**10/92**

**SUPREME COURT OF VICTORIA — APPEAL DIVISION**

# *CROWTHER v COTTERELL and ANOR*

**Fullagar, Brooking and Gobbo JJ**

**21 October 1991**

**PROCEDURE – APPLICATION FOR COMPULSORY BLOOD SAMPLE – INSUFFICIENT EVIDENCE – APPLICATION STRUCK OUT – SECOND APPLICATION LATER MADE – WHETHER MATTER *RES JUDICATA* – WHETHER AN ABUSE OF PROCESS: *CRIMES ACT* 1958, S464U.**

**Section 464U of the *Crimes Act* 1958 (dealing with compulsory blood testing) contemplates that an application for a blood sample is intended to be dealt with on the facts that are established before a magistrate on the day of the application. The section is concerned with states of affairs which may change from day to day. Accordingly, an application which had been dismissed did not make the matter *res judicata* nor make a second application in respect of the same suspect an abuse of process.**

**FULLAGAR J: [1]** This is an appeal from a judgment of a judge of this Court given on the hearing of an originating motion and summons by which orders were sought in substance restraining and prohibiting a magistrate from making any order on a part-heard application by the prosecution for an order for compulsory blood tests pursuant to s464U of the *Crimes Act* 1958 which was added into that Act by the *Crimes (Blood Samples) Act* 1989. On 16th January 1991 a police prosecutor applied for a blood sample from the appellant pursuant to the section I have just mentioned. During the course of the hearing an indication was given by the Magistrate that the police evidence in respect of scientific matters relating to DNA sampling was inadmissible.

There was, as I understand it, put into evidence an inconclusive written report signed by a scientist relating to his tests comparing blood emanating from the appellant and blood from the clothes of the prosecutrix. Scrawled across the report in ink were words indicating that a comparison of DNA, which had not been done, might prove conclusive. The police indicated to the magistrate that some evidence might be available relating to the comparison of DNA in the or a sample and DNA in blood found on clothes of the prosecutrix in connection with the rape charged. But all that was available as to evidence about this was that someone had spoken to the scientist concerned who had made statements to the effect that DNA tests would be conclusive. The magistrate said in the absence of admissible scientific evidence she would strike out the application. The respondent policeman after a short adjournment said that no further evidence relating to DNA sampling would be led **[2]** and indicated that the application could be dismissed or struck out, and either an appeal could be brought or a further application made. The Magistrate then ordered that the application be "struck out".

On 31st January 1991 the policeman made a further application pursuant to the section. This application was identical to the first application, except that in the second application the policeman proposed to call the scientific evidence adumbrated but not called on the first application. On the hearing of the second application counsel for the appellant submitted that the magistrate was estopped from entertaining the second application pursuant to the section by reason of the fact that the first application had been determined adversely to the applicant for the order. He also contended that the second application was an abuse of process and that the magistrate had no jurisdiction to entertain it. The magistrate rejected these submissions and commenced to hear the second application which was adjourned part-heard.

On the appellant's behalf the originating motion and summons were then taken out seeking *inter alia* orders in the nature of prohibition and they were then determined by a judge of this Court who dismissed the originating motion and summons, and it is from that dismissal that this appeal is now brought. It is desirable to refer briefly to the structure of the new section 464U. It provides by sub-s.(1) that, if a person who is a "relevant suspect" refused to give a sample of his

or her blood upon request and a member of a police force believes on reasonable grounds that that **[3]** person has committed an offence in respect of which the blood sample is requested, that member may apply to the Magistrates' Court for an order directing the person to give a sample of his or her blood. By sub-s.(3) it is provided that the Court "may" make an order directing the person to give a sample, if the Court is satisfied of various prerequisites, the last of which is in these terms:

> "(f) in all the circumstances the making of the order is justified."

Mr Dixon for the appellant contended that the magistrate's order that the first application be "struck out" was effective as an order that the application be dismissed and he contended that the application had been dismissed "on the merits". I am content to assume that the order was the equivalent of a dismissal, but I would add that the magistrate on the facts before this court certainly investigated the sufficiency of the evidence under sub-s.(3) of s464U. Accordingly, I am content to deal with the matter as if there was a dismissal and as if there was a dismissal "on the merits" in the sense that the magistrate looked at the evidence before her and decided that that evidence was insufficient to cause her to exercise what I consider was her discretion to make an order in favour of the applicant and dismissed it for that reason.

It may be said that, if the court is satisfied in all the paragraphs of sub-s.(3) down to and including all the matters referred to in paragraph (f) thereof, there is virtually no discretion and the Court really must make an order despite the use of the word "may" in introducing the **[4]** sub-section. But whether that be true or not, I think that the presence of the word "may" coupled with the contents of paragraph (f), operates to confer a discretion.

Mr Dixon for the appellant relied first upon the principle of *res judicata*. He said in substance that the first application put in issue the right of the appellant not to suffer an invasion of his person, and a battery, by the compulsory taking of a blood test against his will. He said in substance that the issue whether that right was to be violated or not was decided in his favour by the magistrate when she dismissed the first application "on the merits". He relied upon the definition, if that be the word, of the basic rule of *res judicata* stated by Fullagar J in *Jackson v Goldsmith* [1950] HCA 22; (1950) 81 CLR 446 at p466; [1950] ALR 559, and quoted in the joint judgment of the High Court in *Port of Melbourne v Anshun* [1981] HCA 45; (1981) 147 CLR 589 at p597; (1981) 36 ALR 3; (1981) 55 ALJR 621. Fullagar J there expressed the rule as to *res judicata* by saying:

> "where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. This rule is not, to my mind, correctly classified under the heading of estoppel at all. It is a broad rule of public policy based on the principles expressed in the maxims *interest reipublicae ut sit finis litium* and *nemo debet bis vexari pro eadem causa*."

Mr Dixon contended there was to be found here a cause of action raised by the Crown against the appellant, being the assertion of a right in the Crown to compel a blood test, and this had passed into judgment between the parties, i.e. the Crown and the appellant, with the making of the order dismissing the application. Therefore, Mr Dixon said, the right could not be asserted by the Crown in any subsequent application; or, alternatively, **[5]** on any subsequent application in which the evidence was the same as that severally proved and unsuccessfully adumbrated on the first application. He rather emphasised, I think, that it was a right which had been adjudicated upon and accordingly I gather that he also relied on the statement by Dixon J in *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464 at p532, which is also quoted on the same page of the report of *Anshun*:

> "in the first (*scil.* the doctrine of *res judicata*) the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence ..."

As I understand it, Mr Dixon would emphasise the words "right or". Mr Dixon, as I understood him, also said that if the doctrine of *res judicata* did not apply expressly, then it ought to be applied by analogy. His second contention for the appellant in his opening remarks and in his written submissions was that the second application to the magistrate was precluded by the

rule in *Henderson v Henderson* [1843] EngR 917; [1843-60] All ER 378; 67 ER 313; (1843) 3 Hare 100, which is also referred to in *Anshun* 147 CLR at pp598 *et seq*. I will not set out the passage from *Anshun* here, but I point out that it commences with these words:

> "Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction ..."

Finally, Mr Dixon for the appellant contended that the second application was an abuse of the process of the Court and he referred especially to the judgment of Mason J in *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 at pp25-26; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, and to the central paragraph on p31. **[6]** An examination of the new section 464U of the *Crimes Act* shows that it is intended as an aid in the investigation of and proof of crimes or suspected crimes. The Parliament, recognising that compulsory blood testing was a cutting down of common law rights of an individual, deliberately left the operation of the section, as it has done on finger-printing, to the supervision of the courts. Not only must the court consider certain matters set out in the section, but it must be satisfied that in all the circumstances the making of an order is justified. In the present case an application was made which in the opinion of the magistrate did not establish the statutory prerequisites to the exercise of her discretion or, it might be said, to the making of an order, so she declined to make an order.

But the section contemplates, in my opinion, that an application is intended to be dealt with on the facts that are established before it on the day of the application. Upon the same basis, for example, a bail application may fail on one set of established facts, yet it may on a second occasion succeed on a different set of established facts. As the primary purpose of the new legislation is to aid in the investigation and proof of serious crimes, one would not expect that if, for example, an application was granted and followed by –

(a) a car accident in which the sample was destroyed on the way to testing;

(b) a scientist slipping on a floor and destroying the sample before testing.

**[7]** a second application would be shut out by *res judicata* or any other rule. On the contrary, one would expect that a second application would be considered on its merits, upon the facts established in support of the second application, including the facts of the existence of the first application and the order made pursuant to it and the sequel to that order.

As to *res judicata*, there is in my opinion no analogy between the doctrine which is judicially described as above by Dixon J and Fullagar J on the one hand and, on the other hand, the dismissal of an application under s464U of the *Crimes Act*. Although one may speak of the right of a person not to have blood forcibly removed from his body, a description less informative perhaps than is a description of the duty of each citizen not to assault and batter another, nevertheless it cannot be said in any real sense that that right has been litigated and decided so that the right has been litigated and decided so that the right has been extinguished in the judgment. There is in truth, I think, no judgment to the effect that the appellant is not subject to any compulsory blood test, or not subject to any blood test based upon beliefs concerning the rape which is here said to be relevant. As the learned trial judge held, there is no *lis* between the Crown and the subject in which the cause of action can be said to have been destroyed. If one postulates, as the appellant's counsel did before us, that there is something analogous to a cause of action asserted by the one against the other, it seems to me that it would be the cause of action of rape asserted by the Crown against the appellant which has not yet been tried at all.

**[8]** It may be said that the Crown is seeking from the Court the right compulsorily to take and investigate blood of the appellant, but there is in my opinion no adjudication of that right so as to extinguish it, but only a decision as to whether or not to grant the right upon the evidence *pro tem* before the Court. It is not a case of the Court deciding whether a right, asserted by one side or the other to exist at the launching of the application or "litigation", really did exist at the launching or immediately before judgment, but a case of the Court exercising a discretion whether or not to permit a compulsory investigation which – conditionally upon the Court's approval – the statute authorises. As to the rule in *Henderson v Henderson*, I think that Mr Dixon in the course of argument virtually conceded that he could not in this case rely independently on the rule in *Henderson v Henderson*, that is to say, independently of his submission that the doctrine

of *res judicata* here applied. I should add, however, my clear opinion that the rule in *Henderson v Henderson* has no application whatever to this case.

As to abuse of process, it seems clear from recent decisions of the High Court that the superior court in a particular jurisdiction has jurisdiction to intervene to prevent utilisation by the prosecution of procedures or powers for a purpose other than that for which they were by the legislature created or bestowed. It may even be that the superior court may intervene to prevent what it regards as a serious infliction of "unfairness" by the prosecution upon the subject, although that judicial way of putting it may seem to some judges too close to **[9]** measuring by the Chancellor's foot rather than by established legal principle. However this may be, I think that the simple answer here is that there is shown by the appellant no unfairness and no utilisation by the prosecution of powers for a purpose beyond that for which they were created or bestowed. Indeed, a fact relevant both to hardship and to purpose is that the present appellant is placed in exactly the same position, so far as relevant, as he would now be in if the first application had been adjourned whilst the possibility of additional evidence had been investigated and additional evidence obtained. In my opinion, the appeal should be dismissed.

**BROOKING J:** Sub-section (3) of s464U requires the Court to be satisfied of six matters. These are in substance: That the person concerned is a relevant suspect; that there are reasonable grounds to believe that he has committed the offence; that material reasonably believed to be from the body of a person who committed the offence has been found at one of the places mentioned; that there are reasonable grounds to believe that taking a blood sample would tend to implicate or exculpate the person concerned; that the person concerned has refused to consent or is incapable of consenting; and that in all the circumstances the making of the order is justified. It is plain that the sub-section requires the court to consider the position as at the date at which the blood sample order is sought in asking whether it is satisfied of these six matters. The refusal of an application on the ground that one or more of those matters has not been established cannot bring into operation the principle of **[10]** *res judicata*, for on a subsequent application under the section the court will be required to consider not whether the six requirements were satisfied at the date of the earlier application but whether those requirements are satisfied at the date of the subsequent application.

To adapt the words of Fletcher-Moulton LJ in *Radcliffe v Pacific Steam Navigation Company* (1910) 1 KB 685 at pp690-691, the fulfilment of the six requirements as at the date of the later application is *ex necessitate rei* a matter which has not been and could not have been determined prior to the date of the hearing of that later application and therefore cannot come under the head of *res judicata*. In reliance on that decision, the Court of Appeal in *Burman v Woods* (1948) 1 KB 111 held that the principle of *res judicata* did not prevent a landlord from seeking to recover possession of a house on the footing that greater hardship would be caused by refusing him possession than by giving it. Somervell LJ said at pp112-113:

> "The court has to direct its mind to the date of the proceedings and the evidence which it hears at the time, and clearly that is the date on which its order is drawn up; but it is plain that the relevant facts with regard to hardship may alter at any time:... Therefore, I should not have thought that the principle of *res judicata*, as such, was applicable to such cases".

Shortly after *Burman v Woods* was decided but at a time perhaps when the report was not available in New Zealand the Supreme Court of New Zealand reached the same conclusion in *MacDonald v Fyson* (1948) NZLR 669 where Christie J observed at p670 that the factors that went to make up hardship were not static and constant so as to make it possible that the question of relative **[11]** hardship be determined once and for all, but were subject to change both in kind and in degree. These observations are applicable to most at all events of the matters to which s464U(3) directs attention. The three decisions cited are probably examples of the unsuccessful invocation of issue estoppel, not *res judicata*, but the approach of the court is still appropriate. Section 464U(3) does not require the magistrate simply to be satisfied of the occurrence of certain past acts or events or of the existence in the past of certain states of affairs, with the result that, at whatever date an order is sought, the question for decision will always be the same. The provision is concerned with the circumstances shown to exist by the date of the hearing. All six paragraphs employ the present tense, usually the present simple, although the present perfect is found in paragraphs (c) and (e). The sub-section requires events up to the time of the hearing to be considered. It is concerned with states of affairs which may alter from day

to day. The sub-section is ambulatory, in the sense that the outcome of an application depends on the circumstances existing at the time it is heard. This consideration alone is enough to show that the determination of an application cannot make the matter *res judicata*. What I have said is intended to be supplementary to the reasons for judgment of the learned presiding Judge, with which I concur.

**GOBBO J:** I agree, for the reasons given by the learned presiding Judge and by my brother Brooking J, that the appeal should be dismissed. **[12]**

**FULLAGAR J:** The order of the court is that the appeal is dismissed with costs.

**APPEARANCES:** For the appellant Crowther: Mr J Dixon, counsel. Piesse Clarebrought, solicitors. For the respondents Cotterell and Buchhorn: Mr GJ Maguire, counsel. Victorian Government Solicitor.

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