35/85

SUPREME COURT OF VICTORIA

R v HARRIS and ORS

Ormiston J

3 June 1985

CRIMINAL LAW – COMMITTAL FOR TRIAL – RESTRICTED COMMITTAL – WHETHER DESIRABLE – CROWN EXHIBITS NOT PRODUCED – SUB-POENA TO PRODUCE DOCUMENTS – OBJECTION TO INSPECTION OF BY ACCUSED – EFFECT OF OBJECTION'S BEING OVERRULED – TESTS TO BE APPLIED IN ALLOWING INSPECTION.

H. and others were committed for trial charging that they conspired to import prohibited narcotic goods. At the committal hearing the evidence led by the prosecution was confined to events said to have occurred between certain dates, and attempts to cross-examine witnesses about events occurring outside those dates were rejected by the Magistrate. When the indictment was filed covering a wider time span, the accused claimed that they were denied access to material which may have been relevant to the preparation of their defence. Accordingly, sub-poenas were issued and served upon Police Officers requiring production of tape-recordings and transcripts of all telephone interceptions at premises owned, occupied or frequented by the accused. The police officers, whilst not objecting to production of the material to the Court, objected to its being handed to the accused or their legal representatives. Upon application for production of the material and inspection by accused—

HELD: Application granted. Material to be produced to the Court and, with the imposition of rigid guidelines, made available for inspection by the accused and their legal representatives.
(1) A person to whom a sub-poena to produce documents is addressed is bound either to comply with it or apply to the Court to set it aside.
***Lane v Registrar of the Supreme Court* (NSW) [1981] HCA 35; (1981) 148 CLR 245; (1981) 35 ALR 322; 7 Fam LR 602; applied.**

(2) Upon that person's bringing the documents to Court, he may object to their production on grounds such as privilege or that some good reason exists why they should not be produced.
***Commissioner for Railways v Small* [1938] 38 SR (NSW) 564; 55 WN (NSW) 215, applied.**

(3) If there is no valid objection to the production of the documents, then the documents become subject to the control of the Court.
***Waind v Hill* [1978] 1 NSWLR 372, followed.**

(4) Once the documents are subject to the control of the Court, in deciding whether to allow an inspection of them, the Court should consider whether the documents have any apparent relevance to the issues being determined, together with the various competing interests – if any – which should be protected. Bearing in mind that in criminal cases where an accused's liberty may be at stake, a wide test of relevance may be appropriate and the Court should allow an inspection where:
(i) there is some concrete ground for believing that the documents would be likely or may tend to assist the accused in the preparation of his defence; or

(ii) it is "on the cards" that the materials produced will assist the accused in the preparation of his defence.
***Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; [1984] 58 ALJR 97 applied.**

(5) Observations about the problems which may arise from restricted or skeletal committal proceedings, and the absence of any clearly enforceable duty on the prosecution to call witnesses and produce documents.

ORMISTON J: *[After setting out the nature of the application the material required for inspection and the attitude of counsel to the application, His Honour continued]*: … **[335]** This is a most unusual case, and I should not like it to be thought that the resolution of the present applications would necessarily provide an answer to any future attempt to obtain materials on subpoena. The absence of any claim for public interest immunity is of special significance, for, in substance, it means that no claim is made by those holding these materials that any investigations will be jeopardised, that any sources of information will be revealed, or that any private or confidential information will be improperly revealed, at least if the provisions of the Act are complied with.

The second unusual feature is the sheer volume of material, which has meant that the task of assembling the prosecution case has been so great that I do not think one could fairly expect those responsible for the prosecution to have discerned all the material which might assist in the defence of the accused, especially in the light of a lack of any direct knowledge of what defences will be taken. Thirdly, the preliminary examination was of a kind which is becoming more common, in which the sole enquiry appears to have been whether there was a *prima facie* case against the accused. Although the conspiracy is now alleged to cover the period 1st September 1982 to 21st April 1983, the committal hearing was confined in effect to events up to 19th January 1983, when some 330 kilograms of cannabis resin which had arrived at **[336]** Tullamarine Airport three days earlier was seized and the accused Peter James Kelly was arrested. It was not disputed that any attempt to cross-examine about other tape-recordings, especially of conversations after 19th January 1983, was firmly rejected by the Magistrate.

It is not necessary for me to determine whether such a procedure, convenient as it may have been in the circumstances, is justified by cases such as *R v Epping & Harlow Justices: ex parte Massaro* [1973] QB 433; [1973] 1 All ER 1011, *In re Van Beelen* (1974] 9 SASR 163 at p244 and *Moss v Brown* [1979] 1 NSWLR 114, or whether the observations of Gibbs and Mason JJ (concurred in by Aickin J) in *Barton v R* [1980] HCA 48; [1980] 147 CLR 75 at pp98-99; (1980) 32 ALR 449; 55 ALJR 31 would call for a wider enquiry. At the least that judgment suggests that the trial court has power to protect the accused from any conscious or unconscious denial of his rights: see at pp95-97, 100-101.

I shall deal first with the application to order the Crown to supply further material to the accused, being the balance of the tapes and transcripts in the possession of the Director of Public Prosecutions. The very fact that it is hard to define what is in the possession of the Crown for this purpose suggests that what remains of the rule of *Mahadeo v R* [1936] UKPC 43; [1936] 2 All ER 813 may be difficult to apply in modern circumstances. See also the cases discussed in Lane: *Prosecutors: Non-disclosure of Exculpatory Evidence* [1981] 5 Crim LJ 251. This case has been conducted on the basis that the possession and control of Major General Gray is not that of the Crown for these purposes, for none of the 609 hours of recordings in the form of 5½ inch tapes has ever come into the hands of the Director of Public Prosecutions or counsel for the Crown.

[337] On the other hand, the essence of the rule is that any document improperly withheld can be made the subject of an order where it is shown that "the interests of justice require": *R v Charlton* [1972] VicRp 90; [1972] VR 758 at p761. Such a rule ought to apply to materials in the hands of the Chief Commissioner of the Federal Police at least in relation to a Federal prosecution. If the rule is but a reflection of the duty of prosecuting counsel either to lead any credible evidence inconsistent with the Crown case or to make it available to the defence, then the present case shows that rule's inadequacies, for no criticism can be or was made of counsel in not going through the material in Canberra and not passed over to the Director of Public Prosecutions. But counsel for the prosecution have offered to make available the 180 extra cassettes and transcripts which might now appear to have more relevance to this trial than was first appreciated.

If it is suggested that I have a power to go further, then I doubt that I could do so unless I were convinced that counsel had not exercised their judgment properly: cf. *Dallison v Caffery* [1965] 1 QB 348 at pp369, 375-6; [1964] 2 All ER 610; [1964] 3 WLR 385; *R v Easom* [1981] 28 SASR 134 at pp149-153; (1981) 4 A Crim R 171. Although there have been attempts in the past to impose on the prosecution specific obligations towards the accused, the tendency of recent authority in the High Court is to restrict that duty to one of care and fairness but no enforceable responsibility: cf. *Richardson v R* [1974] HCA 19; [1974] 131 CLR 116; 3 ALR 115; (1974) 48 ALJR 181; 18 ALT 275; *Lawless v R* [1979] HCA 49; [1979] 142 CLR 659 especially at p678; 26 ALR 161; 53 ALJR 733; *Apostilides v R* [1984] HCA 38; (1984) 154 CLR 563; 53 ALR 445; (1984) 58 ALJR 371; 15 A Crim R 88. The accused is left with his right to establish on appeal that there has been a miscarriage of justice: *ibid*.

[338] It is difficult otherwise to ascertain what is the scope of "the interests of justice" in *Charlton's case* [1972] VicRp 90; [1972] VR at p761, let alone know what means there are to ascertain the relevant facts, short of direct enquiry of the prosecuting counsel. Here the facts have been stated with candour, and the concession being made as to the 180 documents, I see no further operation of the rule in the present case. It may be, although it is not necessary for me to

decide, that the rule empowering the court to enforce disclosure of the prosecution material goes further and is based, not on admitted or proven failure to disclose by the Crown, but on some general concept of fairness. If it is, then the subpoenas in the present case also comprehend the range of cassettes and material which counsel for Mr Kelly sought under this rule.

I turn therefore to the manner in which I should deal with the materials which Detective Inspector Chalker and Major General Gray are commanded to produce by the three subpoenas. In the first place, no objection was taken that they required the production of materials other than documents: cf. *Senior v Holdsworth* [1976] 1 QB 23; [1975] 2 All ER 1009. Secondly, I see no reason to restrict the operation of subpoenas in criminal cases. Subject to one argument put by counsel for the prosecution, there seems to be no basis why the rule worked out by common law courts over the years in civil cases should not apply with appropriate adaptation in criminal cases, except where a subpoena is directed to the accused or his relatives. That these rules do apply was made manifest by the reasoning of all members of the High Court in *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; [1984] 58 ALJR 97, although the minority differed as to the test of relevance and the operation of a claim for public **[339]** interest immunity. The exception suggested by counsel for the prosecution is in fact one example of a claim for that immunity in that he argued that the accused should not be able to inspect the prosecution brief by use of a subpoena. It seems to me that such an objection might well be valid, subject to the principles adopted by the majority in *Alister's case*, but it is not necessary to resolve that issue in this case.

Here there is a specified class of materials sought pursuant to the subpoenas which are adequately defined by their terms, at least in the light of counsel's concession on the matter, and in no way do the subpoenas seek discovery or any general disclosure of the Crown itself. In fact, they are confined to materials intercepted from telephone numbers at premises owned, occupied or frequented by the accused. If some other objection based on a specific matter had been raised, I would have had to consider the competing interests referred to in *Alister's case*. Ordinarily the objection must be one raised by the witness and I therefore do not consider the vague assertions by the prosecution as to "sensitive material" – relating to other offences to be sufficiently specific: cf. *Waind v Hill* [1978] 1 NSWLR 372 at pp385-6. In the absence of any specific objection I see no reason why the common law rules should not apply.

I therefore start with the general rule recently confirmed by the High Court in *Lane v Registrar of the Supreme Court (NSW)* [1981] HCA 35; (1981) 148 CLR 245; (1981) 35 ALR 322; 7 Fam LR 602; [1981] 55 ALJR 529 at 534 that a person to whom a subpoena is addressed is "bound either to comply with it or to apply to the court to set it aside". Having brought the documents to court he may still object to the production of some or all of them on appropriate grounds, such as privilege, and **[340]** he may satisfy the court that some good reason exists why they should not be produced: *Commissioner for Railways v Small* [1938] 38 SR (NSW) 564 at p574; 55 WN (NSW) 215. The next step in the production of materials to the court is best stated by Moffitt P for the Court of Appeal in *Waind v Hill* (*supra*) at p384.

> "If a subpoena for production is properly issued and not set aside, and, if there is ruled to be no valid objection to the production of the documents to the court, then the documents are in the control of the judge, who is invested with jurisdiction to take all steps necessary for the proper trial of the issues before him, subject to the due observance of any relevant rules and procedures of the court. So far as factual matters are concerned, the proper conduct of the litigation has only been that which fairly leads to the introduction of all such evidence as is material to the issues to be tried, and the testing of that evidence by the accepted procedures of the court."

Moreover, as the Court of Appeal held in that case, subject to the overriding principle that a subpoena must not be used for an improper or other extraneous purpose, there is no rule confining the material which can be sought by subpoena to that which will in fact be tendered in evidence and, as is known in civil cases, rules of practice indicate that parties may inspect materials so produced to determine if they shall be used in evidence, subject to the control of the court and the protection of the interests of the parties, witnesses and other persons: cf. *Lucas Industries Ltd v Hewitt* (1978) 45 FLR 174; [1978] 18 ALR 555 at pp566-8. Again *Alister's case* indicates that such a practice is not appropriate for criminal proceedings: see also *R v Barton* [1981] 2 NSWLR 414. Once the documents have been produced, they are in the control of the court and I would respectfully adopt in general the views expressed by the Court of Appeal in *Waind v Hill* (*supra*)

at pp382-383 as follows:

> **[341]** "At this point documents are in the control of the court, pursuant to the valid order of the subpoena. As pointed out in *Small's case* [1938] 38 SR (NSW) 564 at p574; 55 WN (NSW) 215, at this time the witness may state he objects to their being handed to the parties for inspection. If he states he does not object to the parties inspecting the documents, or by lack of objection is taken to have no objection, no doubt normally there would be little reason not to permit inspection by either party. However, the documents are under the control of the judge and, even if the witness has not objected, there may be good reason in the elucidation of the truth why the judge may e.g. defer inspection by one party or the other. Indeed, no doubt, he will normally defer inspection by a party who has not issued a subpoena until his opponent has an opportunity to use the documents in cross-examination. There may be good reason why he may, or indeed should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or, concerning some other person who is neither a party nor the witness. It may well be that the documents are the property of some institution, but relate to private matters concerning some person and the officers of the institution do not take objection on the basis that the responsibility for disclosure rests with the court. The documents are in its control and are used on its responsibility so far as properly required for the purpose of the proceedings."

And at p385:

> "The crucial question in relation to the exercise of the discretion to permit inspection in the second step is whether the documents have an apparent relevance to the issues."

The only qualification I would add is that I should pay close regard to the fact that the accused's liberty is at stake and that a wide test of relevance may be appropriate: cf. *Alister's case* at pp99-100, 116 and 118. As Gibbs CJ stated at p99 in considering a claim for public interest immunity:

> "Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial (see *Sankey v Whitlam* at 42, 62), so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight **[342]** to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere 'fishing' expedition can never be allowed, it may be enough that it appears to be 'on the cards' that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report would assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done."

I cannot believe that the learned Chief Justice used the word "discovery" other than deliberately. His approach, concurred in by Murphy J at p107, and similarly formulated by Brennan J at pp115-118, can only lead to the conclusion that the practice of permitting inspection by the parties of documents to decide whether they should be tendered or used in cross-examination, as worked out in *Small's case* (*supra*) and *Waind v Hill* (*supra*) for civil courts in New South Wales, has a general application, certainly in criminal cases. No argument was advanced to the contrary: see also *Lucas Industries Ltd v Hewitt* (*supra*). In the light of those authorities I must consider first the relevance of the materials to be produced and then the various competing interests, if any, which should he protected.

The test of relevance to be derived from *Alister's case* would appear to require that there should be some concrete ground for belief that the materials produced would be likely, or may tend, to assist the accused in their defence, which takes the case beyond a mere "fishing expedition": at pp99, 107, 118. The test, however, should be applied liberally with a proper appreciation of the nature and exigencies of a criminal trial, **[343]** so that it may be enough that it is "on the cards" that the materials will assist the defence. Although there may appear to be an element of "fishing" in the present case, that does not appear to me to be a bar to inspection, bearing in mind that one of the exigencies of a criminal trial which has been accepted by all parties is that I cannot enquire what is the nature of the defence of each of the accused. I must accept that counsel genuinely wish to undertake the investigation of these tapes and transcripts. Moreover the present case is one where an inspection appears to be justified.

The whole of the Crown case, as I have been told, depends on inferences to be drawn from recorded telephone conversations. Such inferences may appear more or less obvious depending on one's viewpoint, for there are very few direct references to the importation of drugs, and these are evident only if one understands some of the 'code' words used. The conversations are the actual words of the co-conspirators, both on the 472 tapes and on all the other tapes which have been made of these telephone conversations, and there are numerous reasons why they should in fairness know what has been recorded of those conversations. I do not accept that they can remember what they said or did in detail two to three years ago, especially when the court knows that there are 472 relevant conversations, on the view that the Crown takes, and that some 14,000 conversations have been taped from those telephone numbers in all. If the activities of the accused were innocent, then the taped conversations may well provide real evidence of their innocent activities: cf. the analysis of tape-recordings in *R v Matthews & Ford* [1972] VicRp 1; [1972] VR 3 at pp11-13. Merely because they have been recorded pursuant to the Act is no reason for **[344]** non-disclosure. In fact, the very opposite conclusion should be reached. The privacy of the accused has been invaded and they have good reason to enquire what has been recorded of their conversations during the period of the alleged conspiracy.

Other grounds were put forward which I think may have some bearing on allowing this material to be investigated. In some cases, counsel for the accused asserted that they may wish to take the defence that what they were dealing with was not drugs but stolen goods. The material on the 472 cassettes certainly suggests that this was an activity of several of the accused. If that be the case, then, in the special circumstances of this case and bearing in mind the nature of the comparative penalties for the two offences, such a defence may, at least on one view, be thought to be an appropriate course to take.

Secondly, it was suggested that there was a question as to the accuracy of the tape-recordings and, in particular, as to the identification of the voices of the accused. It seems to me to be desirable that, if there are other alleged recordings of these voices, then the whole of the material should at least be available for consideration and testing by the accused. Whether these defences are pursued or not, I do not think it right to inhibit the enquiry. Bearing in mind the liberality of the tests posed by the majority in *Alister's case* and having considered all the arguments addressed to me, I am of opinion that the materials may tend to assist one or more of the accused in their defence. They are therefore sufficiently relevant to permit inspection on behalf of the accused.

It remains to consider whether there are any competing interests to be protected. Detective Inspector Chalker and Major General Gray have both objected to the accused inspecting **[345]** the materials and I must decide whether those objections override the rights of those serving the subpoenas. As to the private interests which their counsel said should be protected, none were specified other than those of the accused and the co-conspirators, two of whom are now dead. No other public interest was claimed, except that I should ensure that the Act is complied with. This I have power to control because of the rules expounded in *Waind's case* (*supra*). In any event, the Act provides heavy penalties if the materials are passed on to others without a legitimate interest in the present trial.

In the light of the arguments presented to me and the absence of any evidence justifying any restrictions over and above those appropriate for preserving the materials, I am not persuaded that the accused and their legal representatives should not be shown all of the recorded material and any transcripts thereof. As to possible further delay this is a special case, in the sense that all the accused are on bail and none of the witnesses in respect of any significant evidence are individuals whose evidence might be thought to be lost or might suffer by reason of the passage of time. As I have said, essentially the Crown case is based on the tape-recordings and certain other police observations, together with a large mass of formal material. None of that evidence seems to me to be of a kind which will he prejudiced in the telling by a delay which might arise from an investigation of these other tapes.

However, because of the delay, I intend to impose rigid guidelines for the use of the materials, consistent with the provisions of the *Telecommunications (Interception) Act* 1979. The trial must not be delayed longer than is necessary. Hearing these tapes will take a number of weeks. When they are produced, **[346]** I shall require counsel or the solicitors for the accused to engage continuously

in the task of listening to the tapes until they have been played through, subject to any further directions I may give. They will have to be heard in a room appropriately set up for the purpose and the tapes will have to be kept secure. At present, I propose that counsel will have to listen to those tapes for two periods of three hours a day until they have finished listening to them. Further directions may then be necessary; and, of course, if any change is thought appropriate, or if counsel wish to be relieved in any way from that burden, I shall hear any application.

Accordingly, I will adjourn the hearing today to enable the procedures to be worked out. I also propose that transcripts of the 2,111 tapes should be provided to counsel for the accused during a similar period. Counsel may well have to read those at night, but I shall listen to any arguments to the contrary. I should add that I reject the argument on behalf of Detective Inspector Chalker and Major General Gray that I should go through these tapes and transcripts myself to determine their relevance. There seems to me no reason why I should do that. Counsel for the accused are far better able to ascertain what is relevant and irrelevant, and in the light of there being no evidence to the effect that any other person's private interests are going to be affected or that there is any other prejudice which was likely to flow to any other person, bearing in mind the restrictions which are imposed by the *Telecommunications (Interception) Act*, I consider I can leave the matter to counsel for the accused to handle responsibly.

The fact that in a case of this magnitude committal proceedings have had to be restricted and the absence of any **[347]** clearly enforceable duty on the prosecution suggest that the day may be close when proper methods of discovery may be required for at least complex criminal trials: cf. Elkington: *Discovery upon Indictment in New South Wales* [1980] 4 *Criminal Law Journal* 4. What I am obliged to direct in the interests of a fair trial of the accused seems needlessly cumbersome, but I do not think I should say anything further on the issue, except that it should be looked at carefully by those best able to consider an overall solution to the question.

I therefore propose not to make any order on the application made by counsel for Mr Kelly, except to acknowledge that the Crown has undertaken to provide further materials. However, as far as the subpoenas are concerned, I propose to fix a date on which both the gentlemen to whom the subpoenas have been directed shall produce those documents to the court. In the case of Detective Inspector Chalker, no doubt it is possible for him to be present, subject to anything that the accused may have to say. It may be appropriate that the materials from Major General Gray can be brought to this court by some person duly authorised on his behalf. No doubt if the accused are not satisfied with that material, it may, again subject to any argument on the issue, be necessary to cross-examine him during the trial. However, I do not think that it will be necessary for the purpose of bringing the material to the court for him to come personally ...
