36/92

SUPREME COURT OF VICTORIA

WOLF v GRECH

O'Bryan J

27, 30 April 1992

EVIDENCE – PUBLIC INTEREST IMMUNITY – LOCATION OF POLICE OBSERVATION POST – NATURE OF PRIVILEGE – COMPETING INTERESTS – COURT TO PERFORM BALANCING TASK – DISCLOSURE NOT RELEVANT TO DEFENCE CASE – WHETHER WITNESS SHOULD BE COMPELLED TO DISCLOSE LOCATION/IDENTITY OF OCCUPIER.

1. Where a claim of public interest immunity is made, a court is required to balance the harm which may be done by disclosure with the need to avoid a miscarriage of justice. It is for the defendant to show there is good reason to protect the liberty of the subject over the need to protect informers.
***Young v Quin* (1985) 4 FCR 483; (1985) 59 ALR 225; and**
***R v Hennessey* (1978) 68 Cr App R 419, applied.**

2. Where a witness claimed the privilege in relation to the name and address of the occupier of premises used by police officers as a covert observation post, and the defendant was unable to show that such evidence was relevant to the defence case, a magistrate was in error in ruling that the witness should disclose the particulars sought.

O'BRYAN J: [1] This application by originating motion seeks an order that the Magistrate presiding in the Magistrates' Court at Melbourne in a proceeding wherein David Wolf is the informant and Mario Peter Grech is the defendant be restrained from requiring the informant (or any other witness called on behalf of the informant) to disclose the name and address of the owner of premises in Reservoir used as an observation post by police officers during March and April 1991.

The question raised in this proceeding is whether certain questions directed to a police officer in the course of a committal hearing, to which objection was taken by the prosecutor on the ground of public interest immunity, should be answered.

During late February and up to approximately mid April 1991 an "observation post" was set up by the police in the vicinity of premises occupied by Grech at No. 84 St. Vigeons Road, Reservoir in order that police may conduct surveillance and observation of the movements of Grech and other persons at or near his premises. The evidence shows that Detective Sergeant Rix of the Tactical Investigation Group of the Victoria Police spoke to the owner of a residential property in the vicinity of Grech's premises and obtained permission to use his property for surveillance purposes. The owner consented upon condition that his identity and the location of his property would not be revealed save to other police involved in the surveillance operation.

[2] For a time surveillance was maintained by a camera which enabled a police officer to monitor activities happening on or near Grech's premises on a screen. As I followed the evidence, the police officer followed the activities by watching a screen and made notes of what he observed in a running log. No permanent record in the form of a film exists. At a later time a video camera was mounted in the same position as the camera earlier used and film was taken which shows activities on or near Grech's premises. Oral evidence only was given in Court of the earlier surveillance. The later surveillance evidence was supported by the films.

During cross-examination of Detective Senior Constable Wolf, senior counsel for Grech elicited that "the 'first camera' was mounted in a position that gave no ample view of the defendant's driveway and the majority of the front of the house". The witness declined to answer further questions put to elicit the actual location of the camera. Public interest privilege was claimed on the basis that surveillance was a covert operation and the Court should protect from disclosure the identity of the occupier of the premises to whom an assurance of anonymity had been given.

Senior counsel submitted in the Court below that it was relevant to testing the evidence of the witness who simply monitored a screen to know the precise location of the "first camera". Of course, once the precise location was revealed the identity of the owner of the premises must inevitably be revealed. It was also put that the legal advisors of the defendant would wish to inspect the premises. **[3]** I am unsure how this would be achieved were the private owner to decline to allow an inspection. It was not suggested to me how a Court could compel a private individual to open his premises to the defendants' legal advisors for inspection against his wishes.

In the Court below Wolf was not asked to estimate the distance between the camera and the property line of Grech's premises. Nor was he asked to estimate the height of the camera above street level. Counsel for the applicant indicated that objection would not be taken to such questions notwithstanding that the answers would inevitably narrow down the possible location of the camera. What the applicant sought to protect from disclosure is the name of the occupier and the address of the premises used as an observation post.

It is not unimportant to the determination of the question raised here that one could expect an expert photographer to pin-point with a high degree of accuracy where the camera was probably mounted once he was shown the film and made familiar with the *locus in quo*.

The learned Magistrate overruled the objection of the prosecutor in the Court below and declined to uphold the public interest immunity objection. The hearing was then adjourned to enable the informant to test the ruling in this Court. The rule formulated in *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1; [1978] AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5 and known as "public interest immunity" is important in the proper functioning of police investigative operations and the detection of criminals and criminal activities. There must **[4]** be occasions when it will be more in the public interest to conceal the identity of a police informant or of a member of the public who has rendered a service to the police and thus society in general in the detection of a criminal or criminal activities than to reveal the information to the public. On some occasions the price of non-disclosure may be too high. Obviously, when the interests of justice require that disclosure be made, the public interest is better served by disclosure. The circumstance that an undertaking not to reveal an identity given in good faith by a police officer to an informer or a member of the public is important to police trust, but should only be given conditionally, and must be so understood by both the giver and the receiver of the undertaking.

Reference should be made to a number of authorities which have clearly broadened the scope of the rule formulated in *National Society for the Prevention of Cruelty to Children* providing for the absolute confidentiality of information given in confidence in the public interest. The rule established in the mid nineteenth century known as "police informer's immunity", now known as "public interest immunity", was considered in the course of committal proceedings by the Federal Court: *Young v Quin* (1985) 4 FCR 483; (1985) 59 ALR 225. Counsel for the defendants sought to cross-examine a police witness upon a number of matters in connection with a drug prosecution in respect of which public interest immunity was claimed. One matter concerned the position of various cameras used in police surveillance of certain criminal activities. Bowen CJ noted: **[5]**

> "The public interest has two aspects which may conflict: one that harm shall not be done to the community by the disclosure of material; the other that the administration of justice shall not be frustrated by the withholding of material which should be produced if justice is to be done. The Court has to decide which aspect of the public interest predominates. It was expressed by Gibbs ACJ in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 @ 39; 21 ALR 505; 53 ALJR 11; 37 ALT 122 as follows: 'In some cases ... the Court must weigh the one compelling aspect of the public interest against the other in deciding where the balance lies.'"

The learned Chief Justice then proceeded to "perform the balancing task" and came to the conclusion that evidence relevant to a defence would not likely be revealed if the evidence was not withheld. Sheppard J also concluded that the matters to be explored in the cross-examination could not go to the guilt or innocence of the defendant. His Honour considered that the cross-examination proposed was no more than a fishing expedition.

In the Court of Appeal (UK) in *R v Rankine* [1986] QB 861; [1986] 2 All ER 566; (1986) 83 Cr App R 18; [1986] Crim LR 464; [1986] 2 WLR 1075 the rule was extended to protect the identity

of a location used as an observation post in connection with a police undercover investigation in a drug case. The judgment of the Court comprising Lord Lane CJ, Mann J and Sir Roger Ormrod was delivered by Mann J. At p867 the Court said:

> "The reasons which give rise to the rule that an informer is not identified apply with equal force to the identification of the owner or occupier of premises used for surveillance and to the identification of the premises themselves. The cases are indistinguishable and the same rule must apply to each."

The reason underlying the rule is probably obvious but it is convenient to repeat it in the succinct language used in *Rankine*:

> **[6]** "It is in the public interest that nothing should be done which is likely to discourage persons of either class from coming forward. One thing which above all others would be likely to prevent them from coming forward with information would be the knowledge that their identity may be disclosed in Court. Accordingly for many years it has been the rule that police and other investigating officers cannot be asked to disclose the sources of their information."

The rule is qualified, of course, by a duty to admit evidence in order to avoid a miscarriage of justice. Lawton LJ said in *R v Hennessey (Timothy)* (1978) 68 Cr App R 419:

> "Cases may occur when for good reason the need to protect the liberty of the subject should prevail over the need to protect informers. It will be for the accused to show that there is good reason."

Two further English authorities need to be mentioned. In *R v Johnson (Kenneth)* [1988] 1 WLR 1377 a Court of Appeal upheld a ruling given during a criminal trial that evidence revealing places of police observation from dwellings and the identity of their occupiers should be excluded and that no injustice had resulted from the ruling.

In *R v Brown and Daley* (1988) 87 Cr App R 52 a Court of Appeal held that police evidence touching on how a police surveillance operation had been conducted was wrongly excluded during the trial. The trial judge had ruled that it was in the interests of public policy for the police not to divulge any matters detrimental to future surveillance operations. The decision in *Brown* is an example of the qualification of the rule being applied to avoid a miscarriage of justice. The decision did not otherwise **[7]** diminish or restrict in a general way the "public interest immunity" rule applicable to a covert "observation post".

In the present case one must "perform the balancing task" in order to determine whether the ruling in the Court below was correct. During the hearing I endeavoured to test the assertion made by counsel for the respondent that evidence identifying the location of the first camera was relevant to the defence case but, I believe, counsel did not demonstrate why the defence needed to know the precise location of the camera. As I earlier indicated, by means of either, intuition or, expert evidence the defence will be able to pin-point with a high degree of accuracy the probable location of the first camera. This will be achieved by eliminating a number of locations as being either, improbable or, impossible. It follows, in my opinion, that the defence does not need to be told by a police witness the name and address of the occupier of the premises in which the camera was located because the information can be obtained elsewhere. When the location is determined by the defence the lawyers acting for the respondent will undertake such inquiries or make such investigations as they deem necessary to support the defence case. All this can be done without the need to breach confidential information. This is a case where no injustice has been shown as likely to arise if the confidential information is protected from disclosure in the Magistrates' Court.

In my opinion, the ruling below was wrong and the learned Magistrate should protect the anonymity of the occupier of the premises by not requiring any witness to **[8]** disclose the name or address of the occupier of the premises in which the camera was located.

Finally, I wish to make clear that my decision is not intended to fetter the discretion of a trial judge should the respondent be committed to stand trial. At trial, perhaps as a result of a *voir dire*, further material may emerge which will show there is good reason not to protect further from disclosure the name and address of the occupier of the premises. I shall make a declaration that the informant or any other police witness is not required to answer a question if the consequence of

doing so will disclose the name or address of the occupier of the premises in which the surveillance cameras and/or listening devices were located for the purposes of investigating the offences with which the respondent was charged. A restraining order will be unnecessary. I shall hear counsel as to any further order that may be necessary.

APPEARANCES: For the applicant Wolf: Mr SP Gebhardt, counsel. Victorian Government Solicitor. For the respondent Grech: Mr J Rapke, counsel. Galbally & Rolfe, solicitors.
