45/90

SUPREME COURT OF VICTORIA

CZARNECKI v McINNIS

Teague J

4 September, 2 October 1990

PROCEDURE – APPLICATION FOR COURT ORDER TO FINGERPRINT SUSPECT – COURT REQUIRED TO MAKE NOTES OF EVIDENCE – REASONS TO BE GIVEN – ORDER TO BE ENTERED IN COURT RECORDS – ORDER MADE WHEN NOT APPLIED FOR – WHETHER ORDER VALID – DUTY ON MAGISTRATE TO ADEQUATELY RECORD EVIDENCE: *CRIMES ACT* 1958, SS464K, M, O, P.

Evidence on oath was given by McI., a police officer, to a magistrate in support of an application that C., who was in custody and had refused to give his fingerprints when requested to do so, be directed to give his fingerprints to a member of the police force. The magistrate failed to make notes of the evidence and after hearing McI., made an order (without giving reasons and noting them in the court records) which was not applied for but one which would only be appropriate where a suspect was held in a police gaol, prison or a Youth Training Centre. The fingerprints of C. were subsequently taken. Upon order nisi to review—

HELD: Order absolute. Order for fingerprints quashed. Order that fingerprints obtained be delivered up for destruction.
1. There is an obligation on judicial officers to make a reasonable note of oral testimony and to give reasons for the making of whatever order is made.
***Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; (1989) VR 8; and**
***Cook v Blackburn* [1989] VicRp 4; (1989) VR 35, applied.**

2. Having regard to the magistrate's failure to record the evidence, to give reasons for the making of the order, to enter a note of the reasons in the court records together with the making of an inappropriate order and one which was not applied for, the order was invalid and should be quashed.

TEAGUE J: [1] Until the start of this year, police could not, either at common law, or pursuant to any statute, compel a suspect to provide his fingerprints for the purpose of assisting them to assess the suspect's liability for criminal conduct.

On 1 January 1990, when amendments to the *Crimes Act* enacted in 1988 came into operation, the police were provided with a means whereby fingerprints could be obtained without the consent of the suspect. In 1988, in what was substantially the same introductory speech given in both Houses of Parliament, when the amendments were debated, this was said –

> "The central feature of the Bill ... is that non-consensual fingerprinting of suspects will be available to police in criminal investigations. The key safeguard balancing this power is the requirement of a court order.
>
> This control corresponds with the scrutiny of courts over other intrusive investigative procedures like the use of listening devices and search of one's house.
>
> Judicial supervision ensures a degree of independence in the assessment of whether fingerprinting is justified in the particular case and greatly reduces the likelihood of later disputes."

Counsel told me that they were not aware of any decision of this Court as to the operation of those amendments. On 23 February 1990, a magistrate sitting as the Magistrates' Court at Melbourne made an order, on an application made to her by the respondent before me, Detective Senior Constable McInnis, with respect to Mr Czarnecki, the applicant before me, in these terms –

> "I order the officer in charge of the place at which the person is held to take the **[2]** fingerprints of the person, or cause them to be taken and deliver them to the applicant within 2 days."

On 23 March 1990, an order nisi was made by Master Evans under s88 of the *Magistrates' Courts Act* that the respondent show cause why that order of the Magistrates' Court should not

be reviewed on the grounds that:

> "The Respondent show cause to this Honourable Court why the order of the Magistrates' Court at Melbourne made on 23 February 1990 which purports to be recorded in the exhibit should not be reviewed on the grounds that:
> (i) No written application for the order was filed in the Court prior to the making of the order.
> (ii) The learned Magistrate failed to record the evidence for which the order was made.
> (iii) The learned Magistrate failed to record the reasons for making the order.
> (iv) The learned Magistrate failed to record the order in the register of the Court."

On 23 February 1990, a Detective Sergeant Payne interviewed Mr Czarnecki in connection with investigations being made by the Fraud Squad into circumstances surrounding the conversion of certain titles to land and the obtaining of finance, which investigations were believed to be likely to result in the laying of charges for a number of indictable offences.

Mr Czarnecki was asked if he would consent to give his fingerprints. He refused, and Mr Payne directed Detective Senior Constable McInnis to apply to the Melbourne Magistrates' Court for an order compelling Mr Czarnecki to provide his fingerprints. **[3]** At about 12.45 p.m. on that day, Mr McInnis attended before the learned magistrate with a partially completed form ("the form"). The form is so important that it merits a fairly full description.

It is headed "VICTORIA POLICE", "V.P. Form No. 241", "APPLICATION FOR COURT ORDER TO FINGERPRINT SUSPECT".

It then provides boxes for a Court reference, the suspect's full name, address, date of birth, and gender, the applicant's name, rank, number and station.
It then reads -

"I apply for an order to fingerprint the ▭ suspect ▭ young person named above.
He or she ▭ presently in custody
▭ has been charged with an offence
▭ has been summonsed to answer a charge"

An area is then devoted to boxes to be completed for applications to the Children's Court.
An area is then devoted to boxes to be completed if the suspect or young person is in police gaol, prison or Youth Training Centre.

The next area is headed "COURT ORDER FOR FINGERPRINTS". There is then a box for "Person to be fingerprinted". It then reads -

"▭ Application refused
▭ I direct the person named above to give his/her fingerprints to a member of the police force.
▭ I order the officer in charge of the place at which the person is held to take the fingerprints of the person, or cause them to be **[4]** taken and deliver them to the applicant within ▭ days"
It then provides boxes for the signature of the magistrate, the date, and the place of the Magistrates' Court. The balance of the sheet is devoted to an area headed

"WITNESS TO FINGERPRINTING"

In relation to the form completed on 23 February 1990 with respect to Mr Czarnecki, I note that there is no entry in the Court reference box, and there is no entry in the area devoted to boxes to be completed if the suspect or young person is in a police gaol, prison or Youth Training Centre.

Mr McInnis gave evidence on oath before the learned magistrate with respect to matters allegedly relating Mr Czarnecki to three other men, and to documents said to have been used in connection with certain criminal offences, on which documents latent suspect fingerprints had been developed, which matter I do not need to detail. Mr McInnis said that, during the time he was before the learned magistrate, she looked at the *Crimes (Fingerprinting) Act* 1988. In that Act the amendments to which I have referred were set out.

After hearing Mr McInnis, the learned magistrate placed a tick in the form, under "COURT ORDER FOR FINGERPRINTS", in the third of the boxes, added "2" in the box before "days", signed and added the date, and handed the form back to Mr McInnis.

Having regard to the evidence before me, I find that the learned magistrate did not retain a copy of the **[5]** application, that she did not make notes of the oral testimony given before her by Mr McInnis, that she did not give to Mr McInnis reasons for deciding to make the order she made, and that she did not cause a note of her reasons for making the order to be entered in the records of the court.

In coming to those findings, I have relied partly on what was said by Mr McInnis as to what occurred when he appeared before the learned magistrate, partly on what was said by Mr Czarnecki's solicitor as to what the learned magistrate said in court when an attempt was made on that same day to have the magistrate rehear the application, and later when he telephoned the Melbourne Magistrate's Court asking for copies of the application and of the magistrate's notes, and partly on inferences to be drawn from the absence of any affidavit from the learned magistrate.

The order of Master Evans required that a copy of the order nisi and the affidavits relied on in support be served on the learned magistrate, and I would have expected that she would have sworn an affidavit if there had been material errors in the affidavits served upon her.

It does appear that the magistrate was encouraged to follow the procedure that she followed when Mr McInnis appeared before her by his presenting her with the form to be signed and handed back. It appears that on the application for a rehearing, the attention of the learned magistrate was directed to issues not argued before me.

On the application for a rehearing, the learned magistrate said that, based on the evidence of Mr McInnis, **[6]** she had been satisfied that the application was appropriate and that the criteria of s464M had been met. The evidence does not reveal whether she also referred to s464O, or to s464P of the amendments. The headings of those sections are such that a magistrate might not have treated them as being relevant to the hearing of an application under s464M.

They are very relevant. These are the relevant statutory provisions -

"**Member of police force may take fingerprints.**
"464K. A member of the police force may take the fingerprints of a suspect if—
(a) the suspect gives his or her informed consent; or
(b) a Magistrates' Court makes an order under section 464M(3).'"

"**Court may order fingerprinting.**
'464M. (1) If a suspect refuses to give his or her fingerprints after being requested to do so, a member of the police force may apply without notice to any other person to a Magistrates' Court for an order directing the suspect to give his or her fingerprints.
(2) An application under sub-section (1) must—
(a) be in writing supported by evidence on oath or by affidavit;
(b) if the suspect is held in a prison, police gaol or youth training centre, state that fact.
(3) The Court may make an order directing a suspect to give his or her fingerprints if the suspect—
(a) is in custody within the meaning of this Subdivision; or
(b) has been charged with an offence; or
[7] (c) has been summonsed to answer to an information and the Court is satisfied as required by sub-section (4) or (5).
(4) The Court may make an order under sub-section (3) if satisfied that—
(a) there are reasonable grounds to believe that the suspect in respect of whom the order is sought has committed the offence whether indictable or summary, for which he or she is in custody, has been charged or has been summonsed; and
(b) a fingerprint has been found at the scene of the offence, on a victim of the offence or on an object used in or in connection with the commission of the offence; and
(c) there are reasonable grounds to believe that the taking of the suspect's fingerprints would tend to confirm or disprove the involvement of the suspect in the commission of the offence."'

"**Execution of court order.**
'464O. (7) If a court makes an order under section 464M(4) or 464N(3) or issues a warrant under

sub-section (6), it must—
(a) give reasons for its decision; and
(b) cause a note of the reasons to be entered in the records of the Court.
(8) The failure of a court to comply with sub-section (7) does not invalidate any order made by it.
(10) If—
(a) a Magistrates' Court makes an order under section 464M(3) in respect of a suspect who is held in a prison, police gaol or youth training centre; or
[8] (b) a children's court makes an order under section 464N(3) in respect of a young person who is held in a prison, police gaol or youth training centre—
the Court must also order that the officer in charge of the place at which the person is held must—
(c) take the fingerprints of the persons or cause them to taken; and
(d) deliver the fingerprints to the applicant within a period of time specified in the order.'"

"**Evidence of fingerprints.**
'464P. (1) Evidence in respect of fingerprints taken from a person is inadmissible as part of the prosecution case in proceedings against that person for an offence—
(a) unless the requirements of sections 464K to 464O (as the case requires) have been met; and
(b) if the fingerprints or any record, copy or photograph of them have not been destroyed as required by section 464R.
(2) A court may admit evidence in respect of fingerprints otherwise inadmissible by reason of sub-section (1)(a) if—
(a) the prosecution satisfies the court on the balance of probabilities that the circumstances are exceptional and justify the reception of the evidence; or
(b) the accused consents to the reception of the evidence.
(3) For the purposes of sub-section (2)(a), the fact that fingerprints may match one or more fingerprints found at the scene of the offence, on a victim of the offence or on an object used in or in connection with the commission of the offence is not to be regarded as an exceptional circumstance.'"

I turn to ground (i). **[9]** Mr Miller, who appeared for Mr Czarnecki, argued that the issue which was raised for my determination by ground (i) was to be appreciated, not by focusing on the words of the ground "No written application ... was filed in the Court ...", but on the words "No ... application for the order was filed ...", with the issue being as to the form of the order that was made. Mr Kaufman, who appeared for Mr McInnis, submitted that that was only an ingenious, but misguided misinterpretation of ground (i), and that the only appropriate interpretation was that the issue was as to whether the learned magistrate erred in not ensuring that a written application was filed.

Mr Miller elected not to make any submissions on the subject of the filing of the application, and I did not hear Mr Kaufman out, but accepted that the first question for me to address was as to the meaning of ground (i). If the approach to the interpretation of ground (i) had to be the same as to a statute removing rights, I would have to reject the submission of Mr Miller.

Interpreting the ground in the way for which he contends did not strike me as turning to its plainest meaning, and it does seem that the affidavit of Mr Czarnecki's solicitor was drawn rather to address the non-filing of the application form, than its contents. Nevertheless, I am prepared to accept that it is an interpretation that is open, and as Mr Kaufman did not contend that there was any prejudice beyond an opponent taking a different line to the one anticipated, I am prepared **[10]** to accept that the ground as framed is adequate to raise the issue as to the appropriateness of the order made relative to the application made.

Mr Kaufman argued that I should accept that what the learned magistrate did was to make an order under both subs464M(3) and sub-s464O(10) or alternatively, that she made an order under sub-s464M(3) using a formula that was more appropriate for an order made under sub-s464O(10), but not inappropriate for an order under only sub-s464M(3).

I cannot accept that, as I cannot see that there is any way that one can accept that to tick the third order box was appropriate. Before an order under sub-s464O(10) can be made, the application must satisfy sub-s464M(2)(b).

As that part of the form which it was appropriate to complete if sub-s464M(2)(b) was to be relied on, was not appropriate to Mr Czarnecki, and was not completed, it was inappropriate for the learned magistrate to tick the box appropriate only to an order made under sub-s464O(10). Put another way, the order opposite the box which the learned magistrate ticked and to which

she added "2", could not have been an order that it was appropriate to apply for, as that order was only appropriate for an application under sub-s464O(10), whereas the application to the magistrate could have been made under only sub-s464M(3).

Mr Miller also argued that it was inappropriate for the application form to have been used with the words "I apply for an order to fingerprint the suspect young person named above" – when sub-ss464M(1) and (3) provided **[11]** for the application to be made for "an order directing the suspect to give his or her fingerprints".

I think that it would have been preferable to follow the words of the section, but I cannot accept that the difference is one of substance. Even if the error in making an inappropriate order was the only error made, I believe that the proper course would be to quash the order.

I turn to ground (ii). In *Cook v Blackburn* [1989] VicRp 4; [1989] VR 35, Gray J at 38 said -

> "It can no longer be doubted that there is a duty upon any judge or magistrate of any court from which an appeal lies to adequately record the evidence before him".

At page 40, he said that it was "essential that a judge at first instance discharges his duty to make an adequate record of the proceedings, even at the expense of the speedy despatch of the case in hand."

Mr Miller submitted that this requirement was even more important on an *ex parte* application for an order which would deprive the respondent of common law rights, based on oral testimony, because such a note could be the only means whereby what took place could be supervised. Under s78(1)(k) of the *Magistrates (Summary Proceedings) Act* 1978 "... all parties ... shall be entitled to demand and have copies of ... the record of evidence ...". Under Rule 177 of the *Magistrates' Courts Rules* 1986 "Any party to a complaint may, at his expense, apply in writing to the magistrate for and by his leave obtain a copy **[12]** of the notes taken at the hearing by the magistrate or on his instructions ..." Mr Kaufman argued that there was no obligation under the amendments to the *Crimes Act* on the magistrate to maintain a note of the evidence, and that the existence of the specific requirements of s464O(7) should be treated as indicating that those were the only specific requirements – *expressio unius exclusio alterius*. I do not think that the existence of other safeguards in the Act detracts from the obligation to make a reasonable note of the oral testimony. In short, I do not think that the *expressio unius* principle is applicable in these circumstances.

Not one of the *Listening Devices Act* or of the other "court supervision statutes", or of the rules made pursuant to those statutes specifically require notes of evidence to be taken, but I could not accept that that meant that a judge was not under a duty to do so.

Mr Kaufman also argued that the duty referred to in *Cook* on judicial officers to maintain a note of the evidence was not a duty for the breach of which a party to a proceeding could appeal. I am troubled about the appropriateness of penalizing a litigant because of a judicial officer's breach of duty of this kind. I think that the legal position is not significantly different to that which applies under sub-ss464O(7) and (8), to which I am about to refer at some length.

[13] Those sub-sections are expressed in terms which are very similar to s12 of the *Penalties and Sentences Act*. They spell out that there is a duty on the part of a magistrate or judge to act in a particular way, but contain a qualification that seems to me to have the consequence that no party will be specifically prejudiced or advantaged if that duty is breached. Although I would accept that the duty to take notes exists primarily because of the possibility of appeal, it seems to me that the discipline of recording the evidence is also important in maximizing the prospect that there will be the highest level of attention given to the details as well as the thrust of the evidence and to the relating of the evidence to the issues to be determined.

I would be troubled about accepting that the error of the learned magistrate, in not taking notes of the evidence, if it stood alone, was an appropriate basis for declaring the order made invalid. But it does not stand alone. I turn to grounds (iii) and (iv), which can be dealt with together. These grounds substantially mirror the requirements of sub-s464O(7)(a) and (b).

Apart from the duty spelt out in those statutory provisions to give and record reasons, there are many Victorian and other decisions which confirm the principle that every judicial officer must explain the matters taken into consideration and the conclusions reached on relevant points of fact and law. **[14]** I refer to *Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; [1989] VR 8, and the other authorities set out at page 309f of *Nash on Magistrates' Courts*.

The giving of reasons has to be seen as a very important safeguard, that all of the relevant statutory provisions that ought to be taken into account to determine the relevant procedural steps that ought to be followed, have been followed, that there has been an adequate scrutiny of the evidence presented, and that there has been an adequate relating of the evidence presented to the relevant issues. Although the terms of the sub-s464O(7) are mandatory, they cannot be seen in isolation from sub-s464O(8).

Mr Miller argued that sub-s464O(8) should be construed as qualifying sub-s464O(7) in only a limited way, that it was proper to take account of the absence of any time limit in sub-s464O(7), so that failure to comply would not invalidate an order not challenged, but would invalidate an order which was challenged from the time that it was challenged. He argued that, because the amendments materially impinged on an individual's common law rights, the provisions should be construed restrictively rather than liberally.

With the general proposition I find no fault, but I am unable to accept that there is a justifiable basis for limiting the operation of sub-s464O(8) in the way for which he contends. **[15]** In following sub-s464O(7), with sub-s464O(8), it seems to me that Parliament was directing that, in the means which are used to achieve an end, high standards should be met, but accepting that, if there is a breach of those standards, the end result will stand. Under sub-s464O(7), the magistrate has a statutory duty, but under sub-s4640(8), none of the parties before the magistrate will gain an advantage over another party, because that duty is breached.

Sub-s464O(8) is intended to have a similar operation to provisions like Rule 2.01 of the *Supreme Court Rules*, and Rule 180 of the *Magistrates' Courts Rules*, which provide to the effect that non-compliance with any of the rules shall not render any proceeding void.

It seems that there is a recognition that, in these days of ever-increasing regulation, it is regrettable but acceptable that certain lapses be tolerated, rather than that there should always be an unforgiving requirement of punctilious compliance. In this case, there is another factor to be taken into account, when considering the consequences of the non-compliance with the requirements of sub-s464O(7), and that in section 464P.

Even though sub-s464O(8) may save an order made otherwise than in compliance with sub-5464O(7), the evidence may well be ruled inadmissible. The differences in the options exercisable by an magistrate exercising the powers given under the amendments underscore the importance of the magistrate giving reasons **[16]** for making whatever order is made, and for entering a note of those reasons in the records of the court, as is required by sub-s464O(7).

I think that the use of the word "records", which is also used in s12 of the *Penalties and Sentences Act*, is not intended to require that the reasons be entered in the register of the court, as to which there are other statutory provisions. It would suffice to have an entry made in the magistrate's notebook, or in a sheet added to the file containing a copy of the application, and of the magistrate's notes of the evidence.

I am satisfied that, because of sub-s464O(8), the learned magistrate's order was not invalidated by her failure to give and record her reasons, when those matters are taken in isolation. However, I think that it is appropriate to take account of those matters with the failure to record the evidence, and the making of an order that was both inappropriate and not applied for, in concluding that the order nisi should be made absolute, and that the learned magistrate's order should be quashed.

Mr Miller urged that I should, and Mr Kaufman that I should not, order the destruction of the fingerprints taken pursuant to the order of the magistrate. Mr Kaufman submitted that, as a court on the hearing of a criminal trial might admit them as evidence under s464P, the fingerprints

should remain in existence up until the trial. **[17]** I would assess as remote the prospect that a court would admit the fingerprints under s464P in the light of my findings.

Section 464R of the Act deals with destruction of records of fingerprints, depending on whether the person fingerprinted is charged, and whether convicted. There is no evidence before me as to whether any charges have been laid against Mr Czarnecki. Although I am not satisfied that the statutory provisions require that the prints be destroyed, I am satisfied that the spirit of the provisions is such that it is appropriate that they should be destroyed. If there is still a proper case to be made for obtaining a set of fingerprints, a fresh application to the court can be made.

I am satisfied that the applicant is entitled to have the order nisi made absolute, that the learned magistrate's order should be quashed, and that I should order that the fingerprints obtained pursuant to the order should be delivered up. The use of "box-formatted" documents seems to be on the increase in many spheres. The special potential for error in using such documents in a court context is well illustrated in this case. Judicial supervision of the exercise of coercive power must involve more than the ticking or other perfunctory completion of boxes on a multi-purpose pre-formatted sheet of paper.

APPEARANCES: For the plaintiff Czarnecki: Mr I Miller, counsel. Judge & Papaleo, solicitors. For the defendant McInnis: Mr J Kaufman, counsel. S Lee, Solicitor for the Victorian Government.
