44/90

SUPREME COURT OF VICTORIA

WALSH v LOUGHNAN

Vincent J

11, 15 December 1990 — [1991] VicRp 75; [1991] 2 VR 351

CRIMINAL LAW – COMPULSORY BLOOD SAMPLE – REFUSAL BY RELEVANT SUSPECT TO GIVE SAMPLE WHEN REQUESTED – APPLICATION BY POLICE OFFICER FOR COURT ORDER – "BELIEVES ON REASONABLE GROUNDS" – MEANING OF: *CRIMES ACT* 1958, S464U.

Where a police officer applies to a magistrate for an order directing a suspected person to give a sample of blood, the magistrate must be satisfied that the police officer believes on reasonable grounds that the suspect has committed the offence in respect of which the blood sample is sought. For there to be reasonable grounds for a state of mind – including suspicion or belief – there must exist facts which are sufficient to induce that state of mind in a reasonable person. The police officer is not required to establish that a *prima facie* case exists and the questions to be determined by the magistrate are not to be resolved by reference to the rules of evidence nor by applying a test related to the balance of probabilities.

***George v Rockett and Anor* [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246, applied.**

VINCENT J: [*After setting out some of the evidence given in support of the application for an order, the relevant statutory provisions and a reference to the second reading speech, His Honour continued*] … **[9]** Section 464U(1)(c) makes it clear that, before any application for an order directing that a relevant suspect give a sample of his or her blood may be made to a court by a member of the police force, the member concerned must hold a belief on reasonable grounds that the suspect has committed the offence in respect of which the sample is sought. No such belief need be held **[10]** by the Magistrate who deals with the application. The Magistrate must be satisfied in this context only that reasonable grounds exist. In dealing with this question, it is important that it be kept in mind that there is no requirement that an applicant establish that a *prima facie* case exists or even that there be evidence or information available which indicates that the suspect is probably guilty.

As the High Court stated in *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483 at 488; 64 ALJR 384; 48 A Crim R 246:

> "When a statute prescribes that there must be "reasonable grounds" for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liversidge v Anderson* [1941] UKHL 1; [1942] AC 206; [1941] 3 All ER 338; 116 LT 1: see *Nakkuda Ali v MF De S. Jayaratne* [1951] LR AC 66 at 76-7; *R v IRC; Ex parte Rossminster Ltd* [1979] UKHL 5; [1980] AC 952 at 1000, 1011, 1017-18; [1980] 1 All ER 80; [1980] 2 WLR 1; *Bradley v Commonwealth* [1973] HCA 34; (1973) 128 CLR 557 at 574-5; (1973) 1 ALR 241; 47 ALJR 504; 52 ILR 1;*WA Pines Pty Ltd v Bannerman* [1980] FCA 2; (1980) 41 FLR 169 at 180-1; 30 ALR 559 at 566-7.'

In that case the Court dealt with a somewhat similar situation to that which has arisen here. When dealing with the distinction between the concepts of reasonable grounds for a suspicion, and reasonable grounds for the holding of a belief in the existence of a relevant subject matter, their Honours stated at p490:

> "In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind (*Homes v Thorpe* [1925] SASR 286 at 291; *Seven Seas Publishing Pty Ltd v Sullivan* [1968] NZLR 663 at 666) and the section prescribes distinct subject matters of **[11]** suspicion on the one hand and belief on the other. The justice must be satisfied that there are reasonable grounds for suspecting that "there is in any house, vessel, vehicle, aircraft, or place – Anything" and that there are reasonable grounds for believing that the thing "will … afford evidence as to the commission of any offence". Suspicion, as Lord Devlin said in *Hussein v Chong Fook Kam* [1970] AC 942 at 948, "in its

ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* [1966] HCA 21; (1966) 115 CLR 266; [1966] ALR 855; 40 ALJR 13, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay [its] debts as they became due" as that phrase was used in s95(4) of the *Bankruptcy Act* 1924 (Cth). Kitto J said (at 303):

> "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as *Chambers' Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s(4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension of fear that the situation of the payer is in actual fact that which the sub-section describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than **[12]** rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

Unfortunately judgment was not handed down by the High Court until a short time after the completion of the proceeding before the learned Magistrate who was accordingly denied the assistance which it provides in the determination of this matter.

The questions to be determined by the learned Magistrate were not to be resolved by reference to the rules of evidence or by the application of a test related to the balance of probabilities. In the process of investigation it is by no means uncommon for information to be obtained which would not be admissible in a court of law, or for well-founded suspicions and beliefs to be developed on the basis of a variety of pieces and types of information, including evidence of consistency or inconsistency of conduct, which could not be advanced as proof of the facts outlined or suspected to exist.

At the hearing of the application that the giving of a blood sample by the respondent be ordered he was represented by Mr Morrish of Her Majesty's Counsel and Mr Szabo of Counsel who raised as a preliminary objection before the learned Magistrate, the proposition that the applicant was required, before he was entitled to make an application to the Court, to establish that in accordance with s464U(1)(c) he held the belief that the respondent had committed the offence in respect of **[13]** which the sample was requested, and importantly, that he held that belief on reasonable grounds. His Worship decided to deal with this question as a threshold issue and submissions were presented in relation to it by counsel for each party.

After considering the matter His Worship refused to proceed further with the application. It is that decision which the applicant now seeks to review. Although the Order Nisi contains other grounds, before this Court argument was directed to only one. That grounds reads:

> "The learned Magistrate erred in law in holding that the said grounds which the Applicant so regarded were not reasonable by failing to give any or any sufficient weight to the evidence that in formulating those grounds the Applicant took into account –
>
> (a) that the Respondent had "adopted the attitude that he believes that he is but cannot be certain" that he is the father of the child of the deceased;
>
> (b) that the Respondent had acted in a manner consistent with his being the father of the child as set forth in paragraphs (xvii), (xxiv), (xxvii) and (xviii) of exhibit "DW3" to the affidavit of the Applicant;
> (c) that all probable suspects other than the Respondent have given blood and been eliminated as suspects."

In order that the arguments presented by counsel in relation to the present application

may be placed into a proper context, a brief outline of the propositions advanced before His Worship needs to be provided. **[14]** In substance Mr Gyorffy of Counsel who appeared for the applicant submitted before him that the expression "reasonable grounds" did not require that an applicant establish the existence of a *prima facie* case and should be equated more with the notion of "reasonable suspicion". He relied upon the judgment of the Court of Appeal in *Dumbell v Roberts & Ors* (1944) 1 All ER 326 where it is stated:

> "The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community."

(per Scott LJ at p329) and quoted the judgment of Diplock LJ in *Dallison v Caffrey* [1965] 1 QB 348; [1964] 2 All ER 610; [1964] 3 WLR 385:

> "Where a felony has been committed, a person, whether or not he is a police officer, acts reasonably in making an arrest without a warrant if the facts which he himself knows or of which he has been credibly informed at the time of the arrest make it probable that the person arrested committed the felony. This is that constitutes in law reasonable and probable cause for the arrest." (at QB p370)

Reference was made to *McIntosh v Webster & Anor* 30 ACTR 19; (1980) 43 FLR 112 where Connor J considered the meaning of the term "with reasonable cause suspects" where it appears in s352 of the *Crimes Act* (1900) NSW. The final authority to which he referred was *Shaahan Bin Hussien v Chong Fook Kam* (1969) 3 All ER 1626; [1970] 2 WLR 441 where Lord Devlin expresses the view that:

> "Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police **[15]** case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised." (at All ER p1630)

As His Worship correctly pointed out and as the passages cited clearly indicate these cases were not concerned with the question which arose before him and provided little, if any, assistance to its resolution.

Mr Morrish responded by reference to the nature of the substantial change in the law which has been effected by the enactment of the relevant provisions and, in particular, to the departure which it represents from the traditional common law approach to the rights of persons suspected of the commission of criminal offences. He drew attention to the protections built into the enactment, and argued that it should be interpreted restrictively. On this basis he contended that the concept of reasonable grounds for belief could be equated to that adopted by the Courts when deciding whether a *prima facie* case of the guilt of a suspected person has been established.

His Worship rejected this submission which he considered could restrict the operation of the Act to an extent which was inconsistent with the legislative intention underlying it. The learned Magistrate was obviously troubled about the matter. He was confident, it would seem, that the submissions of neither counsel were correct, but **[16]** indicated that he found himself unable to formulate an appropriate test. At one stage he put the matter as follows:

> "That probably doesn't help you very much, gentlemen, because what I'm saying is that I don't agree with either of your positions. The test is somewhere in between and I can't really formulate it and put what position it actually is on the line. I think you'll just have to rely on me to say that if I am satisfied on the evidence that there are reasonable grounds, by which I don't mean *prima facie* and I don't mean reasonable suspicion, then the application is successful.: (at p26)

By what standard he considered the matter is accordingly unclear. However, His Worship did make some statements which provide some assistance in identifying the approach taken by him. First in this context, note must be taken of the passage just quoted. Second, when giving his ruling His Worship stated:

> "... it is my finding, on the material which is contained in the items that have been tendered as

> Exhibit "A", that there is not sufficient to take the paternity questions beyond the question of a mere suspicion. There is no indication of when in 1984 Nelson and Loughnan met. We're told in s11 a short time later Loughnan and Nelson went out to dinner together. On that evening Nelson claimed to have had sexual (indistinct) on the rear seat of his car. Shortly after Nelson was tested positively as being pregnant. It's a basis for suspicion, I'm not satisfied it's a basis for reasonable belief that Mr Loughnan, giving the material that's provided in evidence in support, is the father. There are negative inferences to be drawn, very few positive inferences to be drawn, strong negative inferences to be drawn." At p41-42)

The apparent balancing of some unidentified competing pieces of information, factors, or possibilities, to which I understand that His Worship **[17]** directed attention in this passage, suggest that he had engaged in an assessment of the evidence before him to determine whether objectively considered it was capable of supporting a finding that the respondent was, more likely than not, the father of the child. In other words he appears to have applied to the question before him a test based upon the balance of probabilities.

In making this comment, I am mindful of the possibility that I may be reading too much into imprecise language which was employed *ex tempore*. Nevertheless, the fact remains that it was used in a situation in which the learned Magistrate not only found himself unable to formulate an appropriate test, but remarked that he would deal with the issue of the establishment of the jurisdictional preconditions according to the standards applicable to a hearing on a *voir dire*.

The question of the basis upon which the learned Magistrate determined whether the belief of the applicant rested upon reasonable grounds assumes importance in this matter by reason of the ground relied upon in this Court. I have already set out that ground earlier in this judgment. It will be observed that it raises a contention that His Worship failed to give appropriate significance to certain aspects of the evidence before him.

For my part, I find it difficult to see how he would ever have been able to determine what weight should be attributed to any of the pieces of information with which he had been provided and therefore those **[18]** referred to in the ground, when he had no clear understanding of what was involved in the concept of "reasonable" grounds for the holding of a belief. To put the matter another way, it is to be anticipated that great difficulty is likely to be experienced in measuring within appropriate tolerances the weight to be given to an item of information, when the person engaged in the exercise either possesses no standard of measurement or, as has probably occurred in the present case, adopts an incorrect standard.

I find it even more difficult to see how upon the application of the proper test His Worship arrived at the decision which he reached. The description of the nature and effect of the evidence as to the paternity of the child given by him and which I have earlier set out, did scant justice to the material before him. He made no specific reference to the conduct of the deceased or the respondent with respect to this question, and gave no indication that he regarded their behaviour as being in any way significant.

There is a remarkable incongruity presented by his decision that the plaintiff did not have reasonable grounds for believing that the respondent was the father of the deceased's child when the respondent was prepared to acknowledge that he may have been, conducted himself in a fashion which was clearly consistent with a belief that he was, and at no stage repudiated the suggestion of which when he was **[19]** apparently confronted with the repeated statements of the deceased to that effect. In that situation I do not consider that proper weight could or has been given to the matters set out in the grounds before this Court.

Accordingly, in my view, the Order Nisi should be made absolute and the application remitted for determination in the Magistrates' Court in accordance with law. By reason of the view which I have formed in this matter I do not find it necessary to deal with the application made by the Solicitor-General to amend the grounds to be considered in this application.

Solicitor for the applicant: Victorian Government Solicitor. Solicitors for the respondent: Gargan and Roache.
