26/90

SUPREME COURT OF VICTORIA

ALTMANN and ORS v MOLONEY and ORS

Cummins J

12 January 1990

PRACTICE – DECLARATORY ORDER SOUGHT – COMMITTAL PROCEEDINGS – WITNESS REFUSING TO ANSWER QUESTION RE LOCATION OF LISTENING DEVICE – CLAIM OF PRIVILEGE – UPHELD BY MAGISTRATE – TEST TO BE APPLIED UPON APPLICATION FOR A DECLARATION – WHETHER SPECIAL CIRCUMSTANCES EXISTED TO JUSTIFY MAKING OF DECLARATION: *LISTENING DEVICES ACT* 1969, SS4A, 5.

1. Special circumstances must exist to justify intervention by a superior court in a committal proceeding.

***Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97; *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Bourke v Hamilton* (1977) 1 NSWLR 470, applied.**

2. Where in a committal proceeding a magistrate upheld a police officer's objection to answering a question seeking to elicit the location of a listening device, no special reason existed to justify intervention by the Supreme Court, notwithstanding that the application for intervention was made *bona fide* for the elucidation of evidence which may have been relevant.

CUMMINS J: [1] The plaintiffs, Mr Kenneth Ian Altmann, Mr David Kenneth Russell and Mr Peter William Turland, pursuant to Order 56, seek a declaration that a Magistrate, the first defendant, Mr Francis Moloney, permit the asking of questions of police officers who are witnesses in committal proceedings at the Geelong Magistrates' Court as to the location of listening devices within premises situated at Lot 6, Campiglis Road, Kawarren, and the shed mentioned in the warrant attached to an affidavit in support of the motion, and that the Magistrate order that the questions so asked be answered.

The matter has come on before me by summons. There is currently at the Geelong Magistrates' Court committal proceedings in relation to the plaintiffs as defendants. Each is charged essentially with conspiracy to traffic in a drug of dependence – namely, amphetamines – between 1st December, 1988 and 19th May, 1989 at Gellibrand; traffic in a drug of dependence – namely, amphetamines – on 29th May, 1989 at Gellibrand, and on that day and place possess a drug of dependence, namely, amphetamines.

During the course of the committal proceeding a witness for the Crown, Inspector Michael Edmund Williams, was asked a question by counsel for a plaintiff, the question seeking to elicit the location of a listening device installed at the premises stated. Inspector Williams refused to answer the question on the ground of public interest immunity. The Magistrate then ruled upon the matter. He upheld that objection.

I have before me exhibited to an affidavit of John Alexander McCulloch, a solicitor for a plaintiff, the **[2]** handwritten reasons of the Magistrate, which reasons are precise and clear. In the course of the proceedings before me I permitted the plaintiffs to add a further element to their seeking of a declaration, and that element was that the Magistrate direct the production of the affidavit, or affidavits, in support of the issuance in this court of the warrant authorising the placing of the listening devices, and also the report, or a copy of it, to the Minister as required by s5 of the *Listening Devices Act* 1969. The reasons of the Magistrate, in refusing application for that material, have been provided to me; again, they are precise and clear.

The *Listening Devices Act* 1969, by s4A, makes the provision for the procedure for and criteria relevant to the granting by this court of authorisation for the placement of listening devices. Consonant with that procedure Hampel J in this court, on 8th May, 1989 and again on 26 May,

1989 issued warrants in the normal form. The first was to operate, and did operate, from 8th to 28th May, 1989 and the second from 29th May to 18th June, 1989.

The warrant authorised the recording of or listening to the private conversations of Peter William Turland, David Kenneth Russell, and diverse others, specified by whom the devices may be operated, and specified that the devices were to be installed at Lot 6 Campiglis Road, Kawarren, and a shed at the rear of the premises. There were no special conditions laid down as to the entering of the premises or the use of the devices. **[3]** By s5 of the Act the person to whom the warrant has been granted under s4A is required to report in writing to the Minister as there set forth under pain of penalty.

Counsel for the plaintiffs has submitted that the issues which arise, both in relation to the ruling upholding public interest immunity and the ruling not requiring the production of the affidavits in support of the warrants or the report to the Minister, are such that this court ought intervene in the committal proceeding by way of declaratory order. The Magistrate, through counsel before me, has acknowledged that he is content to be bound by such ruling as I make without further submissions.

Counsel for the informants has submitted to me that this is not a special case as contemplated by the authorities such as to justify intervention during the running of a committal proceeding. Counsel for the plaintiffs has submitted that this is a special case, essentially because the curial testing of relevant matter bearing upon the proof of guilt or otherwise of the defendants is special within the contemplation of the authorities, and that the ruling that a witness is entitled to refuse to answer a question which is relevant and germane to the determination of guilt or otherwise is itself special.

[4] There is no doubt that the issues raised in relation to the curial pursuit of evidence elicited by a pathway of listening devices are important issues. Aspects of the matter have been considered in *Murphy v R* and *Murdoch v R* [1989] HCA 28; (1989) 167 CLR 94; 86 ALR 35; (1989) 63 ALJR 422; 40 A Crim R 361. Counsel for the plaintiffs submitted that consonant with the principles adumbrated by Brennan J in *Alister and Others v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97 the ruling of the Magistrate upholding the objection bore upon a chance of acquittal of the defendants. Counsel submitted that two critical issues in the proceedings, particularly to the conspiracy charges, which are serious charges, were the proof of what actually was said and, secondly, the identification of the speakers of what was said.

Although the only question which brings the matter before me is the question I have stated and which is set forth essentially in the motion, namely, the location of listening devices, it is plain that the logic which supports, if it supports, the requirement to answer such a question would next equally apply to questions as to the nature and specification of the device or devices, the method of their operation and perhaps their testing. That is because such matters, although not presently adumbrated before me, logically fell under the same principle, namely, the curial testing of the mode of proof by the Crown.

[5] Although no formal step has been taken by the Minister in claiming immunity before me, nor is the Minister represented, the objection taken by Inspector Williams is a routine and well known one and is essentially based upon the overriding importance of the future and ongoing investigation of crime. That is, that the future investigation not be deflected, incommoded or prevented by the curial revelation of methodology which, once revealed, is thereby or may thereby be rendered nugatory for future investigation purposes. Such a consequence would or might follow from such devices being jammed or otherwise defeated once their specifications, capacities and modes of operations are revealed.

The law has developed from the leading decision of *Sankey v Whitlam and Others* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122, proceedings through *Lamb v Moss* [1983] FCA 254; 76 FLR 296; (1983) 49 ALR 533; (1983) 5 ALD 446, *O'Donovan v Forsyth* (1987) 18 FCR 101; (1987) 76 ALR 97; (1987) 19 ATR 380; (1987) 29 A Crim R 292 and *Alister and Others v R* which I have cited, on the question of intervention by superior courts in committal proceedings. Some of these interventions have been sought at a point at the end of the proceedings, such as *Bourke v Hamilton* (1977) 1 NSWLR 470 and other cases. In others, such as this, the

intervention is sought during the conduct of the committal proceedings and before the point of decision making.

[6] The basal principle is laid down by Gibbs ACJ in *Sankey v Whitlam* at pp25-26, in which he states:

> In any case in which a declaration can be and is sought on a question of evidence or procedure, the circumstances must be most exceptional to warrant the grant of relief. The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicality; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. But the procedure is open to abuse, particularly in criminal cases and if wrongly used can cause the very evils it is designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process."

His Honour then referred to the decision in *Bourke v Hamilton* and went on:

> For those reasons I would respectfully endorse the observations of Jacobs J [as he then was] in *Shapowloff v Dunn* (1973) 2 NSWLR 468 at 470 that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order."

As was stated by Needham J in *Bourke v Hamilton* at p493 and cited with apparent **[7]** approval by Fitzgerald J in *Seymour v The Attorney-General and Others* [1984] FCA 122; 1 FCR 416; (1984) 53 ALR 513 at 536; 12 A Crim R 157:

> "...the power to interfere with committal proceedings is a drastic one, to be exercised only in those cases where the Supreme Court takes the view that a failure to exercise it will necessarily result in an injustice being perpetrated."

In this case I do not consider that any of the undesirable motives set forth by Gibbs ACJ at pp 25-26 of *Sankey v Whitlam* are present. That is to say that I consider this application is *bona fide* for the elucidation of evidence which may be relevant. However, there are powerful reasons set forth in the authorities cited why committal proceedings should only be interfered with by superior courts in special circumstances. Those powerful reasons operate whether or not the motives of the applicant are valid. Those considerations are that unless intervention by superior courts is restricted to the necessary case as contemplated by the authorities, the administration of justice (acknowledging that committals are a ministerial, not judicial act) would significantly be defeated.

There are many cases, of which this may be one, where at committal questions which may be important questions of law or procedure or evidence, arise. I consider this case is no different to many cases in which important questions may or do arise. **[8]** Were superior courts to intervene on each such occasion when an application is made, the conduct of committals would be jeopardised and sometimes defeated. Having regard to the issues of law involved and the suggested use of the impugned material and its suggested relevance, I do not consider that this is a special case within the meaning of the authorities such as to found intervention in an ongoing committal. For those reasons I refuse this application.

APPEARANCES: For the plaintiff Altman and Ors: Mr IN Brewer, counsel. McCulloch & Peters, solicitors. For the defendants Moloney and Ors: Mr R Meehan, counsel.
