18/03; [2003] VSC 45

SUPREME COURT OF VICTORIA

O'SULLIVAN v FREEMAN

Ashley J

14 February 2003

NATURAL JUSTICE – APPLICATION FOR AN ORDER FOR PERSON TO UNDERGO COMPULSORY PROCEDURE – EVIDENCE GIVEN OF RECEIPT BY POLICE OFFICER OF TYPED, UNSIGNED LETTER CONTAINING A THREAT TO KILL – DNA BELONGING TO A MALE OR FEMALE FOUND ON STAMP AFFIXED TO LETTER – EVIDENCE GIVEN ON APPLICATION ABOUT HISTORY OF DISAFFECTION BETWEEN APPLICANT AND RESPONDENT – RESULTS OF INVESTIGATION OF TYPEWRITERS AND COMPUTERS NOT GIVEN TO MAGISTRATE – SUCH RESULTS FAVOURABLE TO PERSON SOUGHT TO UNDERGO COMPULSORY PROCEDURE - WHETHER SUCH MATTERS SHOULD HAVE BEEN DISCLOSED TO THE COURT – WHETHER SUCH CIRCUMSTANCE AMOUNTS TO EVIDENCE OF BAD FAITH – WHETHER OPEN TO MAGISTRATE TO MAKE ORDER FOR COMPULSORY PROCEDURE: *CRIMES ACT* 1958, S464T.

A police officer made an application under s464T(2) of the *Crimes Act* 1958 for an order directing O'S. to undergo a compulsory procedure by way of the taking of a mouth swab for the purposes of obtaining a DNA sample. There had been a history of continuing disputation between the police officer and O'S. and the application related to the sending of a typed, unsigned letter containing a threat to kill. DNA deriving from a male or a female source was found on the stamp. A seizure of typewriters and computers found no evidence linking O'S. to the letter. However, this exculpatory fact was not disclosed to the magistrate on the hearing of the application. The magistrate made an order that O'S. undergo the compulsory procedure. Upon application to quash the order—

HELD: Application refused.
It is very important that a court asked to make an order be fully appraised of the state of an investigation. Matters which tend to favour a conclusion that the applicant did not have reasonable grounds for the relevant belief ought to be revealed to the magistrate. In the present case, it was not correct for the magistrate to have regarded the allegations of bad faith and non-disclosure as extraneous to his consideration of the application. However, the outcome of the investigations was no more than a neutral circumstance and the failure to disclose a neutral circumstance could not sensibly stand as evidence of bad faith. On the material before the magistrate, it was impossible to conclude that there was no evidence upon which he could reasonably have been satisfied to make the order.

ASHLEY J:

1. An application was made to the Magistrates' Court at Melbourne for an order directing an adult to undergo a compulsory procedure – in the particular case, the taking of a mouth swab for the purposes of obtaining a DNA sample. The application was made under s464T of the *Crimes Act* 1958 (the Act). The application was made because the plaintiff in this proceeding , Mr Dale O'Sullivan, having been asked to consent to such a procedure, had declined to do so.

2. By s464T(2) an application must be in writing, supported by evidence on oath or by affidavit. The evidence must address so many matters made relevant by s464T(3) as are pertinent in the particular case. Of those matters Court must be satisfied on balance of probabilities, it being required to state the evidence upon which it is so satisfied.[1]

3. By sub-s5 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 sub-s3 (a) to (h)."

4. The application made by Sergeant Freeman stated that Mr O'Sullivan was suspected on reasonable grounds to have committed the offence of making a threat to kill, contrary to s20 of the Act. That section falls within Division 1 of Part 1 of the Act.

5. The affidavit in support of the application showed that a Sergeant of Police at Kyneton named Jenner had received a typed, unsigned letter on 27 August 2002 and a document in the form of a death certificate on 3 September that year. It is unnecessary to refer to the terms of those documents. They are clearly such as might constitute the commission of an offence under s20 of the Act.

6. According to Mr Freeman's affidavit, DNA deriving from two sources was found on the stamp affixed to the second letter. A female was the first source of such material. A male or female could have been the second source thereof.

7. Further according to Mr Freeman's affidavit, there had been continuing disputation between Mr O'Sullivan and Sergeant Jenner in recent years. It had involved, *inter alia*, Sergeant Jenner serving a firearms licence cancellation notice on Mr O'Sullivan, and Mr O'Sullivan later telling Sergeant Jenner in a telephone call that of course he realised his life, that is Sergeant Jenner's life, would be changed forever. It involved also Sergeant Jenner obtaining an intervention order against Mr O'Sullivan, and the latter making numerous applications to have the order cancelled or varied. It involved, again, Mr O'Sullivan making a number of unsuccessful applications for an intervention order against Sergeant Jenner, and Mr O'Sullivan being arrested in July 2002 for an alleged breach of the intervention order, being remanded in custody and not being admitted to bail for about a month.

8. The learned Magistrate expressed himself satisfied on the balance of probabilities that Mr O'Sullivan was a relevant suspect, in that he was a person suspected of having committed an offence described in Division 1, Part 1 of the Act; and that there were reasonable grounds to believe that he had committed the offence. He was satisfied also that material reasonably believed to be from the body of the person who committed the offence had been found on the stamp;[2] He directed that a sample be taken.

9. From that order, Mr O'Sullivan now seeks judicial review under Order 56 of Chapter 1 of the Rules. He put his case as follows:

10. First, no evidence was presented to the learned Magistrate that could have made good on balance of probabilities the matters required to be established under s464T(3).

11. Second, the material placed before the learned Magistrate had been incomplete and selective and so had led the Magistrate into error.

12. Third, the application had been brought in bad faith. There was no valid reason for seeking the order. The order had been sought simply as part of an on-going war between Mr O'Sullivan and Sergeant Jenner.

13. Mr O'Sullivan's contention that the application had been made in bad faith inter-related with his contention that evidence had been selectively provided to the learned Magistrate.

14. Before dealing with the detail of Mr O'Sullivan's submissions, I should make these points:

15. First, there are a number of defects in the way Mr O'Sullivan brought this proceeding. One example is that the learned Magistrate was not made a party, as he should have been[3]. I have put the defects to one side, being rather concerned to resolve the substance of the matter.

16. Second, this is not a proceeding by which I am authorised simply to re-decide the application agitated before the Magistrate. In order to succeed in this proceeding, the plaintiff must show that there was a relevant legal error which could justify the quashing of the order which the Magistrate made. There are strictly limited circumstances in which the court is authorised to make such an order: jurisdictional error, failure to observe an applicable requirement of procedural fairness, fraud, or error of law on the face of the record.

17. As I understand the authorities, the circumstance that there was no evidence at all upon which the Magistrate could have found, on balance of probabilities, the matters which the plaintiff was required to establish, would provide a basis for quashing the order which his Worship made.

In the present case, on the material which was before the learned Magistrate, it seems to me impossible to conclude that there was no evidence upon which he could reasonably have been so satisfied. There was clear evidence that an offence of a relevant kind had been committed. There was clear evidence of a history of disaffection between Sergeant Jenner and Mr O'Sullivan, including a statement by the latter which might be perceived as a threat of harm. There was the presence of DNA on the stamp. It was uncertain, as it must have been, whether the DNA material on the stamp that could have been from a male was DNA deposited by Mr O'Sullivan. But the question was whether material reasonably believed to be from the body of the person who committed the offence had been found on the stamp; and certainly it was open to conclude that DNA material had been deposited by the putative offender.

18. Concerning the second and third aspects of his submissions, Mr O'Sullivan informed me from the Bar table, and Mr Burns for the defendant accepted, that police investigators had made a range of investigations which were not described in Sergeant Freeman's affidavit. Mr O'Sullivan told me that those investigations, which apparently involved the seizure of typewriters and computers, with a view of establishing the machine on which the critical documents had been printed, had not turned up anything against him. Indeed, he asserted that by a process of exclusion they were to his advantage. He argued that Mr Freeman's failure to disclose the results of those investigations to the learned Magistrate was evidence of bad faith; and that non-disclosure meant that his Worship reached conclusions upon incomplete material.

19. Having regard to the peculiar nature of s464T of the *Crimes Act*, it involving a procedure to which the suspect is not a party and in respect of which the party has no right of cross-examination, no right to call evidence and a very limited opportunity to be heard, it seems to me very important that a court asked to make an order be fully appraised of the state of an investigation. Matters plainly tending to favour a conclusion that the person referred to in s464T(1)(d) did not have reasonable grounds for the belief there referred to, or to favour a conclusion that reasonable grounds for the belief referred to in sub-s(3)(b) were not established, ought to be revealed to the court. In my opinion this court would not have its hands tied if it were to emerge that an order had been made by the Magistrates' Court on a premise which was likely to have been false. It might be said in such a case that the suspect, however restricted his or her rights, had not been afforded the hearing required by the rules of procedural fairness. There is a possible analogy with the circumstances considered in *R v Criminal Injuries Compensation Board ex parte A*[4]. The cases dealing with warrants which are discussed in *Aronson and Dyer,* Judicial Review of Administrative Action[5], may also be of relevance. The Court's readiness to act would be the greater if there was a contention of substance that the failure of disclosure was deliberate or actuated by want of good faith.

20. So much for principle. It does not follow, and I do not consider it to be the case, that the principle has application in the matter now before me. Let it be assumed that the investigations referred to by Mr O'Sullivan in his statement from the Bar table were conducted; and with the outcome that he described. Clear it is that they were not disclosed to the learned Magistrate. But in my opinion the outcome of such investigations was no more than a neutral circumstance; and failure to disclose what I consider to be a neutral circumstance could not sensibly stand as evidence of bad faith.

21. There is one matter more. I have studied the (incomplete) transcript of the proceeding below. It seems clear to me that Mr O'Sullivan attempted to press the issues of bad faith and non-disclosure. The learned Magistrate appears to have regarded them as extraneous to his consideration of the application. In my opinion that was not correct. But because, in the particular case, I have concluded that the substance of the matter does not run in the plaintiff's favour. I would not in the exercise of my discretion make an order in the nature of *certiorari*.

22. In the event, the proceeding commenced by originating motion must be dismissed.

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[1] See subs. 7(b).

[2] See s464T (3)(c)(1)(c).

[3] In that connection counsel for the defendant informed me that contact had been made with the Chief Magistrate, who had informed the presiding Magistrate of the proceeding, and who had indicated that the presiding Magistrate would abide the outcome of the proceeding in accordance with the so-called *Hardiman* principle.

[4] [1999] UKHL 21; [1998] QB 659; [1999] 2 AC 330; [1999] 2 WLR 974.
[5] 2nd Ed, pp210-211.

APPEARANCES: The plaintiff O'Sullivan appeared in person. For the defendant Freeman: Mr A Burns, counsel. Victorian Government Solicitor.
