09/02; [2002] VSC 75

SUPREME COURT OF VICTORIA

WILSON & ANOR v CHILDREN'S COURT OF VICTORIA & ANOR

Mandie J

14 March 2002 — (2002) 129 A Crim R 107

CRIMINAL LAW – ORDER TO UNDERGO COMPULSORY PROCEDURE – PRE-REQUISITE FOR MAKING ORDER – COURT TO BE SATISFIED THAT MATERIAL REASONABLY BELIEVED TO BE FROM THE BODY OF A PERSON WHO COMMITTED THE OFFENCE HAS BEEN FOUND AT THE SCENE OF THE OFFENCE – SUCH PRE-CONDITION NOT DETERMINED BY COURT – WHETHER COURT IN ERROR: *CRIMES ACT* 1958, S464U(7).

Section 464U(7) of the *Crimes Act* 1958 empowers the Children's Court to make an order directing a child to undergo a compulsory procedure if satisfied on the balance of probabilities of certain matters. One of the matters of which the court must be satisfied is that material reasonably believed to be from the body of a person who committed the offence has been found either at the scene of the offence or on the victim of the offence or on anything reasonably believed to have been worn or carried by the victim when the offence was committed or on an object or person reasonably believed to have been associated with the commission of the offence. The defendants were charged with a number of offences including aggravated burglary of residential premises and one of the articles said to have been stolen was a wallet which was in the kitchen of the premises and was subsequently found in the garden of the premises. Two separate DNA samples were found and taken from that wallet. After hearing evidence on the application, the court made orders that the defendants undergo a compulsory procedure. Upon an originating motion to quash—

HELD: Orders made quashed.
The court was required to deal with the question whether the mere fact that there was more than one type of DNA material found on the wallet itself supported a reasonable belief that at least one of the DNA profiles came from the body of a person who committed the offence. Parliament has laid down that whether the material is reasonably believed to be from the body of a person who committed the offence is a pre-condition to the making of an order and not a mere matter to be taken into account and thus it is a jurisdictional matter. As the court failed to determine this matter, there was jurisdictional error by the court.

MANDIE J:

1. This proceeding is brought by the plaintiffs by originating motion dated 31 October 2001 against the Children's Court of Victoria and Senior Constable Frilay. The relief sought by the originating motion is that the decision of the Children's Court of Victoria at Melbourne on 6 September 2001 ordering the first and second plaintiffs to undergo a compulsory procedure pursuant to s464U(7) of the *Crimes Act* 1958 (Victoria) be set aside. I think it is common ground that the relief sought is judicial review in the nature of *certiorari* and that the relief sought is perhaps more precisely stated as being that the order be quashed.

2. The plaintiffs have been charged with a number of offences including that of aggravated burglary which latter offence forms a basis for the application which was made to the Children's Court under s464U(7) of the *Crimes Act*. The alleged burglary was of residential premises at which two occupants were present and asleep and one of the articles said to have been stolen was a wallet which was in the kitchen of those premises and was subsequently found in the garden of the premises. Two separate DNA samples have been found and taken from that wallet.

3. Section 464U(7) of the *Crimes Act* empowers the Children's Court to make an order directing a child aged ten years or more but under 17 years, to undergo a compulsory procedure if satisfied on the balance of probabilities of certain matters. The compulsory procedure here sought to have been ordered and in fact ordered by the Children's Court was the provision by each plaintiff of a buccal swab. It is common ground that the pre-conditions for an application to the Children's Court were satisfied, that is the conditions contained in sub-s(3) of s464U.

4. Section 464U(4) provides for an application to the Children's Court by a member of the

police force to be in writing supported by evidence on oath or by affidavit and I take it from that that evidence supporting an application might be given on oath or by affidavit or by both means. In the present case it appears that affidavits in support were filed with the court and there is some dispute about what otherwise happened with those affidavits, which I will come to in due course. But that the application before the court was supported by sworn evidence by the relevant member of the police force, who is the second defendant in this proceeding.

5. It is not in issue that notice of the application was given to a parent or guardian of each of the plaintiffs. See s464U(5). Section 464U(7), as I have said, contains a number of matters as to which the Children's Court must be satisfied on the balance of probabilities in order that it may be empowered to make an order that a child undergo a compulsory procedure as defined. There are a number of these matters but the only two which were put in issue before the Children's Court and which have been the subject of debate in this proceeding are contained in sub-ss(b) and (c). Section 464U(7)(b) says in substance that the court must be satisfied on the balance of probabilities, that there are reasonable grounds to believe that the child has committed the offence in respect of which the application is made.

6. And s464U(7)(c) provides, in substance, that the court must be satisfied on the balance of probabilities, that material reasonably believed to be from the body of a person who committed the offence has been found either at the scene of the offence or on the victim of the offence or on anything reasonably believed to have been worn or carried by the victim when the offence was committed or on an object or person reasonably believed to have been associated with the commission of the offence.

7. The particular parts of that provision which are relevant to the present proceeding are the words, "at the scene of the offence" and the words, "on an object believed to have been associated with the commission of the offence", namely the wallet.

8. Section 464U(8) provides a number of matters which the court must take into account but these matters have not been the subject of grounds of review.

9. Section 464U(9) requires the Children’s Court to give reasons for its decision, to state the evidence on which it is satisfied of the matters referred to in sub-s(7) and cause a note of the reasons to be entered in the records of the court.

10. Section 464U(12) provides that a child in respect of whom an application is made, is not a party to the application and may not call or cross-examine any witnesses and may not address the court other than in respect of any matter referred to in sub-s(7)(a) to (g) or sub-s(8).

11. Section 464U(13) provides that in exercising the right of address under sub-s(12)(c), a child may be represented by a legal practitioner or with the leave of the court, a parent or guardian of the child. In the present case each plaintiff was represented by a legal practitioner before the Children's Court, which was constituted by Her Honour Judge Coate.

12. A number of decisions of this Court were referred to relating to the nature of this procedure and in particular I was referred to and have had regard to *Loughnan v Magistrates Court of Victoria* [1993] VicRp 49; [1993] 1 VR 685.

13. As I have said, the second defendant gave evidence before the Children's Court. The learned judge made an order as sought in respect of each plaintiff, for the provision of a buccal swab, and the order was made on a standard form which named the child, named the applicant for the order, named the alleged offence as "aggravated burglary-person present" and then it recited that "having heard the application supported by", and there is a blank which has not been filled in, and being satisfied on the balance of probabilities of a number of matters, that the application was granted for the attached published reasons.

14. Attached to the order, were the reasons as required by the Act. Her Honour said, and it was accepted before me, that there were two issues before the Children's Court in relation to the application. The first was that, whether, on the evidence before that court, the court was satisfied on the balance of probabilities, that there were reasonable grounds to believe that these children

had committed the relevant offence and the second was whether the court was satisfied on the balance of probabilities that there was material reasonably believed to be from the body of a person who committed the offence, found at the scene of the offence.

15. Her Honour summarised the sworn evidence of the second defendant given before her, namely that at about 3am on Friday August 11 2000, the house at 39 Walters Avenue, Airport West, was burgled; that the occupants of the house were asleep inside the premises when the burglary took place; that a wallet was stolen from the kitchen of those premises during that burglary and was found in the front garden of 39 Walters Avenue, Airport West; that the respondents were observed together a few streets away from 39 Walters Avenue, in Elreno Crescent, Airport West, at a proximate time to the burglary; that there were no other pedestrians observed in the area at that time; that a trained police dog handler and dog, tracked the respondents from where they were seen in Elreno Crescent, Airport West, to where they were apprehended a few streets away at the intersection of Laugherne Avenue and Lock Street, Airport West; that the dog handler and police dog then "back tracked" back from the location where the respondents were apprehended back to 39 Walters Avenue, Airport West, in an "unbroken track" and that the stolen wallet found in the front garden of 39 Walters Avenue, Airport West has been analysed at the forensic science laboratory and that analysis has established that two separate types of male DNA have been found on the wallet. Her Honour then went on to give her reasons for making the order, to which I will come in a moment.

16. The first ground relied upon by the plaintiffs, in attacking Her Honour's order, was that the court erred in law, in purporting to exercise jurisdiction without determining or addressing a pre-condition for the exercise of jurisdiction to make the order, namely that material reasonably believed to be from the body of a person who committed the offence has been found at the scene of the offence or on an object associated with the commission of the offence, pursuant to s464U(7)(c)1(A) or (C) of the Act.

17. It was submitted on behalf of the plaintiffs that the court had committed a jurisdictional error or, further or in the alternative, an error of law, by failing to consider or determine on the balance of probabilities, whether there was material reasonably believed to be from the body of the person who committed the offence, found at the scene of the offence. That was the issue formulated by the Children's Court, or one of the two issues formulated by the Children's Court, at the commencement of the reasons for decision.

18. It cannot be said that the court did not advert to that as one of the issues but the question is, whether having adverted to it as one of the issues, it was dealt with and determined.

19. After setting out the summary of the evidence, to which I have already referred, Her Honour formulated the test applicable in the circumstances as follows, "Does the court find on the balance of probabilities that there are reasonable grounds for the investigating police member to form the belief the respondents have committed the offence and whether a comparison between the DNA of each respondent with the DNA found on the wallet at the scene, would tend to prove or disprove the respondents' involvement in the commission of the offence". It is to be noted that the second matter mentioned, whether the DNA found on the wallet at the scene would tend to prove or disprove the respondents' involvement in the commission of the offence, does not relate to the issue raised by s464U(7)(c) but to another issue raised by the relevant provisions contained in s464U(7)(f). The question raised by (f) was not an issue before Her Honour and was not an issue named by her at the outset and it seems not unreasonable to take the view that there was a slide in the reasoning from one issue to the other which may, I think, have certain consequences.

20. When one then looks at the reasoning which follows that formulation of the test which I have just set out, there is a reference to the evidence upon which Her Honour said she was satisfied on the balance of probabilities, that there were reasonable grounds to form the belief that the respondents had committed the offence, but there is no express finding that there was material reasonably believed to be from the body of the person who committed the offence, found at the scene of the offence.

21. The court referred to matters relating to the other issue before it, whether there were reasonable grounds to believe that the children had committed the offence. Her Honour emphasised

three aspects of the evidence in respect of that issue and then said, "And the two DNA profiles identified on the stolen discarded wallet are male and even though one of those DNA samples may belong to the owner of the wallet, it is not possible that both belong to the owner as no person can have two DNA profiles. A comparison between the DNA profiles found on the wallets and the respondents' would tend to prove or disprove their involvement in the commission of the offences".

22. There is no express consideration of the question whether the DNA samples found at the scene or found on the wallet, was material reasonably believed to be from the body of a person who committed the offence. It was submitted on behalf of the second defendant, that such consideration and finding was implicit in the reasoning contained in the reasons for decision.

23. I do not think that that is so. It does not appear from the reasons that Her Honour expressly considered the question whether either of the DNA profiles found on the wallet was material reasonably believed to be from the body of a person who committed the offence. There is really no indication in the reasons, despite stating the requirement at the outset, that the court subsequently considered that question.

24. I do not think that it is implicit in the reasons that that question was considered at all. The evidence before the court was that there was a wallet on the kitchen table of the premises and that it was stolen and subsequently found in the front garden of the premises. There was no information or evidence before the court as to who used the wallet, or who was likely to have touched the wallet. A separate charge relating to the wallet alleged that it was the property of a particular person but there appears to have been no evidence about that before the court.

25. It was submitted by counsel for the second defendant that a wallet is a personal item, and that it was also a reasonable inference that it would have been transported to the front garden by the person who committed the relevant offence and that person had left one of the two DNA profiles on the wallet. There is a lot to be said for that reasoning but it is curious that it is not considered by the court.

26. The absence of reference to any considerations of that kind suggests to me that it is not implicit in the reasoning of the court that the issue was considered at all. Although the issue is stated on the first page of the reasons, I have referred to the subsequent passage in which the court slid to a different and separate issue which was not debated in the Children's Court, namely whether the DNA found on the wallet at the scene would tend to prove or disprove the respondents' involvement in the commission of the offence. For obvious reasons, as I have said, that was not an issue and the conclusion which the court expressed at the end of the reasons, immediately before making the order, was to the same effect, that a comparison between the DNA profiles found on the wallet and the respondents' would tend to provide or disprove their involvement in the commission of the offences.

27. The court does not appear to have grappled at all with the question as to whether the mere fact that there was more than one type of DNA material found on the wallet of itself supported a reasonable belief that at least one of the DNA profiles came from the body of a person who committed the offence. The failure of the court to even consider that question, in the context of these reasons, leads me to conclude that it cannot be implied that that was considered. It would seem to have been a key question to be considered if the issue initially stated was to be analysed.

28. On the face of the record, apart from stating at the outset that it was an issue, there is no consideration of the issue and no conclusion as required by the Act that the court was satisfied on the balance of probabilities that there was material reasonably believed to be from the body of a person who committed the offence, found at the scene of the offence. There is no reference at all by the court to that material having been found on an object associated with the commission of the offence, which was probably the preferable way of phrasing the issue. But putting that on one side, even if it is sufficient for the purpose of an order to refer to the material having been found at the scene of the offence, there is no reasoning to be found anywhere in the record relating to the aspect of "from the body of a person who committed the offence".

29. The reference to the DNA profiles, one being male and one of which may belong to the owner, seems to have been related to the question of tending to prove or disprove the involvement

of the plaintiffs in the commission of the offences and was not related to the question whether the material is reasonably believed to be from the body of a person who committed the offence. Parliament has laid that down as one of the prerequisites to the making of an order and it is not a mere matter that is to be taken into account and thus it is a jurisdictional matter. I was referred to some authorities on that question. One of them was *Potter v Tural* (2000) 2 VR 612, 629-630, in the judgment of Batt JA, where the distinction is made between matters which a court is required mandatorily to have regard to and to take into account and matters which delimit the jurisdiction and which are a pre-condition of the existence of any authority to make an order at all. In my opinion sub-s(c) is one of the latter class of conditions. It is a pre-condition of the court having power to make any order at all and therefore goes to jurisdiction. I am therefore of the view that there was a jurisdictional error by the court.

30. In any event, even if that is wrong, there was in my view for the same reasons, an error of law on the face of the record. The court has not either considered the question raised by s464U(7)(c) or reached the conclusion required to be reached as a pre-condition to the making of an order by s464U(7)(c).

31. I will deal briefly with the other grounds. The second ground is that the court erred in law in the tests it formulated to determine the existence of jurisdiction. It is sufficient to say that I do not think that the court erred in its initial formulation of the questions to be decided, that is on the first page of the reasons, and that when it came to what the court referred to as the test applicable, what was set out does not appear to be incorrect, although I have found that an important aspect was omitted, namely that covered by sub-s(7)(c), but otherwise I am not satisfied that there was any error in formulation of the test. In particular the words, "for the investigating police member", I do not think detract from the broad statement of the test contained in the court's reasons.

32. Ground 3 was that the first defendant erred in law in exercising the jurisdiction to make a compulsory procedure order in circumstances where no reasonable decision maker, acting within the jurisdiction and according to law, could have made such an order. That ground would have raised an interesting question if I had been of the view that the court had considered whether there was material reasonably believed to be from the body of a person who committed the offence found at the scene of the offence: whether the evidence was sufficient to make it open to the court to be satisfied on the balance of probabilities as to that matter. That is a somewhat difficult question. There is some strength, as I have already indicated, in the argument that there was at least some evidentiary material which entitled the court to be so satisfied. However, the absence of any reasoning by the court on that question does not render it necessary to consider whether such reasoning would have been totally illogical and an error of law, as submitted. That is because in my opinion, the court did not address itself to the jurisdictional question to which I have already referred, so ground 3 does not really arise in the circumstances.

33. Ground 4 attacks the conclusion of the court that on the balance of probabilities there were reasonable grounds to believe that the plaintiffs had committed the offence. Ground 5 also attacks that conclusion. It is unnecessary to determine those grounds, although my tentative view is that there was some evidence before the court as disclosed by the reasons for decision which was sufficient to provide reasonable grounds to believe that the children had committed the offence. It is unnecessary to determine that question.

34. Ground 6 was that the court erred in law in finding that the wallet found in the front garden of 39 Walters Avenue, Airport West contained two male DNA profiles in the absence of any evidence to support such a finding. In the circumstances that ground does not arise.

35. Ground 7 was that the court, in making the finding described in ground 6, without the first and second plaintiff having the opportunity to address the matter, erred in law by denying the first and second plaintiff natural justice. This ground arises from circumstances which are not entirely clear. There were affidavits filed by the second defendant in support of the application, which were apparently not known to the legal representatives for the plaintiffs. At least there is evidence that one legal representative was unaware of the affidavit and it would seem to be a reasonable inference, which had I decided otherwise, might perhaps have been supplemented by further evidence, that neither representative knew of the existence of that affidavit and there is

some considerable basis for inferring that the court relied on the affidavits. There were two affidavits but they were both to the same effect. The court probably had recourse to the affidavits which referred to two "male" DNA samples, and that evidence was contradicted by evidence apparently later given by the second defendant in his oral evidence.

36. The court's reasons placed some emphasis on there being "male" DNA samples and the plaintiffs' complaint was that because the plaintiffs were unaware of the existence of the affidavit, they had not had an opportunity to address that particular question. There were a number of answers put to that, but, in the circumstances, I think it is unnecessary to determine the question, although it is somewhat disquieting that affidavits may have been inadvertently used by the court on the assumption that the parties were aware of them, when in fact that may well not have been the case. However, in the circumstances of my conclusion in relation to ground 1, it is unnecessary to determine that question.

37. The formal order will be that the orders of the court in relation to each of the plaintiffs dated 6 September 2001 requiring that each plaintiff provide a buccal swab, be quashed.

APPEARANCES: For the first plaintiff W: Mr L Carter, counsel. Pearsons, solicitors. For the second plaintiff: Mr L Carter, counsel. Victoria Legal Aid. For the second defendant: Mr D Trapnell, counsel. Solicitor for Public Prosecutions.
