20/08; [2008] VSC 75

SUPREME COURT OF VICTORIA

REID v TABBITT & ANOR

Coghlan J

11, 14 March 2008

PRACTICE AND PROCEDURE – APPLICATION FOR A PERSON TO UNDERGO A COMPULSORY PROCEDURE – VATE TAPE AND TRANSCRIPT NOT AVAILABLE AT TIME OF HEARING APPLICATION – NATURAL JUSTICE – WHETHER PERSON DENIED NATURAL JUSTICE – TEST TO BE APPLIED BY MAGISTRATE WHEN DEALING WITH APPLICATION – APPLICATION GRANTED FOR TAKING OF SWAB – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S464T.

1. When a magistrate is determining an application for an order that a person undergo a compulsory procedure, the test to be applied is that the magistrate must be satisfied on the balance of probabilities that there are reasonable grounds to believe that the person has committed the offence. The test does not involve the magistrate reaching any degree of satisfaction as to the commission of the offence.

2. Where a VATE tape was not made available to the magistrate in determining an application for an order directing a person to undergo a compulsory procedure because the tape had not been transcribed and the tape did not provide any exculpatory material, the person was not denied natural justice by the magistrate not viewing the tape.

COGHLAN J:

1. By Originating Motion dated 18 October 2007, the plaintiff seeks an order quashing an order made by Broughton M on 20 September 2007 in the Ballarat Magistrates' Court that, pursuant to S464T of the *Crimes Act* 1958 (Vic) ("the Act"), the plaintiff provide a forensic sample to the defendant.

2. The plaintiff seeks a further order that Broughton M be, "directed to redetermine the application subsequent to full disclosure having been made by the first defendant and according to proper principles of law".

3. The grounds of the application set out in the Originating Motion are:

> "1. The 1st defendant did not provide full disclosure of available material to the Court upon the hearing of the application pursuant to s464T, *Crimes Act*, (Vic) on September 20, 2007 in that the VATE tape of the victim was not produced to the Court.
> 2. 2. The Honourable Magistrate fell into error in ruling that s464T(3)(b) should not be interpreted as meaning that the Court must find the respondent to the application guilty on the balance of probabilities of the offence in respect of which the application was made."

4. The events which led to this Motion began on Saturday 17 August 2007 when K.T. (born 25 March 1992) attended an 18th birthday party. K.T. later claimed that she had been attacked and digitally penetrated without her consent. As a result of the police investigation, the plaintiff was charged with the offences of rape and sexual penetration of a female under the age of 16. K.T. was medically examined. Various samples containing mixed DNA were recovered from her and her clothing.

5. It was in that context that the application was made to the Ballarat Magistrates' Court.

6. The application was for the provision of a sample by "buccal swab".

7. The taking of the "buccal swab" was a forensic procedure under s464T of the Act. That section provides for a Magistrate to make "an order directing a person to undergo the compulsory procedure" s464T(1) of the Act). Such an order may be made on the application of a member of the police force. It is founded on the plaintiff refusing to undergo the procedure, the plaintiff being

a relevant suspect and that the member of the police force believing on reasonable grounds that the person has committed the offence s464T(1)(a), (c) and (d) of the Act).

8. Section 464T(2) sets out the form of application. No issue arises under that section in this case.

9. Section 464T(3) provides as follows:

> "(3) The Court may make an order directing a person to undergo a compulsory procedure if the Court is satisfied on the balance of probabilities that—
> (a) the person is a relevant suspect; and
> (b) there are reasonable grounds to believe that the person has committed the offence in respect of which the application is made; and ...
> (h) in all the circumstances, the making of the order is justified. ...
>
> (5) A relevant suspect in respect of whom an application is made—
> (a) is not a party to the application; and
> (b) may not call or cross-examine any witnesses; and
> (c) may not address the Court, other than in respect of any matter referred to in subsection (3)(a) to (h).
>
> (6) In exercising the right of address under subsection (5)(c), a relevant suspect may be represented by a legal practitioner."

10. The plaintiff was present at the time of making the application and was represented by Mr Stephen Howe of counsel who made submissions on his behalf. In such applications the role to be played by counsel is somewhat restricted because of the provisions of s464T(5) set out above. Mr Howe made detailed submissions relating to the matters in paragraph (a) to (h) but made two additional submissions. He submitted that exculpatory material available to the defendant (applicant) before the Magistrate had not been put before her. It would follow that the plaintiff (respondent) had been denied natural justice. (See *O'Sullivan v Freeman* [2003] VSC 45). To support his argument, Mr Howe quoted various pieces of material to the Magistrate from the Bar table. He was not permitted to lead evidence, but made submissions.

11. Much of the material went to establishing the proposition that relevant material had not been put before the Magistrate. It was submitted that the material was exculpatory and therefore went either to the question of natural justice or to the proposition that the Magistrate could not be satisfied that there were reasonable grounds to believe that the person had committed the offence in respect of which the application was made (s464T(3)(b)).

12. How the submissions fitted in with s464T(5), I am by no means sure. In any event, the material which was referred to by Mr Howe was tendered by Ms Maxwell, the solicitor who appeared on behalf of the applicant.

13. There was one "document" which remained untendered. That was either the VATE tape of the interview with the complainant or a transcript of it. (See generally s37B Evidence Act 1958 (Vic)).

14. However, tendered to the Magistrate was a document titled "Video Taped Interview Log".

15. The following passages appear in that document.

> "This guy with dark hood pulled down to his nose jumped on me and stuck his fingers in me, while lying on the couch".
>
> And later Constable White asked:
>
> "What was the male wearing?---Black jumper. Jeans, lip pieced (sic)".
>
> "Describe piecing (sic) in lip?---A bar that went straight thru and a ball on either end".

16. At no other place in the "log" is any mention made of piercing.

17. It has emerged that the so-called exculpatory material was material which was served on the plaintiff together with the affidavit in support of the application.

18. In any event, the solicitor for the defendant (applicant) below tendered all of the material which was referred to and counsel for the plaintiff (respondent) was permitted to make detailed submissions on it.

19. Once the material was supplied to the Magistrate, the procedural fairness argument before her was somewhat arid. She heard detailed submissions on the material. The main argument advanced was that the complainant had only described one piercing of the lip of the alleged offender. It was submitted that he had two piercings; one in the lip and one between the lip and the chin. Mr Howe made submissions based upon the statements of Mark Keyte, Rebecca Kensington, Sergeant Karl Curnan, Dr Jill Ramsey, Constable Tibbett (with reference to a recorded conversation with the plaintiff), A.T. (the mother of the complainant) and Constable White. Recent photographs of the plaintiff and his jacket were also tendered. In one sense that material enabled her to look at the question of whether she had been provided with adequate material, but it also allowed her to deal with the case more fully.

20. The general thrust of the submissions was that there was sufficient doubt about the reliability of the identification evidence both relating to the question of "piercings" and the colour of the jacket for her Honour to refuse the order.

21. Toward the end of submissions being made on behalf of the plaintiff, the following exchange occurred (pp23/24 of transcript exhibited to the affidavit of Raylene Maxwell of 13 February 2008 ("the transcript")):

> "MR HOWE: Simply that it has been described variously. To be fair, Your Honour, the victim herself describes the jacket as dark once, and that once is the first time she described it in the VATE log. Now, whether she describes it that way on the VATE tape, I have no idea. I think Your Honour should really see the tape to be fully informed of the matter. I haven't seen it. But that's my view. Whether she says it on the tape, I don't know. But there's once where it is referred to as dark, but then later on in that same interview she reverts to black. So it is always described as black, consistently as black, from the first moment she tells anyone about it, except for once in the VATE log where she says dark. But, as I say, it then reverts to black subsequently, Is the VATE tape obtainable? Is it close by? HER HONOUR: I'm certainly not going to call for the VATE tape if it is not readily available.
>
> MR HOWE: I will take that no further then, Your Honour. That's my submission.
>
> HER HONOUR: It is not in court at the moment?
>
> MS MAXWELL: No, Your Honour. It's being transcribed at the present.
>
> MR HOWE: For the moment that's all I have to say before you read the material, Your Honour."

22. No application was made by counsel with respect to the VATE tape.

23. Counsel for the plaintiff had commenced his submission with an argument that the words of s464T(3)(b) should be interpreted as meaning that the Magistrate needed to be satisfied on the balance of probabilities that the plaintiff was "guilty of the offence".

24. Counsel advanced no authority for the proposition. The argument was repeated before me and it appears to involve the proposition that because the paragraph requires, "reasonable grounds to believe that the person has committed the offence", a tribunal could not be satisfied as to the existence of reasonable grounds unless satisfied on the balance of probabilities that the person had committed the offence.

25. The Magistrate gave careful and cogent reasons for her decision which are set out at p28ff of "the transcript".

26. It is fair to say that her Honour dealt with all the factual matters which had been put to her by counsel for the plaintiff. By necessary implication she rejected the construction of s464T(3)(b) suggested by counsel. She dealt with all the matters suggested by counsel to be exculpatory. She also must be taken to have rejected the argument relating to procedural fairness advanced

to her. As I have already noted, once the Magistrate had all of the material, that argument was not really sustainable. She concluded:

> "I have certainly traversed a number of the issues which question has been raised about the prosecution case, but if I could put it now the other way. I have considered certainly all of the material that I identified and it is the case that, in my view, having considered all of that evidence, that there are reasonable grounds to believe that the respondent has committed the offence with respect to which the application is made and the application will be granted."

27. She made an order that the plaintiff, "attend at the Ballarat Police Station for the provision of a buccal swab on or before 22 October 2007 unless an order to review is filed in the Supreme Court before that date".

28. The first ground before me was:

> "1. The 1st defendant did not provide full disclosure of available material to the Court upon the hearing of the application pursuant to s464T, *Crimes Act* (Vic) on September 20, 2007 in that the VATE tape of the victim was not produced to the Court".

29. There is no evidence before me that the tape was available at the time of the hearing below. The evidence was to the contrary. It is not clear to me that such a tape would be admissible on an application of this kind s37B *Evidence Act* 1958 (Vic)). The tape was not produced before me. I had one advantage over her Honour. I had before me a transcript of the VATE tape. Counsel for the plaintiff who, as I understand it, has not seen the VATE tape, did not urge me to view the tape.

30. Lack of procedural fairness would be a basis for quashing the order made by the Magistrate (see *O'Sullivan v Freeman* [2003] VSC 45).

31. It seems to me that the first ground could only be made out if there was something in the VATE tape itself which would have affected the Magistrate's attitude to the application in a way which was favourable to the plaintiff.

32. The Magistrate had before her the log of the VATE tape. She proceeded on the basis that the complainant had said in the tape that there was one "piercing". I have read the transcript of the tape and compared it with the log which was tendered. (See part of LR1 Exhibited to the affidavit of Jeremy William Harper of 12 December 2007, Video Taped Interview Log).

33. In her reasons, Broughton M very carefully dealt with the questions of both the piercing and the jacket or jumper worn by the suspect (transcript pp.33-36). She made reference to the VATE tape. She said:

> "Dealing with the videotaped interview log, I note that the VATE tape itself was not in court. I didn't call for it. It's not been seen by the respondent. But certainly it's the case that the VATE log refers to the complainant giving a description. Certainly there's a spelling error, but it is clear that it means 'lip pierced'. Then the complainant appears to have been asked 'Describe piercing in lip'. 'A bar that went straight through and a ball on either end'."

34. The transcript of the VATE tape contains the following passages:

> "Q19: Okay. 'Take advantage', how – how do you mean 'take advantage'?
>
> A: Well, I was probably earlier with some boys that night and they must have seen me and thought that, you know, it was okay for them to come up and kiss me or touch me. And when I was in a caravan ... the annexe, they came in and one of them – first of all they came in with me when me and my friend – me and my friend, Tim, were in there and jumped on top of us and that. And he told them to go away 'cos I wanted to sleep. And then after that, I – Tim had left the room said he'll be back in a minute, then they came in again and were just laughing and saying stuff like 'Get into her. She's easy. She looks easy. She was doing it all night'. And after that I was lying on the couch and one of them jumped on top of me, I think he had his hood put in front of his face and, yeah, I was trying to push him away and he, sort of, stuck his fingers in me.
>
> Q20: Stuck his fingers in where?

A: In my vagina.

Q21: In your vagina? (NODS HEAD)

Q22: Where did this happen?

A: At my friend, Chris Sharp's house. This was his 18th birthday.

Q23: Was Chris in the room?

A: No.

Q24: So were you on the couch when this happened?

A: Yeah. I was lying down.

Q25: Down on the couch. And where were your clothes?

A: My clothes were on my body, except my undies were, sort of, pulled down to here by one of the guys.

Q26: What were you wearing that night?

A: A dress and a cardigan.

Q26A: Now, you said a male came in and got on top of you.

A: Yep.

Q27: Tell me more about him.

A: I can't really remember much of him. I ... he had a black jumper and jeans and I remember he had his lip pierced. That's all I remember.

Q28: Can you describe the piercing in his lip?

A: It sort of had a bar that went straight through and a ball on the end and a ball on the top."

35. The only real difference between the transcript and the log is that the jumper is called a "dark hood" in the log but has colour or shade ascribed to it in the VATE transcript.

36. I am unable to see how the playing of the tape or the reading of the transcript could have made any difference to the decision reached by the Magistrate. Counsel for the plaintiff was unable to give me any particular reason as to why his client's position would have been advanced by the playing of the tape, except to say it would have provided the complete context in which the expression "piercing" was used.

37. It is important to note that at no time in her reasons for decision did the Magistrate proceed on any basis other than that the complainant had referred to piercing in the singular.

38. I am satisfied that the plaintiff was not denied natural justice by the Magistrate not viewing the VATE tape. Counsel did not ask for the Magistrate to view the tape. I accept that he may have felt somewhat constrained by the provisions of s464T(1) and (5) and by what the Magistrate said about it.

39. If there was some reason to believe that the VATE tape provided additional and, in particular, exculpatory material, then the position may well be different. That is not this case.

40. As to the second ground of appeal, I am satisfied that the test to be applied is that the Magistrate must be satisfied on the balance of probabilities that there are reasonable grounds to believe that the person has committed the offence.

41. Those are the plain words of the sub-section and sub-paragraph. The test does not involve the Magistrate reaching any degree of satisfaction as to the commission of the offence. Magistrates would be constrained almost to the point of impossibility if that were the test.

42. I listed the matter on 14 March 2008 intending to deliver judgment. I raised with counsel the fact that I had not seen the VATE tape. I enquired of counsel as to whether or not counsel thought that it was necessary to do so. Mr Howe, who appeared on behalf of the plaintiff, submitted that the only question was whether there was some nuance on the question of "piercing" which might be derived from viewing the tape. He was anxious not to delay the matter, particularly on the issue of costs. I gave him the opportunity to seek instructions. He was unable to contact his client but did not seek to have the matter adjourned to do so or so that I might look at the VATE tape. Given the narrowness of the issue as I see it, which is, is there anything on the VATE tape (taking the transcript of it to be accurate) which might have led Her Honour to a different conclusion; Mr Howe's view that not much might be gained from the actual viewing of the tape is correct. I can only reiterate that all the matters going to the possible identification of the defendant were very carefully dealt with by Her Honour.

43. The order of the Court is that the proceedings commenced by Originating Motion are dismissed.

APPEARANCES: For the plaintiff Reid: Mr S Howe, counsel. Jeremy Harper & Associates, solicitors. For the firstnamed defendant Tabbitt: Mr T Gyorffy, counsel. Office of Public Prosecutions.
