39/87

SUPREME COURT OF VICTORIA

BLAYNEY v STOBART

Nathan J

10 September 1987

CRIMINAL LAW – EVIDENCE – NARCOTICS CASE – POLICE INFORMER INVOLVED – REFUSAL BY POLICE OFFICER TO REVEAL IDENTITY OF INFORMER – PUBLIC INTEREST PRIVILEGE – WHETHER WITNESS COMPELLABLE – ENTRAPMENT.

B., a police officer, laid charges against S concerning the possession of and trafficking in cocaine. During the committal proceedings, B. was called to give evidence during which he claimed privilege from answering certain questions, the answers to which he said could lead to the identification and death of a police informer. The Magistrate ruled that B. was required to answer the questions. Upon a motion seeking a declaration that B. was not obliged to answer—

HELD: Declaration made as sought.
(1) Before granting any claim for privilege in a criminal matter, the court must be convinced that the claim is more than being probably well-founded. In determining this question, the court may have regard to the status of the person claiming privilege and whether the personal safety of the informer or other persons is in jeopardy.

(2) In the present case there was cogent and persuasive evidence that the life of the informer was imperilled by revelation. Accordingly, it was open to the Magistrate to be satisfied beyond reasonable doubt that the public interest required the police officer to be immune from any penalty in refusing to answer questions which were likely to lead to the identification of the informer.

NATHAN J: *[After setting out the facts briefly, His Honour continued]*: … **[2]** The public interest privilege entitling a police officer to refrain from answering an otherwise pertinent question must be weighed very carefully against the interests of the subject in maintaining his innocence where the privileged evidence may help him to do so. The privilege, if successfully maintained can lock out a subject from a possible ground of defence or at the very least from evidence which the Magistrate should assess in deciding whether he has a case to answer. That there is such a privilege albeit not extending to the point where evidence of the innocence of an accused person is excluded in a criminal trial is now beyond doubt. See *R v Lewes* **[3]** *Justices; ex parte Secretary of State for Home Department* (1973) AC 388; [1972] 2 All ER 1057, *Signorotto v Nicholson* [1982] VicRp 40; (1982) VR 413; (1981) 46 LGRA 141. The privilege is not limited to those cases where the personal safety of an informer or other persons is in jeopardy but it will more readily be invoked in those circumstances (See *Alister & Ors v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97;).

A Court must be convinced that any claim for public interest immunity in a criminal matter is more than being probably well-founded. It should do so to a level of satisfaction higher than being convinced as a matter of probability. The mere claim for immunity does not establish it (See *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122 – in substance a criminal matter turning on issues of conspiracy and deception). However the position and authority of the claimant may be relevant. Thus a Court may have regard to the status of the person claiming the privilege; in this case a claim by a superintendent or commissioner who, after having made due inquiries and proper assessment would have been more persuasive than the detective. However, as the case was proceeding there was no time to obtain such support, if indeed it were to be forthcoming; so no default attaches to Blayney (as to the authority of the claimant in criminal matters see *Lewes Justices case*, and *A & Ors v Hayden & Ors (No.2)* [1984] HCA 67; (1984) 156 CLR 532; (1984) 56 ALR 82; (1984) 59 ALJR 6 and in civil matters see *Haj-Ismail & Ors v Maddigan & Ors* [1982] FCA 231; (1982) 45 ALR 379; (1982) 64 FLR 112),

The problem is to define the means a Magistrate can use to satisfy himself that a claim

for privilege is convincing yet not obliging the informant to reveal the **[4]** nature of the privileged information in open court. There is authority that cross-examination as to the basis for the claim should only be permitted in exceptional circumstances – see *Young v Quinn & Ors* (1985) 4 FCR 483; (1985) 59 ALR 225 at 226, 231 and 237; *Hilton v Wells* [1985] HCA 16; (1985) 157 CLR 57; (1985) 58 ALR 245; (1985) 59 ALJR 396; 15 A Crim R 394 and *Conway v Rimmer* [1968] UKHL 2; (1968) AC 910 per Lord Morris at 971; [1968] 1 All ER 874; [1968] 2 WLR 998. However, this cannot be a blanket prohibition as the accused could be berefted of establishing a defence or from testing a mere assertion.

As I have already observed the mere claiming of the privilege does not establish it. The evidence in support of the claim must be cogent, clear and persuasive. The claim may require additional evidence to that of the claimant such as, that the life or health of the informer(s) is imperilled by revelation. In this case looking at the hand-up brief as a whole and the sworn evidence of Blayney, I am satisfied that a claim for privilege was not only sustainable but persuasive. There is a great deal of evidence that a series of meetings with potential drug suppliers were set up by Stobart, sometimes arranged with the assistance of third parties. Oblique language, spoken acknowledgements of risk, the care needed when relying on third parties, the need to vet them, litter all the tape recorded conversations. Moreover, it is now a matter of notoriety that police informers in drug trafficking cases are likely to be murdered if their identity becomes known to the trade. This is not as a matter of possibility but of likelihood. The protection of informers gives substance to the hope that more of them will volunteer. With the drug trade, more so than with any **[5]** other class of criminal activity, there is a substantial public interest in securing the identity of informers, making them immune from discovery; and because of its complicated and clandestine nature the drug trade cannot be eliminated or reduced without the use of informers.

Blayney has sworn the informer's life is imperilled; so strong is this evidence in the context of cocaine dealing that there is no need to go beyond or behind it. That there is an informer in this case is not in dispute, that he or she must be known to Stobart is also apparent. Therefore even the preliminary stage at which Blayney claimed the privilege was appropriate. There is only a limited number of people who could be the informer(s); thus that which at first examination would appear to be a premature stage to claim the privilege, is not so in fact.

I am of the view that the Magistrate had before him abundant evidence, both sworn and in the hand-up brief to be convinced beyond reasonable doubt that the public interest required Blayney to be immune from any penalty in refusing to answer questions likely to enable Stobart or other persons to identify the informer(s).

[His Honour then dealt with the question of entrapment and reached the following conclusion. Evidence of entrapment, that is, where a law enforcement officer entices or inveigles a person into committing an offence that person otherwise might not have done, and for the purposes of prosecuting it, ought usually to be excluded by the exercise of judicial discretion on the basis that it has been obtained at too high a price, contrary to the standards of justice of a fair and free society. A person claiming to have been entrapped has the responsibility of establishing that fact. It is not for the Crown to disprove the contention merely because it has been raised. Cross-examination to do so should generally be permitted subject to claims for public interest immunity which should be decided as discrete matters.]
