves intrusion into the frequency. The conversations between the accused and the deceased's wife (or others) were not "a communication in its passage over (a) telecommunications system" (s6(1) and (2)) but were face-to-face conversations, intended to be private, in a room or vehicle. The conversations were not conducted on or by telephone or on or by the telecommunications system. The communications were not communications passing between users of the telecommunications system. Accordingly, the transmission did not contravene the provisions of s7 of the Act and evidence was admissible.

CUMMINS J:

Preface

1. In Ruling No. 2 I refused the provision to the defence of material in the hands of the Chief Commissioner of Police as to surveillance methods utilised by investigating police and which was sought on behalf of the accused in order to found a submission for exclusion of evidence. The

evidence sought to be excluded is numerous statements by the accused in private conversation in his home and a vehicle and which were clandestinely received and recorded by Victorian police pursuant to warrants issued by this Court. The crime charged is murder. The conversations were between the accused and the wife of the deceased, following the killing of the deceased and which the prosecution says are incriminatory of the crime charged. The conversations occurred at Phillip Island, Victoria and were recorded by police in Melbourne. They were heard and recorded pursuant to three warrants issued by this Court: the first on 1 July 1997, the second on 18 July 1997 and the third on 11 August 1997. The essential defence submission is that if the conversations at Phillip Island and which were heard and recorded in Melbourne were transmitted between Phillip Island and Melbourne by telephonic communication, that transmission contravened the provisions of s7 *Telecommunications (Interception) Act* 1979 (Commonwealth) which proscribed interception of a communication passing over a telecommunications systems unless a Commonwealth warrant had been obtained therefor. It is common ground that no such Commonwealth warrant had been obtained or was in existence at the relevant or at any time. Thus, so the defence argument runs, the evidentiary material obtained lawfully by State warrant, but unlawfully by lack of Commonwealth warrant, is inadmissible. In order to found such submission the defence seeks by way of subpoena directed to the Chief Commissioner of Police (Victoria) data as to the method of capturing, transmitting, receiving and recording of the subject conversations, in particular the method of transmission of the material between Phillip Island and Melbourne. It is hoped by the defence thus to attract the provisions of s7 *Telecommunications (Interception) Act* 1979 (Commonwealth) to the material and to found its evidentiary exclusion.

2. Production of the methodological material was opposed by counsel appearing by leave for the Chief Commissioner of Police (Victoria), on the ground of public interest immunity. Rather than have reference to confidential material, in order to facilitate the presentation of the defence submission I formally assumed the optimum factual situation the defence were seeking: that the transmission of data from Phillip Island to Melbourne was over a "communications system", thus fulfilling that element of s7 *Telecommunications (Interception) Act* 1979 (Commonwealth). On that factual assumption, which was the most favourable factual substratum for the defence for purposes of its submission, nonetheless I ruled that no forensic purpose was made out for the production of the sought-for material. I stated in Ruling No 2:

> "2. I consider that the objection by Mr Dennis, appearing by leave for the Chief Commissioner of Police, that there is no forensic purpose made out for the elicitation of material on the *voir dire* is made out. There is no forensic purpose because I consider, taking Mr Faris's arguments at their highest on the facts and the law, they cannot as a matter of law successfully found a submission that s7 was breached. Essentially that is because, in my view, the conversations in a room between two persons face to face which were overheard and passed over on a telecommunications system were not conversations to which s7 applies because they were not between users of, or by a user of, the telecommunications system.
>
> 3. Because the matter involves statutory construction and a large number of authorities I will reduce my reasons to writing and publish them to the parties. I conclude that Mr Faris's argument founders on that first and in my view critical point and thus is stillborn and cannot produce in law any result favourable to the defence. Thus no forensic purpose is served by further investigating the matter."

I now publish those reasons.

The test

3. I turn first to the appropriate test to be applied to the consideration of production or refusal of production of material as to which a claim of public interest immunity is made on behalf of police in criminal proceedings.

4. Frequently in this Court counsel have expressed the test as whether it is "on the cards" that the sought-for material would materially assist the defence. Although that expression has judicial authority I consider it is unhelpful and should not be used. Metaphor illumines; it does not define. The test is whether it is reasonably possible that the sought-for material would materially assist the defence.

5. In this Court the authority frequently relied upon for the "on the cards" formulation is *Fitzgerald v Magistrates' Court of Victoria & Ors*[1] per Balmford J particularly at paragraph [20].

That matter was an Order 56 review of a decision in the Magistrates' Court as to a magistrate's refusal to order production of police documents in relation to charges under the *Road Safety Act* 1986 as to driving with a prescribed blood alcohol content. The matter before Balmford J was not an appeal pursuant to s92 *Magistrates' Court Act* 1989 but an Order 56 review because the order below was interlocutory. Her Honour reviewed relevant authority, notably *Alister & Ors v R*[2] per Gibbs CJ at 414-415 and *Saleam*[3] per Hunt J at 409 and in whose judgment Carruthers and Grove JJ agreed, that the magistrate must be satisfied that it is "on the cards" that the sought-for documents would materially assist the defence. Her Honour continued:

> "I note that in the second edition of the *Oxford English Dictionary* 'on the cards' is defined as meaning 'within the range of probability'. Thus the decision of the Magistrate which is under review is a decision that it was not within the range of probability that the documents would materially assist the plaintiff."

6. The dictionary definition utilised by her Honour is not the denotation of the expression when first judicially used in both England and Australia. Its judicial genesis appears to be in the judgment of the Court, delivered by Asquith LJ, in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*[4]. In considering the principles of liability enunciated in *Hadley v Baxendale*[5] and passed upon by Lord du Parcq in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker A/B*[6] the Court stated (at 540):

> "Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, forsee that a breach might necessarily result in that loss. It is enough if he could forsee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case [*Monarch Steamship Co Ltd*], if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy."

"Liable" does not mean "likely". In *Koufos v C. Czarnikow Ltd*[7] Lord Reid used the term "on the cards" interchangeably with serious or distinct possibility. His Lordship's meaning was crystal-clear, as the following passage (at 390) reveals:

> "It has never been held to be sufficient in contract that the loss was foreseeable as a 'serious possibility' or as 'a real danger' or as being 'on the cards'. It is on the cards that one can win £100,000 or more for a stake of a few pence – several people have done that."

It is clear that his Lordship placed the expression "on the cards" in the category of possibility, not probability. In *Koufos*, other Lords deprecated the use of the expression "on the cards". Lord Morris of Borth-Y-Gest, referring to the judgment of the Court of Appeal in *Victoria Laundry* above cited, stated (at 399):

> "Certain illustrative phrases are employed in that case. They are valuable by way of exposition but for my part I doubt whether the phrase 'on the cards' has a sufficiently clear meaning or possesses such a comparable shade of meaning as to qualify it to take its place with the various other phrases which line up as expositions of the rule."

Lord Pearce stated (at 415):

> "I do not however accept the colloquialism 'on the cards' as being a useful test because I am not sure just what nuance it has either in my own personal vocabulary or in that of others. I suspect that it owes its attraction, like many other colloquialisms, to the fact that one may utter it without having the trouble of really thinking out with precision what one means oneself or what others will understand by it, a spurious attraction which in general makes colloquialism unsuitable for definition, though it is often useful for a collection of definable ideas."

I agree. Lord Upjohn stated (at 425):

> "... like all your Lordships I deprecate the use of that phrase ['on the cards'] which is far too imprecise and to my mind is capable of denoting a most improbable and unlikely event, such as winning a prize on a premium bond or any given drawing."

7. It appears that the first use of the expression "on the cards" in the area of public interest

immunity was by Lord Edmund-Davies in *Burmah Oil Co Ltd v Bank of England and Anor*[8] at 1126 when he said:

> "Then is all this merely 'on the cards', simply a 'fishing expedition'? If that is all there is to it, discovery should be refused. But in my judgment the existence of such documentary material is likely. And that, in my judgment, is sufficient."

Those sentences, in context, were part of the following passage:

> "What are the probabilities of such documentary support being in existence? Is it merely pure conjecture? If so, applying the plaintiffs' own test, production should be refused. But in my judgment, there is more to it than that. It is, at the very least, 'on the cards' that, in the light of the bank's known support and advocacy of profit-sharing, they expressed their unequivocal dislike when the government expressed determination to impose its final terms upon Burmah. It was, I think, an over-simplification for the Attorney-General to submit that the only issue is whether the January agreement was in fact inequitable, and not whether the bank regarded it as inequitable. For if, faced by government obduracy despite its strong representations, the bank insisted upon the proposed contractual terms, an arguable foundation for the appellants' allegations of unconscionability against the bank itself could be laid. Then is all this merely 'on the cards,' simply a 'fishing expedition'? If that is all there is to it, discovery should be refused. But in my judgment the existence of such documentary material is likely. And that, in my judgment, is sufficient. For although, as the noble and learned Lord, Lord Wilberforce, has pointed out, it was *known* in *Conway v. Rimmer* [1968] UKHL 2; [1968] AC 910; [1968] 1 All ER 874; [1968] 2 WLR 998 that there were in existence probationary reports on the plaintiff, positive knowledge of that sort is not, in my view, a *sine qua non* before discovery may be ordered. Nevertheless, as I have already indicated, I think it is very unlikely to have come into existence before January 10, 1975, and (if it exists at all) it will probably be found in the 10 documents numbered 16, 20, 21, 22, 24, 34, 26, 32, 35 and 26 in the appellants' case."

It is there evident that his Lordship, like Lord Reid in *Koufos*, was using the term "on the cards" as meaning a possibility, not a probability. That is its judicial genesis in the area of public interest immunity. It is thus apparent that the use by His Lordship is quite different from the dictionary definition utilised by Balmford J in *Fitzgerald*.

8. In Australia the expression has often been used without definition. It first appeared in *Alister & Ors v R* per Gibbs CJ at 414 (cited by Balmford J in *Fitzgerald*) where his Honour stated:

> "Although a mere 'fishing' expedition can never be allowed, it may be enough that it appears to be 'on the cards' that the documents will materially assist the defence."

The learned Chief Justice did not state whether the expression 'on the cards' meant possible or probable; simply that it was more than "a mere 'fishing' expedition". However his Honour was astute to the analysis of Lord Edmund-Davies in *Burmah* and there is no reason to think the Chief Justice did not draw the distinction made by his Lordship. In *Saleam* Hunt J, in whose judgment Carruthers and Grove JJ agreed, stated at 409 (cited by Balmford J in *Fitzgerald)*:

> "In my view, the criterion finally suggested by Gibbs CJ in *Alister* as that which had to be satisfied before a court should inspect documents in relation to which a claim for public interest immunity had been made is appropriate to be applied also when the trial judge has to determine whether access should be granted to documents subpoenaed from the police in relation to which objection has been taken that no legitimate forensic purpose exists for their production. He must be satisfied that it is 'on the cards' that the documents would materially assist the accused in his defence."

However his Honour had earlier stated, at 408-409:

> "Both Brennan J at (456) and Gibbs CJ (at 414) adopted as a starting point for fixing the criterion to be applied in such a task that which was suggested by Lord Wilberforce in *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 at 439; [1983] 1 All ER 161; [1983] 2 WLR 494 – that, before a court inspects the documents for which a claim for public interest immunity has been made, there must be some concrete ground for its belief that ultimately access to the documents would be permitted, so as to take the case beyond a mere fishing expedition. Both the Chief Justice and Brennan J thought that, because it was a criminal case, special weight had to be given to the fact that the documents might assist an accused person whose liberty is at stake: *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at 42, 61-62. Gibbs CJ (at 414); 21 ALR 505; 53 ALJR 11; 37 ALT 122 said that, although a mere fishing expedition could never be allowed, it may be enough in such

> a case that it appears to be 'on the cards' that the documents would materially assist the accused. Murphy J (at 431) agreed with the judgment of Gibbs CJ. Wilson and Dawson JJ, who dissented on this point, referred (at 439) to the criterion suggested by Lord Fraser in the *Air Canada* case at 436 – that there have to be definite grounds for expecting to find material of real importance to the parties seeking disclosure. Their Honours did not think that the criminal nature of the proceedings affected the criterion to be applied where public interest immunity was claimed. Such a view would not, of course, apply where the only issue to be considered is whether there is a legitimate forensic purpose for the production of the documents at a particular stage of the criminal proceedings."

The expression "on the cards" has since frequently been stated in the area of public interest immunity, but again without definition: *Hunt and Boyce v De Pinto & Anor*[9] per Perry J at 454; *Falconer v Kenworthy*[10] per Wheeler J at 546-547 (where the adverb "materially" was examined but not the expression "on the cards"); *Spizzirri*[11] per de Jersey CJ at 102 and per Pincus JA at 107; *R v Mokbel*[12] per Gillard J and where his Honour at [46] applied the test that the documents "may provide (the relevant) information"; and *Felice v County Court of Victoria & Anor*[13] per Osborn J. Wheeler J in *Falconer v Kenworthy* above cited referred with approval to the judgment of Scott J in *Ran v R*[14] who having referred to the "on the cards" test, stated:

> "In my opinion, the better test is that there should be evidence that the documents concerned are likely to be relevant for some legitimate forensic before access to the documents is permitted."

9. The meaning of the expression "on the cards" has been considered in Australia. In the insurance context, Lindgren J in *FAI General Insurance Co Ltd v McSweeney*[15] stated that circumstances "may give rise to a claim where the bringing of the claim against the insured in respect of them was a 'definite risk' or a 'real possibility' or 'on the cards'." In the medical context in a murder appeal, in *Erich v R*[16], concerning the meaning of the word "probable" used in cross-examination of a pathologist, the Court referred to passages in *Koufos* above cited and then expressed the compendium "something which is a serious or distinct possibility or which is 'on the cards'".

10. The above demonstrates the frailty of metaphor and the danger of applying a dictionary definition thereto. I agree with Adams J in *RTA v Connolly*[17] who stated that "this area of the law is bedevilled with metaphors". Legal definition should not be measured by the company one keeps when fishing or playing cards. On the basis of the above authorities, I consider that the true test is whether there is a reasonable possibility that the sought-for information would materially assist the defence. Probability is too high a standard.[18] Mere possibility is too low. The adverb "reasonably" gives proper scope to the judge to determine the issue responsibly and objectively. Such a standard also is consonant with the principles of open justice.[19]

The substantive issue

11. The impugned conversations, principally between the accused and the wife of the deceased, occurred in residential premises at Phillip Island. They were received at a police listening post in Melbourne and there recorded. The defence subpoena seeks information as to the means of receiving and transmission of the sounds from Phillip Island to Melbourne for, so the defence submission goes, if that transmission was telephonic it was unlawful because no Commonwealth warrant had been obtained, or ever was obtained, pursuant to s7 *Telecommunications (Interception) Act* 1979 (Commonwealth) authorising telephonic interception. Thus, it was submitted, the impugned material was unlawfully obtained and should be excluded from evidence at trial.

12. The depositional and other material establishes that listening devices were installed in premises, known as "Shearwater", at Lot 5 Phillip Island Tourist Road, Phillip Island between 9 July and 4 August 1997. A listening device also was installed in the accused's vehicle, FHJ 942, between 16 and 28 August 1997. The installation and utilisation of the devices was effected pursuant to and in accordance with warrants issued by this Court pursuant to s4A *Listening Devices Act* 1969 (Victoria) (the then applicable State legislation; now replaced by the *Surveillance Devices Act* 1999 (Victoria)). The first two warrants, issued on 1 and 18 July 1997 respectively, related to the premises and the vehicle; the third, issued on 11 August 1997 related to the vehicle only. The sounds were received at and recorded at a police listening post in Melbourne. There is no doubt that the installation, listening and recording were lawful under the stated Victorian legislation. The relevant Victorian legislative requirements were satisfied and complied with. The question is whether there was breach of s7 *Telecommunications (Interception) Act* 1979 (Commonwealth)

in that a telephonic communication was intercepted without relevant warrant, being a warrant issued pursuant to s7(2)(b) of the Commonwealth legislation.

13. At the relevant time the *Telecommunications (Interception) Act* 1979 (Commonwealth) provided as follows:

> **Part II – Interception of telecommunications**
> 7 Telecommunications not to be intercepted
> (1) A person shall not:
> (a) intercept;
> (b) authorize, suffer or permit another person to intercept; or
> (c) do any act or thing that will enable him or her or another person to intercept;
> a communication passing over a telecommunications system.
> (2) Subsection (1) does not apply to or in relation to:
> (a) an act or thing done by an employee of a carrier in the course of his or her duties for or in connection with:
> (i) the installation of any line, or the installation of any equipment, used or intended for use in connection with a telecommunications service; or
> (ii) the operation or maintenance of a telecommunications system; or
> (iii) the identifying or tracing of any person who has contravened, or is suspected of having contravened or being likely to contravene, a provision of Part V11B of the *Crimes Act* 1914;
> where it is reasonably necessary for the employee to do that act or thing in order to perform those duties effectively;
> (aa) the interception of a communication by another person lawfully engaged in duties relating to the installation, connection or maintenance of equipment or a line, where it is reasonably necessary for the person to intercept the communication in order to perform those duties effectively;
> (ab) the interception of a communication by a person lawfully engaged in duties relating to the installation, connection or maintenance of equipment used, or to be used, for the interception of communications under warrants;
> (ac) the interception of a communication where the interception results from, or is incidental to, action taken by an officer of the Organisation, in the lawful performance of his or her duties, for the purpose of:
> (i) discovering whether a listening device is being used at, or in relation to, a particular place; or
> (ii) determining the location of a listening device;
> (b) the interception of a communication under a warrant; or
> (c) the interception of a communication pursuant to a request made, or purporting to be made, under subsection 30(1) or (2). .....
> 6 Interception of a communication
> (1) For the purposes of this Act, but subject to this section, interception of a communication passing over a telecommunications system consists of listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication.
> (2) Where a person lawfully on premises to which a telecommunications service is provided by a carrier, by means of any apparatus or equipment that is part of that service:
> (a) listens to or records a communication passing over the telecommunications system of which that service forms a part, being a communication that is being made to or from that service;
> (b) listens to or records a communication passing over the telecommunications system of which that service forms a part, being a communication that is being received at that service in the ordinary course of the operation of that telecommunications system; or
> (c) listens to or records a communication passing over the telecommunications system of which that service forms a part as a result of a technical defect in that system or the mistake of an officer of the carrier;
> the listening or recording does not, for the purposes of this Act, constitute the interception of the communication. .....
> 5 Interpretation
> (1) In this Act, unless the contrary intention appears: .....
> *communication* includes conversation and a message, and any part of a conversation or message, whether:
> (a) in the form of:
> (i) speech, music or other sounds;
> (ii) data;
> (iii) text;
> (iv) visual images, whether or not animated; or
> (v) signals; or
> (b) in any other form or in any combination of forms."
> Section 63, contained in Part VII (*Dealing with intercepted information*), in relevant part provided:

"(2) Subject to this Part, a person must not, after the commencement of this subsection:
(a) communicate designated warrant information to another person; or

(b) make use of designated warrant information; or

(c) make a record of designated warrant information; or

(d) give designated warrant information in a proceeding."

14. The critical parts of the Commonwealth legislation set out in the previous paragraph are, first, by s7 the proscription of interception; by s6 the definition of interception; and by s5 the definition of communication. Section 7 in its proscription of interception is plenary as to the actors, including permissive and delegated action. Section 6 is restrictive as to interception, confining it to "a communication in its passage over (the) telecommunications system". And s5 in its definition of communication is broad in ambit.

15. Mr Faris, who with Mr Hayden appeared for the accused, in an extrapolated submission put that if the subject conversations were transmitted from Phillip Island (the accused's premises and vehicle) to Melbourne (the police listening post) by telephonic means including mobile phone, the receipt in Melbourne of those conversations constituted an interception contrary to s7. Thus the defence subpoena seeking to establish that the geographical transfer was telephonic. As I have said, rather than proceed down the evidentiary path (which was opposed by Victoria Police), as a matter of logic I proceeded on the assumption that the defence predicate was so: that the transmission was telephonic; and asked, what is the consequence under s7?

16. Shorn of its extrapolation, Mr Faris' essential submission is that if the subject conversations were captured by hidden mobile telephones, transmitted to the Melbourne listening post, and there heard and recorded, that hearing and recording constituted an interception proscribed by s7, because there were conversations (s5(1)(a)(i)); the conversations passed over a telecommunications system (s6(1)); and which were listened to and recorded (s6(2)(a)). Numerous authorities were cited in support of elements of that submission, including as to whether a recording is of a communication "in its passage over (a) telecommunications system" (s6(1)). Comprehensive and helpful though that submission was, I consider it founders at the outset.

17. The defence submission founders at the outset because it confuses hearing with communication. In law there was no communication passing over the telecommunications system. A face to face conversation between two persons in a room or vehicle is not a communication over the telecommunications system. It is a conversation in a room or vehicle. (Of course, if the parties were communicating with another person by speaker-phone different considerations would apply; but that was not the case here). Eavesdropping is not communicating. It is listening. What was heard and recorded in Melbourne was third-hand listening; it was not a communication. Further, in law there was no interception. Interception, as the prefix 'inter' connotes, involves intrusion into the frequency. The conversations between the accused and the deceased's wife (or others) were not "a communication in its passage over (a) telecommunications system" (s6(1) and (2)) but were face-to-face conversations, intended to be private, in a room or vehicle. The conversations were not conducted on or by telephone or on or by the telecommunications system. The communications were not communications passing between users of the telecommunications system, which is the class the Commonwealth legislation is designed to protect, and intrusion upon which is the vice the Commonwealth legislation is designed to obviate.

18. Thus the defence submission fails at the entry gate to the Commonwealth legislation. In law there was no communication passing over the telecommunications system; and there was no interception of that communication in its passage over that telecommunications system. Speaking to someone face-to-face in a room or vehicle is not communicating over the telecommunications system. That remains so whether or not it is eavesdropped by a third party by mobile telephone, if that is what occurred.

19. Although there are a vast number of authorities upon telephonic interception, there appears no authority governing this precise question. Most of the authorities relate to the receiving of the communication rather than, as here, its source. However there is clear authority for the purposive analysis I have stated. In *Edelsten v Investigating Committee of New South Wales*[20] Lee J held

that interception involves intrusion into the frequency and at 229 stated:

> "The Act, in seeking to control interception of communications, is concerned to protect the privacy of communications passing between users of the system established by the Commission ..."[21]

20. The submission was also made on behalf of the Chief Commissioner that the police officer at the listening post which received the communication was lawfully on police premises to which the telecommunication service was provided by the carrier and thus s6(2) applied and the listening or recording thereby did not constitute a proscribed interception. In view of my ruling on the primary matter, it is unnecessary to consider this additional submission further.

21. Accordingly I ruled in Ruling No. 2 that, taking the defence position at its factual highest, no forensic purpose was made out for the provision of the material sought by subpoena because as a matter of law it could not avail the defence. Therefore I refused the provision of the sought-for material.

---

[1] [2001] VSC 348; (2001) 34 MVR 448.
[2] [1984] HCA 85; (1983-1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97.
[3] (1989) 16 NSWLR 14; 39 A Crim R 406.
[4] [1949] 2 KB 528; [1949] 1 All ER 997; 65 TLR 274.
[5] [1854] EngR 296; (1854) 9 Exch 341; 156 ER 145.
[6] [1949] AC 196 at 233; [1949] 1 All ER 1.
[7] [1967] 1 AC 350.
[8] [1979] UKHL 4; [1980] AC 1090.
[9] (1995) 63 SASR 402; (1994) 77 A Crim R 447.
[10] (1998) 99 A Crim R 541.
[11] [2000] QCA 469; [2001] 2 Qd R 686; (2000) 117 A Crim R 101.
[12] [2005] VSC 410 at [45].
[13] [2006] VSC 12 at [42]-[50].
[14] (1996) 16 WAR 447 at 456.
[15] (1999) 10 ANZ Insurance Cases 61-443 at 75,033-4 cited with apparent approval by Bennett J in *Macquarie Underwriting Pty Ltd v Permanent Custodians Ltd* [2006] FCA 1291 per Bennett J at [20]; (2006) 14 ANZ Insurance Cases 61-713.
[16] (Also known as *Ante Erich v R*) [1980] FCA 28; FCA (Full Court) 27 March 1980 (FC 45 of 1979) *per curiam* at 5.
[17] [2003] NSWSC 327 at [12]; (2003) 57 NSWLR 310; (2003) 38 MVR 444.
[18] *Contra* Scott J in *Ran v R* (1996) 16 WAR 447 above cited at 456.
[19] As to which see *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 per Lord Hewart CJ at 259; [1923] All ER 233; 93 LJKB 129; *Alister & Ors v R* above cited per Gibbs CJ at 415; *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 per Gleeson CJ and Gaudron, McHugh, Gummow and Hayne JJ at 493; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21; and *R v Mokbel* above cited per Gillard J at [24]-[25].
[20] 86 FLR 388; (1986) 80 ALR 85; (1986) 7 NSWLR 222.
[21] Cited with approval by the Court of Criminal Appeal in *R v Edelsten* (1990) 21 NSWLR 542 at 549; (1990) 51 A Crim R 397. See also *T v Medical Board of South Australia* (1992) 58 SASR 382 at 398 per Matheson J (in whose judgment Debelle J agreed); *Green v R* (1996) 124 FLR 423; (1996) 135 ALR 181 at 189-190; (1996) 85 A Crim R 229 per Franklyn J (in whose judgment Pidgeon and Rowland JJ agreed); and *R v Evans and Doyle* [1998] VSC 486 per McDonald J at [58]–[62].

APPEARANCES: For the DPP: Mr M Gamble SC and Ms S Pillai, counsel. Office of Public Prosecutions. For the accused Selway: Mr P Faris, QC and Mr I Hayden, counsel. Rainer Ellinghaus, solicitors. For the Chief Commissioner of Police (Victoria): Mr BM Dennis, counsel. Victorian Government Solicitor.
