11/08; [2008] VSC 1

SUPREME COURT OF VICTORIA

RAGG v MAGISTRATES' COURT and CORCORIS

Bell J

27 December 2007; 7, 24 January 2008

(2008) 18 VR 300; (2008) 179 A Crim R 568

CRIMINAL LAW AND PROCEDURE – SUMMONS TO PRODUCE DOCUMENTS – ISSUED BY ACCUSED TO POLICE INFORMANT – ACCESS SOUGHT TO UNUSED MATERIAL BY PROSECUTOR – TEST TO BE APPLIED BY MAGISTRATE – DUTY OF PROSECUTOR – FUNDAMENTAL DUTY OF COURT TO ENSURE FAIR TRIAL OF ACCUSED – REFUSAL BY MAGISTRATE TO STRIKE OUT SUMMONS TO PRODUCE DOCUMENTS – WHETHER MAGISTRATE IN ERROR.

1. The governing principle is that an accused person is entitled to seek production of such documents as are necessary for the conduct of a fair trial between the prosecution and the defence of the criminal charges that have been brought. That principle gives proper effect to the underlying fundamental duty of a court to ensure a fair trial and because it is consistent with the human rights of an accused person to equality before the law and a fair hearing specified in art 14 of the *International Covenant on Civil and Political Rights*, as well as the equality of arms principle that has been stated in the international jurisprudence by reference to those rights.

2. When objection is taken to the production of documents, the accused must identify expressly and with precision the forensic purpose for which access to the documents is sought. A legitimate purpose is demonstrated where the court considers, having regard to its fundamental duty to ensure a fair trial, that there is a reasonable possibility the documents will materially assist the defence.
***R v Alister* [1984] HCA 85; (1984) 154 CLR 404 (1983) 50 ALR 41; (1984) 58 ALJR 97; considered.**
***Fitzgerald v Magistrates' Court* [2001] VSC 348; (2001) 34 MVR 448, not followed.**

3. Where an accused identified expressly and with precision the legitimate forensic purposes for which he sought production of certain documents, it was reasonably possible that the documents described in the disputed paragraphs might have assisted the defence. That was so even though the documents were unused material from the prosecution's point of view.

4. Where the prosecution case was based on a reconstruction of the accused's businesses, which the prosecution intended to prove through the evidence of expert forensic accountants, the basis of their evidence would be material obtained in the police investigation, some by physical searches, some by various kinds of covert surveillance activity and the rest by various other means. The material was obtained not just from the accused's businesses but also from third parties, so the accused cannot be expected to know what the entirety of that material was. Out of the material that was seized or obtained, some was selected for use in the prosecution and the rest was rejected and returned. In such a case, the defence was entitled to test the evidence that would be given by those experts by examining the selections that had been made by them from the entirety of the material collected. To use the language of human rights, only then will there be equality of arms between the prosecution and the defence.

5. Accordingly, a magistrate applied the correct governing principle and made no error of law in ruling that the police informant was required to produce certain documents to the court.

BELL J:

INTRODUCTION

1. Jarrod Ragg is an officer of the Australian Federal Police who has brought six charges of tax evasion against Nicholas Corcoris, a Melbourne property developer. To assist with his defence at the committal, Mr Corcoris issued two witness summonses to Mr Ragg to produce certain specified documents to the Magistrates' Court of Victoria. Mr Ragg made application to a magistrate for orders striking out most of the paragraphs of the summonses, which the magistrate refused. He now seeks judicial review of that decision.

2. Mr Ragg submitted to the magistrate that the summonses were too wide and required production of a large number of irrelevant documents. The evidence to be led against Mr Corcoris, and certain other information, was in the hand-up brief that had been given to him in preparation for the committal, which was all he could reasonably require. Mr Ragg contended the magistrate erred in law in rejecting those submissions.

3. Mr Corcoris submitted to the magistrate that the documents would assist the defence in various ways. In particular, the police had obtained a large volume of material during an extensive and sometimes covert investigation, only some of which had been disclosed. Mr Corcoris contended the magistrate, who was very familiar with the matter because he had been managing it for some time, did not err in law in accepting those submissions and, indeed, his decision was correct.

4. The matter is urgent. The magistrate has fixed the committal hearing for 3 March 2008, after being twice previously adjourned, with an estimated duration of eight weeks. Everyone wants to avoid a further adjournment of the committal. His Honour's decision was made on 20 December 2007. The application for judicial review was made to this Court on 21 December 2007. I heard preliminary argument in the matter on 27 December 2007 and, by consent, heard final submissions on 7 January 2008. These are my reasons for deciding not to interfere with the decision of the magistrate, beginning with the grounds relied on by Mr Ragg.

The Grounds of the Judicial Review Application

5. Mr Corcoris issued the first summons on 10 December and the second on 17 December. I will describe them in detail soon. For now it is sufficient to say Mr Ragg objected to producing the documents sought in most but not all of the 15 categories specified in the first. He produced a large number of documents coming within two of those categories. Also, he raised public interest immunity objections to the production of documents in two others. The magistrate has not ruled on those objections yet, so they fall outside the current proceedings.

6. As to the remaining 11 categories in the first summons and the one category in the second, Mr Ragg objected to the production of the documents on the grounds that the summonses were an abuse of process. More particularly, he contended the summonses were oppressive, an impermissible fishing expedition and not supported by any legitimate forensic purpose.

7. Those are proper legal grounds of objection and, if established, may result in summonses to produce being set aside. It was the magistrate's responsibility to decide if the grounds were established, which he did, in the negative. That decision will stand, and Mr Ragg will have to produce the relevant documents to the magistrate, unless he obtains orders in the nature of judicial review from this Court.

8. Mr Ragg contends he is entitled to judicial review because the magistrate committed a jurisdictional error, or an error of law on the face of the record, in refusing the set-aside applications. His Honour's reasons form part of the record,[1] and must be read fairly, as a whole and in context, including the context supplied by the transcript of the argument that occurred before him, as well as the fact that he had been managing the proceedings towards the commencement of the committal for some time. If, so read, those reasons disclose that the magistrate made an error of law, Mr Ragg will have established a ground of judicial review. It is unnecessary to consider the other ground which, in this case, can be no wider.

9. The error of law relied on by Mr Ragg is that the magistrate did not correctly apply the abuse of process test. To fully appreciate his submissions in this regard, we need to know more about the criminal charges brought against Mr Corcoris, the two summonses and the reasons for decision of the magistrate, all of which I will consider under the next general heading.

THE PROCEEDINGS BEFORE THE MAGISTRATE

The criminal charges brought against Mr Corcoris

10. The charges arose from a substantial joint Australian Tax Office/Australian Federal Police investigation called Operation Tarpan. It commenced in 2002 and related to alleged income tax and goods and services tax evasion by Mr Corcoris. It is alleged Mr Corcoris is the director of over 24 companies which in turn are trustees to over 500 trusts. He is the tax agent of those entities. It is alleged he engaged in fraudulent evasion of taxes over a number of years through the creation and operation of three of those companies.

11. Mr Corcoris was charged on 13 December 2004 with six counts of defrauding the Commonwealth between 1 July 2000 and 23 May 2001 contrary to s29D of the *Crimes Act* 1914 (Cth). He was also charged with six counts of obtaining financial advantage by deception between 24 May 2001 and 30 June 2002 contrary to s134.2 of the *Criminal Code Act* 1995 (Cth).

12. The prosecution intends to prove those charges by reconstructing Mr Corcoris's business activities during the relevant period. Having, by various means, obtained the business's financial and other records, the prosecution says it can present an accurate picture to the court, first, of the tax-attracting activities of the business during the relevant period and, second, the fraudulent evasion of that tax (income tax and GST). Therefore, the prosecution case can be compendiously described as a "business reconstruction case." This is a well understood method of conducting a prosecution in such cases. But its success depends on the extent and quality of the material obtained to support the reconstruction, among other things. The main function of the committal concerning the charges brought against Mr Corcoris is to enable the material relied on by the prosecution to be tested by the defence.

13. That material consists of the records of Mr Corcoris's business, which came from searches conducted pursuant to various warrants, and included documents stored both in computer and paper form. Other necessary information came from the product of covert listening device, surveillance device and telephone intercept activity, also carried out under various warrants. The records and information obtained by the prosecution were extensive. Significantly for the present case, documents were obtained not only from Mr Corcoris's businesses but also from third parties, such as persons who had provided services to him. Mr Ragg was responsible for co-ordinating the investigation. Other AFP officers were involved. During some searches of business premises, some authorised non-AFP officers also gave assistance.

The documents specified in the summonses

14. These are the documents specified in the schedule to the first summons:

> SCHEDULE [FIRST SUMMONS]
> 1. All notes, documents, audio tapes, transcripts, video tapes, information reports, diary entries, day book entries, handwritten or typed notes of Federal Agent Ragg with regards to the investigation of Corcoris.
> 2. All crime reports or other Federal Police reports regarding the investigation of Corcoris.
> 3. Interviews or notes of conversations or statements including draft statements with witnesses, whether to be called or not, or suspected persons whether to be called or not, taken or prepared during the course of the investigation of Corcoris.
> 4. Details of all convictions and antecedent reports of all witnesses, who will or might be called as witnesses for the Prosecution in the matter of Corcoris.
> 5. All photographs taken during the course of the Corcoris investigation.
> 6. All Warrants obtained during the course of the Corcoris investigation pursuant to the *Listening Devices Act*, the *Surveillance Devices Act*, the *Telecommunications (Interception) Act*, the *Telecommunications (Interception and Access) Act*, and the *Australian Federal Police Act*.
> 7. All Search Warrants obtained during the course of the Corcoris investigation.
> 8. All property seizure records created during the Corcoris investigation.
> 9. All property receipt records for all property returned to whomever, being property which was seized during the Corcoris investigation.
> 10. The details of copies made of computer hard drives or other data copied from any computers during the Corcoris investigation.
> 11. All notes, documents, information reports, diary entries, records (whether in written or electronic form) audio tapes, video tapes (including any transcripts of such audio tapes or video tapes) prepared or taken during the course of this investigation in relation to Wanda Degnan, including, but not limited to:-
> (a) The conversation conducted between AFP Agents and Ms Degnan on 25 May 2004;
> (b) Documents in relation to an indemnity for Ms Degnan or regarding any letter of assistance to be provided to her;
> (c) Copies of recordings, whether by audio or video of any conversation with Ms Degnan and transcripts of any such conversation.
> 12. All notes, documents, information reports, diary entries, records (whether in written or electronic form) audio tapes, video tapes (including any transcripts of such audio tapes or video tapes) prepared or taken during the course of this investigation in relation to Thomas Degnan, including, but not limited to:-
> (a) The conversation conducted between AFP Agents and Mr Degnan on 20 May 2004;
> (b) Documents in relation to an indemnity for Mr Degnan or regarding any letter of assistance

to be provided to her;
(c) Copies of recordings, whether by audio or video of any conversation with Mr Degnan and transcripts of any such conversation.
13. All listening device and surveillance logs relating to the Corcoris investigation.
14. All authorisation for non Australian Federal Police Members to assist in searches conducted by the Australian Federal Police in relation to the Corcoris investigation.
15. All authorities or notices issued to the Australian Federal Police authorising Australian Federal Police to release or require any documents seized in the Corcoris investigation to be released or produced to the Australian Taxation Office.
16. All documents and information sought is that which does not form part of the Hand Up Brief.

15. Mr Ragg produced the documents specified in categories 3 and 4. The unfinalised public interest immunity claim relates to the documents in categories 11 and 12. You can see category 16 excludes from the previous 15 categories all documents and information already given in the hand-up brief. The magistrate overruled Mr Ragg's objection to producing the documents in categories 1, 2, 5, 6, 7, 8, 9, 10, 13, 14 and 15.

16. Here are the documents specified in the second summons:

SCHEDULE [SECOND SUMMONS]
1. All telephone intercept logs relating to Warrants obtained pursuant to the *Telecommunications (Interception) Act* relating to the Corcoris investigation.

17. This summons was issued because paragraph 13 of the first one specified listening device and surveillance logs, but not telephone intercept logs. A log is not the actual recording of the conversation or a transcript of that conversation, but a running list of the conversations recorded. A log may be used to identify conversations that might be relevant to the defence. The actual recording or transcript of the conversation might then be requested.

18. The summonses were issued under s43(2) of the *Magistrates' Court Act* 1989 which allows any party to a criminal proceeding to issue a witness summons, including a summons for the production of documents. Mr Ragg's application to strike out most paragraphs of the two summonses was made orally.

The reasons for decision of the magistrate

19. On the application to set the summonses aside, the magistrate heard extensive argument from counsel for Mr Ragg and Mr Corcoris. As the summonses were directed to Mr Ragg, it was his counsel, not counsel for the prosecution, who made the submissions in support of the application.

20. Counsel for Mr Ragg went through the categories in the summonses, contending that they were too wide. In respect of legal questions, those submissions were substantially repeated before me.

21. Counsel for Mr Corcoris disputed those contentions. He justified the claim for production of the documents, category by category, by reference to the issues in the prosecution, as he saw them. In respect of legal questions, those submissions were also substantially repeated before me. Counsel for Mr Corcoris also developed somewhat the basis on which production of the documents was sought.

22. The magistrate identified the applicable test by reference to the relevant authorities, and specifically mentioned *Alister v R*,[2] *R v Mokbel (Ruling No 1)*,[3] *DPP v Selway*,[4] and *Roads and Traffic Authority of New South Wales v Conolly*.[5] On the basis of those authorities, he said that the court had to adopt a liberal approach when assessing the legitimate forensic purposes of the defence in a criminal trial, that special weight had to be given to the fact that the documents sought might assist an accused person and that it was then for the judge to determine whether it appeared "on the cards that the documents would assist the accused in his defence." That quotation from the reasons for decision of the magistrate reflected the judgment of Gibbs CJ in *Alister*,[6] which is the leading case on this question.

23. His Honour then gave these reasons for refusing Mr Ragg's application:

8. Applying those principles to the case before me I am satisfied that it does appear to be on the cards that the documents sought may assist the defence.

9. Paragraph 1 merely requests in one form or another the notes of the informant. Such documents commonly form the basis of significant cross-examination in criminal proceedings.

10. The same can be said of the reports sought in paragraph 2.

11. Paragraphs 6 and 7 relate to search warrants obtained in the course of the investigation which would clearly relate to the legality of evidence obtained in the course of this extensive investigation.

12. Paragraphs 8 and 9 relate to property seizure records and property receipt records where property seized has been returned. It is clear from the prosecution submissions in the course of various special mentions or applications for adjournments that the auditors whose evidence is critical in this case had to reconstruct some matters without the benefit of primary documents they would normally have relied upon. As said by Mr Grinberg, at one stage at the discovery of what were referred to as the *McDonald* documents the auditors position was they could not swear as to the truth of their statement without an assessment of the *McDonald* documents. Mr Grinberg submits that in these circumstances it is important for the defence to know the full extent of documents seized and returned in order to properly assess the validity of the auditors conclusions as well as to consider for themselves the relevance of documents not relied upon. I agree with this submission.

13. Paragraph 10 relates to copies of hard drives of computers made by the Australian Federal Police and in my view is in the same category as paragraph 8.

14. Paragraph 5 I regard to be in the same category.

15. In relation to paragraph 13, listening devices and surveillance logs, and I will include also the additional item in the subsequent Subpoena, being telephone intercepts, the forensic purpose seems obvious as the defence are entitled to ascertain for themselves the relevance of these matters which may very well give rise to a basis for cross-examination. The defence are best placed to make this assessment. There may very well be for example conversations which the defence seeks to introduce into evidence which in their opinion is exculpatory or perhaps merely inconsistent with the Crown case.

16. Paragraphs 14 and 15 relate to an assessment by the defence of the legality of actions taken by non AFP members which I regard as a legitimate forensic purpose.

24. Against that background, I can now turn to the judicial review application.

THE JUDICIAL REVIEW APPLICATION

Mr Ragg's submissions

25. Counsel for Mr Ragg submitted there was no discovery in criminal proceedings and the primary (and continuing) duty of disclosure rested on the prosecution. That duty had been discharged in the present case, without complaint by the defence. Mr Corcoris's summonses in effect sought discovery of prosecution documents. Upholding the summonses would pass to the defence, and ultimately to the court, the responsibility of the prosecution to make decisions as to disclosure. Counsel submitted the magistrate did not take the prosecutor's duty of disclosure into account.

26. It was accepted that summonses for production of documents had a legitimate function in criminal proceedings. But the defence had to identify expressly and precisely the legitimate forensic purpose for which production of the documents was sought. No such purpose was demonstrated where the only purpose was to fish for documents that might possibly be relevant.

27. As to paragraph 1 of the first summons, counsel for Mr Ragg submitted the magistrate should have decided this category was impermissibly broad. The reasons his Honour gave were simply that such documents were commonly used in cross-examination by the defence, which did not provide a legitimate forensic purpose. Everything about Mr Ragg's investigation of Mr Corcoris could not be relevant, as the relevance test turned on the issues raised by the charges brought not the investigation conducted. The same criticisms applied to the crime reports sought in paragraph 2.[7]

28. As to paragraphs 6 and 7,[8] it was submitted the prosecution had already supplied copies of the warrants which supported evidence to be led in the proceedings. The defence was not entitled to copies of warrants used to obtain material that would not be so led. Seeking these had to be fishing.

29. As to paragraphs 8 and 9, counsel for Mr Ragg submitted it could only be permissible to seek the production of seizure records relating to financial information obtained from other people,

and a general concession was made to that extent. Any wider claim could only be fishing, and the magistrate's decision to uphold the claims in full was wrong in law. Mr Corcoris already had the records relating to property seized from him.

30. As to paragraph 10, the magistrate treated this category as relating to copies of computer hard drives and data copied from computers during the investigation. But the paragraph sought "details" of what was copied, which is not a claim for production of a document. The magistrate dealt with the claim in paragraph 10, and paragraph 5, on the same legally erroneous basis as paragraphs 8 and 9. There was not legitimate forensic purpose demonstrated for the claims in paragraphs 10 and 5, except as they related to financial information (see the above-mentioned concession).

31. As to paragraph 13[9] of the first summons and the one category of documents specified in the second, the claims for these logs was supported by speculation at best. Proper regard to the legal tests would have led the magistrate to so hold. The magistrate should have set these paragraphs aside, as nothing was identified by Mr Corcoris to which the logs could be relevant.

32. As to paragraphs 14 and 15, counsel for Mr Ragg submitted the only relevant authorities were the ones relating to the actions of AFP officers and other persons who had to be authorised. There was no issue about the legality of the actions of other persons. In particular, there was no issue about the legality of the assistance given by the non-AFP officers on the execution of the warrants mentioned in the paragraphs. The magistrate should have held these claims were fishing.

33. Finally, it was submitted the precedent set by upholding the summonses would be unfortunate; such summonses would require the production of virtually every documents of the prosecution in complex criminal trials.

34. These submissions must be rejected for the reasons that follow, beginning with the relevance of international human rights.

International human rights

35. I think international human rights are relevant when deciding whether the magistrate committed an error of law, because they inform the scope and application of the court's power to strike out summonses to produce issued by, as well as the related duty of a prosecutor to disclose material documents to, the defence in criminal cases. The relevant rights are the right to equality before the law and the right to a fair trial specified in art 14(1) and (3) of the *International Covenant on Civil and Political Rights*[10] to which Australia is a party.

36. This judicial review application was issued by Mr Ragg on 21 December 2007 before the commencement of the relevant provisions of the *Charter of Human Rights and Responsibilities Act* 2006, which was 1 January 2008. By the transitional provisions in s49(2), the *Charter* "does not affect" the proceeding.

37. *Tomasevic v Travaglini*,[11] was a case involving the duty of the court to ensure a fair trial by giving due assistance to a self-represented litigant and to which art 14(1) of the ICCPR was also relevant. The *Charter* likewise did not apply to the proceeding. I there held that international human rights can have an independent significance for the exercise of judicial powers and discretions:

> Apart from the *Charter*, the ICCPR does not 'operate as a direct source of individual rights and obligations' because it has not otherwise been incorporated into Australian law. But like other international instruments to which Australia is a party, the ICCPR has an independent and ongoing legal significance in Australian and therefore Victorian domestic law, a significance which is not diminished, but can only be enhanced, by the enactment of the *Charter*.[12]

38. I went on the specify, by reference to the authorities, what that significance could be:

> What is that significance? Subject to certain limitations and to an evolving extent, the ICCPR, and... other [international] instruments, may at least inform the interpretation of statutes (so as to be consistent with and not to abrogate international obligations), the exercise of relevant statutory and judicial powers and discretions, the application and operation of the rules of natural justice, the development of the common law and judicial understanding of the value placed by contemporary society on fundamental human rights.[13]

39. I then held that the ICCPR should be taken into account in that case:

> Therefore, even though the *Charter* does not affect my consideration of Mr Tomasevic's application for judicial review, I think the ICCPR does. To determine the application, it will necessary for me to identify what was required for the proper performance of the duty of the trial judge to ensure a fair trial by giving due assistance to Mr Tomasevic as a self-represented litigant. I think this should be done in terms that take into account the importance of that duty in promoting and respecting the fundamental human rights of equality before the law and access to justice which are specified in the ICCPR.[14]

40. Whether the summonses issued by Mr Corcoris are, in the relevant respects, an abuse of process will also be influenced by what his fair trial will require. This case is therefore analogous with *Tomasevic*.

41. *DPP v TY (No 3)*[15] was a case involving the exercise of the sentencing discretion in criminal law. I there dealt in greater detail with the question of when it can be legitimate to refer to international human rights. This is the answer I there gave:[16]

> When can an international human right stated in an unincorporated *Convention* be taken into account in the exercise of a judicial power or discretion? As a general proposition, I think it can be if the subject matter of the case before the court comes within its scope, which is a test of relevance; if taking the human right into account is not inconsistent with any applicable legislation, the operation of which such a *Convention* obviously does not impair; and if doing so is not inconsistent with the common law (broadly defined), the content of which, equally obviously, such a *Convention* does not alter.[17]

42. Applying that general proposition to the present case, the first consideration is the subject matter of the proceeding. This is a judicial review application in which Mr Ragg submits the magistrate erred in the ruling he made on the objections to the summonses to produce. Mr Ragg has raised issues concerning the duty of the prosecutor to disclose documents to Mr Corcoris and concerning the scope of the principle against using such summonses for the purpose of fishing. Both that duty and that principle are inseparable from the fundamental duty of the court to ensure a fair criminal trial. The human rights specified in arts 14(1) and (3) of the ICCPR, and the principle of equality of arms which has emanated from those rights, are directly relevant to that subject.

43. The second consideration is whether taking the human rights into account would be inconsistent with any legislation. As we saw, the summonses were issued under s43(2) of the *Magistrates' Court Act*, which confers a general entitlement to issue summonses. Neither that provision nor any other of which I am aware is so inconsistent. The same applies, at least generally speaking, to the prosecutor's duty to disclose. This is so quite apart from the fact that prosecutors may be public authorities under s4 of the *Charter* which, I repeat, does not affect these proceedings. There are specific provisions in Schedule 5 of the *Magistrates' Court Act* and in the *Magistrates' Court (Committal) Rules* 1999 governing the disclosure that must be made by prosecutors in hand-up briefs, but these clearly do not cover the field of this subject or operate to cut down a prosecutor's duty of disclosure under the court's own principles.

44. The third consideration is whether taking the human rights into account would be inconsistent with the common law (broadly defined). As in both *Tomasevic* and *DPP v TY (No 3)*, taking them into account in the present case would not be so inconsistent. Rather, it would reinforce the proper application of the common law principles and thereby strengthen the exercise by the court of its powers in this regard. Those principles govern the scope and application of the prosecutor's duty to disclose and court's power to decide whether paragraphs of summonses issued by the defence should be struck out, in circumstances where it is necessary to take into account what is necessary for the fair trial of the accused. The international human rights relevant to that question can be conveniently considered by reference to the equality of arms principle.

Equality of arms

45. The criminal trial is "an accusatory and adversarial process".[18] The person accused is presumed to be innocent and does not have to prove or say anything. The prosecution is the accuser and, from the first to the last, carries the onus of proving each element of the offence according to the criminal standard of beyond reasonable doubt. The rationale is that the general objectives of the criminal justice system – finding the truth and attributing criminal responsibility – are best achieved by a trial conducted before an independent and impartial judge, or judge and jury, in which both sides participate according to their best interests. A number of important rules of law and practice apply to regulate and moderate the adversarial nature of such a trial, but it has the appearance, and often the reality, of a ritual battle. Equality of arms is an international human rights principle

that picks up the language of the battle to explain some aspects of the most important of those rules – the right to a fair trial.

46. This is the equality of arms principle, which applies to both civil and criminal trials,[19] as stated by the European Court of Human Rights in *Foucher v France*:

> The Court reiterates ... that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage *vis-à-vis* his opponent.[20]

47. Here is the more elaborate statement of the principle given by Stefania Negri in the *International Criminal Law Review*, which also emphasises it is one of comprehensive application:

> The right to a fair trial entails protecting the 'equality of arms' principle, an inherent element of the due process of law in both civil and criminal proceedings. Strict compliance with this principle is required at all stages of the proceedings in order to afford both parties (especially the weaker litigant) a reasonable opportunity to present their case under conditions of equality. Indeed, at the core of the concept of 'equality of arms', as elaborated in domestic and international case law, is the idea that both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial. Fundamental procedural safe-guards aimed at securing such equality are guaranteed in most domestic legal orders, enshrined in human rights treaties and other relevant international instruments, and set out in the Statutes and Rules of the major international courts and tribunals.[21]

48. The equality of arms principle – which was probably taken from the civil law tradition[22] – was originally stated by the European Court of Human Rights set up under the *European Convention on Human Rights*. *The European Convention* – to use its abbreviated name – was entered into in 1950 in the aftermath of the Second World War. Articles 6(1) and (3) contain provisions relating to the equal right to a fair trial before an independent and impartial court or tribunal that are of fundamental importance. The provisions come from the common law and civil legal traditions of those civilised countries that respected and followed the principle of a fair trial and the rules necessary to produce one.

49. Articles 6(1), (2) and (3) of the *European Convention* are analogous to arts 14(1), (2) and (3) of the ICCPR, which came into force in 1976. It will be more relevant for us if I refer to the provisions of the latter. These, then, are the material parts of arts 14(1), (2) and (3) of the ICCPR:

> Article 14
> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> ...
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ...
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...

50. The application of the equality of arms principle in the criminal law context takes account of the prosecutorial setting. Usually, the prosecution enters the trial with two advantages: having superior resources and having conducted the investigation that led to the charges being brought. That gives rise to the issue of disclosure – voluntary or enforced – of material by the prosecution to the defence. That issue lies at the heart of the controversy in the present case. I would adopt these introductory comments on that subject of Martin Hinton in an article in the *Criminal Law Journal*:

> The resources that are mobilised by the state for the purpose of gathering evidence to prove beyond reasonable doubt that an accused has committed a particular offence are immense by comparison to those generally available to the accused. Listening devices, telephone intercepts, forensic scientists,

> surveillance, power to search and seize, powers to compel answers to questions, informants and the sheer number of people devoted to the detection of crime, result inevitably in the creation of a significant repository of information related to the offence under investigation. From this repository of information the prosecution selects what it requires to prove the case against the accused. Invariably, the accused is made aware of what is to be actually used against him or her. The accused does not, however, have access to the information that the prosecution does not intend to use, and is therefore unable to determine whether it contains any material that may assist him or her in the presentation of a defence. Access to that unused material... may be crucial to the accused's defence.[23]

51. In 2007, the Human Rights Committee of the United Nations issued General Comment No. 32 on the right of equality before courts and tribunals specified in art 14 of the ICCPR.[24] The Committee made reference to equality of arms in the context of explaining the operation of this right:

> The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[25]

52. The Committee went on to indicate what was required to ensure an accused had adequate facilities for the preparation of a defence, as required by art 14(3)(b) of the ICCPR:

> 'Adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary).[26]

53. The equality of arms principle has been often applied by the European Court of Human Rights in criminal cases. It has been held that the principle arises under arts 6(1) and (3) of the European *Convention* which correspond to arts 14(1) and (3) of the ICCPR. But it is important to note that the "principle of equality of arms does not exhaust the contents of [art 6(1)]; it is only one feature of the wider concept of fair trial by an independent and impartial tribunal."[27] Moreover, the relationship between pars (1) and (3) of art 6 of the European *Convention*, and thus between pars (1) and (3) of art 14 of the ICCPR, is that of "the general to the particular."[28] Article 6(1) does not define the notion of a fair trial in criminal cases, and the rights specified in art 6(3) are the minimum, not the total, of what is required.[29]

54. The decisions of the European Court of Human Rights are of particular interest in the present case because many of them deal with the obligation of the prosecutor to disclose material to the defence. Indeed, the leading case on equality of arms is a prosecution disclosure case, *Jespers v Belgium*,[30] an early decision of the European Commission of Human Rights.

55. Mr Jespers was a Belgium judge who was convicted of attempting to murder his wife and other serious offences. Several police reports had not been shown to the defence, or shown only late in the trial. The prosecution also had a special folder that contained various documents and items of information not shown to the defence. The Commission rejected Mr Jesper's complaints that the trial was unfair because, as regards some of the documents, they were not necessary for his defence and, as regards the others, he had failed to raise the matter with the trial judge despite having ample opportunity to do so.

56. The Commission noted the advantages possessed by the prosecution and explained how these gave rise to the equality of arms principle:

> As regards the interpretation of the term 'facilities', the Commission notes firstly that in any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is, in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish that same equality that the 'rights of the defence', of which Art 6(3) of the *Convention* given a non-exhaustive list, have been instituted. The Commission had already had occasion to point out that the so-called 'equality of arms' principle could be based not only on Art 6(1) but also on Art 6(3), especially sub-para (b). ...[31]

57. The Commission then interpreted art 6(3)(b) as creating a defence right of access to relevant prosecution documents:

> In particular, the Commission takes the view that 'facilities' which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. Furthermore, the Commission has already recognised that although a right of access to the prosecution file is not expressly guaranteed by the *Convention*, such a right can be inferred from Art 6(3)(b) (...by implication...) It matters little, moreover, by whom and when the investigations are ordered or under whose authority they are carried out. In view of the diversity of legal systems existing in the State Parties to the *Convention* the Commission cannot restrict the scope of the term 'facilities' to acts carried out during certain specific phases of the proceedings, eg, the preliminary investigation. Close scrutiny of the position of the Public Prosecutor's Department and of any obligations of impartiality imposed on it by national law would therefore be superfluous in the instant case. Any investigations it causes to be carried out in connection with criminal proceedings and the findings thereof consequently form part of the 'facilities' within the meaning of Art 6(3)(b) of the *Convention*.[32]

58. The Commission explained the scope of that right in these terms:

> In short, Art 6(3)(b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary 'facility' (*'facilité nécessaire')* if, as in the present case, it concerns acts of which the defendant is accused, the credibility of testimony, etc.[33]

59. Since *Jespers v Belgium* the European Court of Human Rights has frequently applied the equality of arms principle in cases concerning the disclosure to the defence of material held by the prosecution.[34] I can illustrate the operation of the principle in that context by reference to just two.

60. In *Edwards v United Kingdom*,[35] the accused was convicted of robbery. The prosecution had failed to disclose two items of evidence relevant to the defence: that a fingerprint not of the accused had been found at the crime scene; and that the complainant told police she would recognise her assailant yet failed to pick Mr Edwards out in a photograph book. The conviction was referred to the Court of Appeal, who fully examined this material and held the conviction was not unsafe.

61. The European Court of Human Rights held it was a requirement of fairness under art 6(1) of the European *Convention* that "the prosecution authorities disclose to the defence all material evidence for or against the accused..."[36] That requirement was breached in the case of Mr Edwards. However, the Court held the breach was remedied by the procedures in the Court of Appeal. Complaints about non-compliance with the requirements of fairness specified in art 6(1) had to be judged against the proceedings as a whole, including decisions of appellate courts. The proceedings concerning the criminal charges brought against Mr Edwards, judged in their entirety, were fair, because the possible effect of the non-disclosed material was subjected to full adversarial argument on appeal.[37]

62. In *Fitt v United Kingdom*,[38] the applicant complained his convictions for robbery, possession of a firearm and possession of a prohibited weapon were vitiated by the non-disclosure by the prosecution of certain evidence on grounds of public interest immunity. The Court (by a majority of nine to eight) rejected the complaint. Despite the closeness of the result, there was no doubt about the applicable principle, which the majority stated in these unequivocal terms:

> It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings that relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition, Article 6(1) requires, as does indeed English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.[39]

63. The Court rejected Mr Fitt's complaint because the public interest immunity decision did not violate the equality of arms principle, which was not absolute:

> [T]he entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk

> of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused.[40]

That point is of particular significance in cases, not like the present, where the applicable national procedures cut down the accused's right to access material relevant to the defence, or even to see some categories of evidence.[41]

64. In *Mallard v R*[42] Kirby J reviewed a number of leading authorities in the main national and international courts on the duty of the prosecutor to disclose. He found a strong and consistent trend:

> The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.[43]

65. A fair hearing is a concept of universal application; while its precise content may vary, that kind of hearing is as much due, for example, to the landlord and the tenant in a civil eviction proceeding in an administrative tribunal as it is to the prosecution and the defence in a trial of criminal charges in a court. The application of the equality of arms principle to civil cases in courts and tribunals was identified in the leading case in the European Court of Human Rights, *Dombo Beheer BV v The Netherlands*,[44] as involving the concept of a "fair hearing" and a "fair balance" between the parties.[45] As would be expected having regard to the different nature of the issues involved, the principle applies with "greater latitude" in a civil case when compared with a criminal case.[46] Its application to an administrative tribunal would also take account of that context. The Court held:

> [A]s regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.[47]

66. Returning to the present case, the material sought by Mr Corcoris in the summonses was virtually all created during the police investigation. Because Mr Ragg conducted that investigation, he knows what the material is. Mr Corcoris does not, but he contends it will help him in the preparation of his defence. That is precisely the situation at which the equality of arms principle is aimed. Only if the documents sought are material to Mr Corcoris's defence will the principle be invoked. But if they are material – in the necessary non-restrictive sense – the equality of arms principle will then be of relevance, as identified below, in determining whether the summonses, in the respects challenged by Mr Ragg, are an abuse of process.

Prosecutor's duty of fairness

67. Mr Ragg contends the magistrate committed an error of law by not taking the prosecutor's duty to disclose documents to the defence into account. It is therefore important to identify both the scope of the duty and its relevance to striking out a summons to produce in a criminal case on the ground of abuse of process.

68. It was Lord Devlin in *Connelly v DPP* who said "that nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused."[48] His Lordship made that remark in the context of a discussion that included the role of the prosecutor in a criminal trial. In our Court of Appeal, Winneke P, Charles and Chernov JJA took up that subject in *Cannon v Tahche*.[49] According to their Honours, judges, as part of their duty to exercise their common law powers to ensure the fair trial of an accused, have established rules of practice for the proper discharge of the prosecutorial function. Those rules encompass "[w]hat is sometimes called the 'prosecutor's obligation to act fairly', one aspect of which is the prosecutor's 'duty of disclosure'".[50]

69. The principles of the courts establish that the general duty of a prosecutor is to prosecute and not to defend, but the prosecution "must be conducted with fairness towards the accused... and with a single view to determining and establishing the truth".[51] Therefore prosecutors should see themselves as "ministers of justice".[52] Their duty is "to assist the court in the attainment of the purpose of criminal prosecutions, namely, to make certain that justice is done as between the

subject and the State."[53] In performing that function, the prosecutor must act with the objective "of establishing the whole truth in accordance with procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."[54] As was said in *Cannon v Tahche*[55] –

> the 'duty' is owed to the court and not to the public at large or the accused. It is a significant aspect of the administration of criminal justice and the court's capacity to ensure the accused's right to a fair trial.

70. One specific manifestation of the prosecutor's duty to act fairly towards the accused is the duty to call all material witnesses, whether their evidence will be in favour of the prosecution or the defence, unless there is good reason not to.[56] That duty must be exercised with fairness to the accused.[57] It is has been described as a "lonely" and "heavy" responsibility that cannot be shared with the trial judge without jeopardizing their judicial independence in the adversary system. [58] The exercise of this duty is seen to fall within the prosecutor's discretion.[59] It cannot be judicially reviewed, but may be a ground for setting aside a conviction on appeal if, when viewed against the conduct of the trial as a whole, it gave rise to a miscarriage of justice.[60]

71. Another specific manifestation of the prosecutor's duty to act fairly towards the accused[61] is the duty to disclose material documents to the defence.[62] The duty is an incident of the accused's right to a fair trial.[63] It is a continuous duty in the sense that it applies not only in the pre-trial period but also during the course of the trial itself.[64]

72. The scope of this prosecutor's duty to disclose is broad but has limits.

73. As to the scope of the duty, it clearly extends to material on which the prosecution intends to rely for its own case,[65] including the substance of all statements of a prosecution witness or the statements themselves.[66] The duty also extends to material in the possession of the prosecution that may undermine the prosecution case[67] or which tends to assist the defence case,[68] to material which tends to show the accused is innocent,[69] which is inconsistent with the guilt of the accused or which, if not inconsistent, is helpful to the accused,[70] to material going to "exculpate"[71] the accused, to the criminal history or other material affecting the credit of prosecution witnesses,[72] to statements of material witnesses who the prosecution does not intend to call,[73] and to documents, photographs and other real evidence, including scientific analysis.[74] The duty does not require the disclosure of material that might undermine the defence case, such as matters affecting the credibility of defence witnesses; the defence is responsible for making its own inquiries in this regard.[75] According to Brooking, Byrne and Eames JJ in *R v Higgins*: "The application of this duty of disclosure to a given case will depend upon the facts of that case and the significance of the material in question in the light of the issues in that particular case".[76] The test is essentially one of possible relevance,[77] but in this regard the prosecutor must give the issues raised in the criminal trial a broad[78] and not a restrictive[79] interpretation. The duty applies by operation of law and therefore arises whether or not the defence requests disclosure of particular material.[80]

74. It is perhaps worth emphasising that the prosecutor's duty of disclosure extends to "unused material",[81] that is, material that tends to weaken the prosecution case or strengthen the defence case but which the prosecutor does not intend to use against the accused. That, generally speaking, is the category of material sought by Mr Corcoris in the present case. The issue was recently considered by the House of Lords in *R v H*.[82] Here is the golden rule stated by Lord Bingham on behalf of the Judicial Committee on the extent of the duty in such circumstances which, with respect, I endorse:

> Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.[83]

75. The prosecutor's duty to disclose has also been much considered in cases in the Supreme Court of Canada, taking into account both the common law of that country and the human rights specified in the Canadian *Charter of Rights and Freedoms*,[84] which broadly correspond with those specified in art 14 of the ICCPR. *R v Stinchcombe*[85] was the foundation authority. The law was recently restated in *R v Taillefer*, in terms very much consistent with what I think the law is here:

> After a period during which the rules governing the Crown's duty to disclose evidence were gradually

> developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*.[86] The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence... Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses... This Court has also defined the concept of 'relevance' broadly...[87]

As we will see, this "reasonably possible" test will become relevant to the present case.

76. As is the function of deciding what witnesses to call, the function of deciding what material to disclose to the defence rests with the prosecution.[88] While the exercise of the duty is not subject to judicial review, the improper discharge of the duty, if it produced a miscarriage of justice, may give rise to an appealable error.[89] Moreover, the court itself has a fundamental duty to ensure a fair trial.[90] To carry out that duty, the court may exercise both persuasive and compulsive authority. As to the first, the court may use its persuasive authority over the prosecution to bring about the voluntary disclosure of the material to the defence.[91] As to the second, the court may use its compulsive authority "to order the production to the defence of material in the prosecution's possession or power if the interests of justice so require".[92]

77. The limits on the scope of the duty may be drawn out of the same well of fairness from which the duty itself comes. One eminent English judge, writing at different stages of his judicial career, has identified the two considerations that have to be balanced. On the one hand, "in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial." Those words were spoken by Steyn LJ in the Court of Appeal in *R v Brown*.[93] As we have seen, that fundamental principle is the basis of the duty to disclose. On the other hand, the right to a fair trial is one aspect of the administration of criminal justice, whose principal objective is the protection of society. As was said by Lord Steyn in the House of Lords in *Attorney General's Reference (No 3 of 1999)*:

> The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serous crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.[94]

Just as fairness is a two-way street in the context of the exercise of the judicial discretion to exclude evidence on grounds of unfairness,[95] so too these countervailing considerations operate to influence the extent of the prosecutor's duty to disclose in individual cases.[96]

78. Consequently, the duty of the prosecutor to disclose does not permit the defence "to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good."[97] Similarly, it has been held that "there is no rule which enables the accused to seek at the outset indiscriminately to see the relevant papers within the possession or control or power of the prosecution."[98] Our former Chief Justice Phillips, writing when he was the Director of Public Prosecutions, put the matter more bluntly: "[The duty] does not mean the handing of the contents of the prosecution file to the accused's advisers *in toto*. Nor does it mean that details of every interesting irrelevancy should go to the defence."[99]

79. That is the scope of the prosecutor's duty to disclose at common law. I see no dissonance between the duty, as I have described it, and the equality of arms principle recognised in the international human rights jurisprudence, as I earlier explained it. With respect, like Kirby J in *Mallard v R*,[100] I see "a high measure of consistency" between the international law principles and the principles of the common law, to the extent that, with respect to the former, "Australian law gives effect to them."[101] This reinforces the fundamental importance of the duty, because its proper performance is a necessary part of ensuring both that the trial of the accused is fair and that effect is given to that principle and those rights.

80. It remains to consider whether the magistrate erred in law by failing to take the duty into account in refusing Mr Ragg's strike out application.

81. It could only be an error to law if it was a consideration which the magistrate was bound to take into account and he failed to do so.[102] Although the matter is not mentioned in his Honour's reasons for decision, I would be surprised if he failed to consider it. Whether or not the prosecutor had possession of the material, I am sure he could easily have obtained it if required. But this was plainly not a case where the issue could be resolved by leaving the matter to the prosecutor. The likelihood is that the magistrate saw the parties to be in complete opposition on the question of what documents should be produced to Mr Corcoris and that the matter required his formal determination.

82. Mr Corcoris had issued summonses to produce to Mr Ragg and it was Mr Ragg who made the application for them to be struck out in the material respects. Having regard to the scope and extent of the summonses, if it was forensically legitimate for Mr Corcoris to obtain access to the documents at all, it was so legitimate for him to seek that access by issuing the summonses. That having happened, and taking Mr Ragg's submissions in the proceeding into account, the matter could only be properly resolved by a formal determination of the issues by the magistrate, which is what his Honour gave.

83. Therefore I can see no error of law on the face of the record in the magistrate's approach in this regard.

Striking out summons to produce issued by the defence in criminal cases

84. For better or for worse, there is no process of discovery in a criminal trial.[103] If documents wanted by the defence are not voluntarily provided by the prosecution, the accused is entitled to exercise the right usually conferred by statute or rules of court to issue a summons for their production. Such a summons can be issued to a police informant, as was done in the present case.

85. The procedures governing compliance with such a summons – production of the documents, ruling on objections, allowing inspection of the documents, the order in which things should be done – were described by Gillard J in *R v Mokbel (Ruling No 1)*.[104] I need not go into those here. In the present case, as was appropriate, the magistrate ruled on Mr Ragg's objections to compliance with the summonses before production of the relevant documents to the court. As I have said, certain public interest immunity objections are yet to be determined.

86. A summons in a criminal proceeding cannot be used by the defence to go on a fishing expedition. A party to whom such a summons is issued may object to its validity on the ground that it "is oppressive... or that there is no legitimate forensic purpose revealed" by its terms.[105] The defence must have a proper basis for seeking production of documents, and cannot issue a summons for the abstract purpose of seeing whether or not they exist or may be useful.[106] That, submits Mr Ragg, is what Mr Corcoris has done in the present case.

87. It is necessary to identify the test to be applied for determining whether the summons has been issued for a legitimate forensic purpose on the one hand, or to engage in an illegitimate fishing expedition on the other. In determining that question, I would start from the point set by Gillard J in *R v Mokbel (Ruling No 1)*: "This is a criminal proceeding, and it is necessary that the accused person has every opportunity... to examine and test the Crown case."[107] That starting point is the one most consistent with the obligation of the court to ensure the fair trial of the accused, by which the court gives effect to the principle of international human rights that there should be equality of arms between the prosecution and the defence.

88. It is clear that the accused does not have to establish that the defence would actually be assisted by production of the documents. A test of that kind would have the capacity to produce monstrous unfairness, is not supported by authority and was not put forward by Mr Ragg.

89. The defence has to establish only that "it appears to be 'on the cards' that the documents will materially assist the defence." That influential expression came from the pen of Gibbs CJ in *Alister v R*[108]. That his Honour had in mind the non-restrictive application of that test can be confidently inferred from the example he immediately gave of its application:

> 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 could 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.[109]

90. In many subsequent cases, the courts have had to grapple with the problems created when the defence has arguably misused the right to issue a summons for production. That such misuse can impose intolerable and unacceptable burdens on prosecutorial agencies cannot be doubted. That the practice can undermine important principles, such as the rule against discovery in criminal cases, and the rule that it is for the prosecution, and not the defence or the court, to determine what documents should be provided to the defence,[110] also cannot be doubted.

91. One very important response of the courts has been to require the defence to justify, in specific terms, the purposes for which the documents are sought. This is the leading statement of that principle by Hunt J in *R v Saleam*:[111]

> In my view, when a trial judge is faced with a subpoena of this kind, he should require counsel for the accused to identify expressly and with precision the legitimate forensic purpose for which he seeks access to the documents, and the judge should refuse access to the documents until such an identification has been made.

92. The expression "on the cards" was used by Gibbs CJ in *Alister v R*[112] as a metaphor to explain the applicable test. With respect, as a way of explaining that test, perhaps it has outlived its usefulness.[113] As Cummins J showed convincingly in *DPP v Selway*,[114] it can certainly mean different things in different contexts. But there is no doubt in my mind that Gibbs CJ did not use the metaphor to explain that the test was one of probability – that the accused had to show it was probable the documents would be useful to the defence. His Honour was contemplating something less, as the example he immediately gave (see above) would indicate. How should the courts state with greater certainty the test given to us by Gibbs CJ?

93. To answer that question, I think it is necessary to balance two competing considerations: first, ensuring the fair trial of the accused by giving the defence access to material documents; and second, protecting the prosecution, and prosecutorial agencies, from unjustified summonses to produce. We have already seen a similar balance is struck in defining the scope of the prosecutor's duty to disclose. That duty extends, for example, to material which tends to assist the defence case, but not to all material held by the prosecution. We have also seen the same balance is struck in the human rights context. Articles 14(1) and (3)(b) of the ICCPR have been held to require the accused to have access to exculpatory material, which includes evidence that could assist the defence but, again, not everything held by the prosecution. In determining an objection to a summons to produce in the criminal law context, the court is really determining, after balancing those competing considerations, what a fair trial between the prosecution and the accused requires the defence to be given.

94. The issue of a more certain test has been considered in three recent cases from which a positive trend emerges that, by this judgment, I would continue. In none of them are the facts material, so I can go straight to the statements of principle, between which I see no significant difference. The first was *Roads and Traffic Authority of New South Wales v Conolly*.[115] Adams J said this:

> However, the obligation on the party calling on a subpoena to produce is 'to identify expressly and precisely the legitimate forensic purpose for which access to documents is sought.'[116] Where that is done, I do not think that it is necessary that the party needs to demonstrate more than that there is a reasonable chance that the documents in question will serve the purpose so specified.[117]

The second is *Felice v County Court of Victoria and Anor*.[118] Osborn J put the test this way:

> It is sufficient in a criminal proceeding if the material before the court gives rise to a possibility which is not merely hypothetical, but sufficiently reasonable having regard to the circumstances as a whole, to justify production of documents because it is 'on the cards' they will materially assist the defence.[119]

The third is *DPP v Selway*,[120] where Cummins J said most emphatically of all:

> On the basis of the above authorities, I consider the true test is whether there is a reasonable possibility that the sought-for information would materially assist the defence. Probability is too high a standard. Mere possibility is too law. The adverb 'reasonably' gives proper scope to the judge to determine the issue responsibly and objectively. Such a standard also is consonant with the principles of open justice.[121]

95. I would adopt this approach, not only because it is not clearly wrong,[122] but because I think it is correct. More specifically, a "reasonably possibility" test expresses in more certain language what

Gibbs CJ probably had in mind when he used the "on the cards" metaphor in *Alister v R*,[123] gives proper effect to the underlying fundamental duty of the court to ensure a fair trial and is consistent with international human rights and principles that Australia recognises. With respect, I would not follow the judgment of Balmford J in *Fitzgerald v Magistrates' Court*[124] that "on the cards" means "within the range of probability"[125] because it is clearly incorrect.

96. In summary, an accused person is entitled to seek production of such documents as are necessary for the conduct of a fair trial between the prosecution and the defence of the criminal charges that have been brought. When objection is taken, the accused must identify expressly and with precision the forensic purpose for which access to the documents is sought. A legitimate purpose is demonstrated where the court considers, having regard to its fundamental duty to ensure a fair trial, that there is a reasonable possibility the documents will materially assist the defence. That is a low threshold, but it is a threshold.

97. The "reasonably possibility" test does not apply in all cases in a fixed manner as if the relevant considerations always have the same value. It is necessary to consider "the importance of the issue to which it is said the subpoena relates and the importance of the document in question in the determination of that issue"[126] and, more generally, "the circumstances as a whole".[127] In doing so, it is necessary to give a "broad interpretation" to the issues in the case[128] or, to put it another way, the "parties' respective cases should not be restrictively analysed."[129] It is also important to pay due regard to the fact that "[d]efence lawyers are in a better position than a judge to make an appraisal of the value of information contained."[130] Lastly, as Pincus JA said in *R v Spizzirri*: "courts should be careful not to deprive the defence of documents which could be of assistance to the accused."[131]

98. Turning now to the present case, it presents as a classic example of one in which the prosecution side possesses a significantly superior knowledge of the documents revealed by the extensive police investigation, which was carried out with modern search and surveillance techniques, much of it covertly. Despite the material provided in the hand-up brief, which was extensive, a substantial volume of material still has not been provided, on the judgment of the police. I think it is necessary in the interests of a fair trial for the defence to have access to the material sought, even if it is unused material from the point of view of the prosecution. It is reasonably possible that the material may be of positive use to the defence in various ways. Without that access, it can hardly be said that there is equality of arms between the prosecution and the defence.

99. The documents specified in the summonses are extensive and invite critical attention. But this is a major prosecution and the magistrate gave the documents that attention. The documents are described under categories that seem to have an intelligent and meaningful connection to the issues of possible significance in the prosecution. The two summonses are the only ones that have so far been issued in the case. I infer that the defence, by the summonses, is attempting to obtain, at the same time and prior to the commencement of the committal, all the additional documents that may reasonably be needed, which is a process that should be encouraged.

100. My earlier account of the reasons for decision of the magistrate showed that he identified the relevant principles by reference to the leading authorities. I can discern no error in his Honour's approach in this regard.

101. The magistrate then analysed the categories of documents sought in the summonses one by one. You have seen his Honour's reasons for decision.

102. The question before me in this judicial review application is whether the magistrate committed an error of law, revealed on the face of those reasons, read fairly, as a whole and in context, in the way he ruled on Mr Ragg's objections. I can discern no such error. I think his Honour correctly asked himself, in respect of each category that he examined, whether the accused had a legitimate forensic purpose for seeking the documents.

103. A critical consideration in the present case is that the prosecution case against Mr Corcoris will be based on a reconstruction of his businesses, which the prosecution intends to prove through the evidence of expert forensic accountants. I think the defence is entitled to test the evidence that will be given by those experts by examining the selections that have been made by them from the entirety of the material collected during the police investigation. This consideration applies to a significant proportion of the material obtained in the investigation, some by physical searches, come by various kinds of covert surveillance activity and the rest by various other means. You have seen

that the material was obtained not just from Mr Corcoris's businesses but also from third parties, so he cannot be expected to know what the entirety of that material was. Out of the material that was seized or obtained, some was selected for use in the prosecution and some was rejected. As was held by the Court of Appeal in *R v Ward*[132] (a prosecution disclosure case), the defence should have access to "all relevant evidence of help to the accused",[133] and that expression–

> is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.[134]

104. Senior counsel for Mr Ragg made substantial and forceful submissions, which I have already summarised, attacking the legal basis of the magistrate's ruling. In the light of those submissions, senior counsel for Mr Corcoris was driven to accept responsibility for justifying the legal basis of the ruling, which he did, especially in the highly persuasive submissions made in the afternoon of the hearing before me. I generally accept those submissions.

105. Senior counsel for Mr Ragg complained that those submissions included matters not put to the magistrate. I have read and compared the transcript of the argument before the magistrate and before me. Some new matters were put, on both sides, but mainly on behalf of Mr Corcoris. But I think what senior counsel for Mr Corcoris did was to better explain the potential relevance of the documents to the defence, which only makes me more confident in my view that the magistrate's decision did not involve an error of law. I think Mr Corcoris is entitled to justify the magistrate's decision on different or developed particulars of potential relevance, if any are available. On discretionary grounds alone I would not grant judicial review of a ruling on relevance that appeared to be correct, either on the particulars given or on additional ones put forward on review. Further, it is neither necessary nor appropriate for me to require Mr Corcoris to redraw the summonses, because I think the magistrate correctly decided the legal issues concerning their validity in their current form.

106. Having made those general remarks, let me turn to the specific categories of documents, beginning with the first summons.

107. As to paragraph 1, the magistrate was surely correct to say these commonly form the basis of significant cross-examination in a criminal proceeding. He did not say "in relation to the issues in the proceeding", but that was necessarily implicit. In a case such as this, the defence are entitled, subject to lawful objection, to production of the notes (broadly defined) of the principal investigator. That is because his credit as a witness will almost certainly be in issue, and because the validity of the reconstruction on which the prosecution case depends, for which he was responsible, will definitely be in issue. Mr Ragg concedes the defence should have the material in this category going to financial matters, which probably accounts for a lot of the documents concerned. But the very nature of the case is such that the defence is legitimately interested in the totality of Mr Ragg's notes. How otherwise can the reconstruction – built by the investigation generally – be properly understood by the defence on equal terms with Mr Ragg and the police forensic accountants?

108. As to paragraph 2, it is reasonable to assume there may be such reports. An AFP internal report on the investigation into Mr Corcoris's businesses might, reasonably possibly, be useful to the defence, both in the cross-examination of Mr Ragg and the police forensic accountants and in exploring proper lines of defence.

109. As to paragraph 5, these could be relevant on a number of bases. It is reasonable to think the photographs will show what and how documents were seized from Mr Corcoris's and other businesses, the state of the record-keeping at his and those businesses and the state of the documents on being seized compared with their state on return, all of which could be used in cross-examination, as the magistrate said.

110. As to paragraphs 6 and 7, Mr Corcoris has placed in issue the legality of the police investigation in so far as it relied on warrants obtained on behalf of Mr Ragg. The warrants supporting the evidence that the prosecution actually intends to lead have been given to Mr Corcoris. But, in view of the likely connection between all of the warrants apparently obtained in the one investigation, I think his forensic interests legitimately extend wider than that. The defence can legitimately ask to be placed on an equal footing with the prosecution in this regard.

111. As to paragraphs 8 and 9, the reasons for decision of the magistrate clearly reveal he had

a detailed knowledge of the issues to which these documents might be relevant. Even without the benefit of those reasons, I would reject Mr Ragg's submissions in this regard. As I have said, the prosecution is based on a reconstruction of Mr Corcoris's businesses, one that has been made possible – if at all – by the material that was obtained by the police from those and other businesses. To prepare for and conduct his defence, Mr Corcoris is entitled to know, subject to lawful objection, what that material was. Most of the documents in this category are probably financial in nature, which Mr Ragg rightly conceded could be properly sought by Mr Corcoris.

112. There is a drafting problem in paragraph 10, for it seeks "details" of copies made of the specified things rather than the copies themselves. I think it can only be read fairly to both sides as requesting documents, if any, containing those details, not the copies of the things themselves, on which basis it is a legitimate request. If Mr Corcoris is actually seeking the copies specified, that too might be legitimate, subject to considerations of oppression and lawful objection, but he would have to do that in a separate summons.

113. As to paragraph 13, examination of these logs will assist the defence to see what selections were made by the prosecution. That, I have said, is a legitimate forensic exercise. The logs will also enable the defence to see whether there is exculpatory material in the logged conversations, which is reasonably possible enough to be the subject of legitimate defence inquiry. As the magistrate said in his reasons, the defence is best placed to make the necessary judgments in this regard. The defence must be given access to the material on equal terms to the prosecution before those judgments can be made.

114. The documents in paragraphs 14 and 15 go to the legality of various steps taken in the investigative process, as the magistrate correctly decided.

115. As to the documents specified in the schedule to the second summons, these come within the same category as paragraph 13 of the first.

116. For these reasons, I am of the view that the magistrate did not make an error of law on the face of the record in the ruling he gave on the objections raised by Mr Ragg to compliance with the relevant paragraphs of the two summonses.

CONCLUSION

117. Jarrod Ragg brought a judicial review application against the refusal of a magistrate to strike out most of the paragraphs of two summonses issued by Nicholas Corcoris. Mr Ragg, an officer of the Australian Federal Police, has laid criminal tax evasion charges against Mr Corcoris, a property developer. The magistrate will shortly hear the committal relating to those charges. The summonses were issued to obtain documents of assistance to the defence in those proceedings.

118. The main ground relied on by Mr Ragg was that the magistrate erred in law on the face of the record (his reasons for decision) in refusing to strike out the challenged paragraphs of the summonses. He contended that, in those paragraphs, Mr Corcoris was seeking documents that were irrelevant to his defence, which was an abuse of process.

119. In my view, the governing principle is that an accused person is entitled to seek production of such documents as are necessary for the conduct of a fair trial between the prosecution and the defence of the criminal charges that have been brought. When objection is taken, the accused must identify expressly and with precision the forensic purpose for which access to the documents is sought. A legitimate purpose is demonstrated where the court considers, having regard to its fundamental duty to ensure a fair trial, that there is a reasonable possibility the documents will materially assist the defence. That is a low threshold, but it is a threshold.

120. I put the principle that way because I think it expresses in more certain language what Gibbs CJ probably had in mind when he used the "on the cards" metaphor in *Alister v R*,[135] because it gives proper effect to the underlying fundamental duty of the court to ensure a fair trial and because it is consistent with the human rights of an accused person to equality before the law and a fair hearing specified in art 14 of the *International Covenant on Civil and Political Rights*, as well as the equality of arms principle that has been stated in the international jurisprudence by reference to those rights.

121. In my view, Mr Corcoris has identified expressly and with precision the legitimate forensic purposes for which he seeks production of the documents. For the specific reasons I give in this

judgment, it is reasonably possible that the documents described in the disputed paragraphs might assist the defence. That is so even though the documents are unused material from the prosecution's point of view.

122. An important part of my reasoning is that the prosecution case against Mr Corcoris is based on a reconstruction of his businesses, which the prosecution intend to prove through the evidence of expert forensic accountants. The basis of their evidence will be material obtained in the police investigation, some by physical searches, some by various kinds of covert surveillance activity and the rest by various other means. The material was obtained not just from Mr Corcoris's businesses but also from third parties, so he cannot be expected to know what the entirety of that material was. Out of the material that was seized or obtained, some was selected for use in the prosecution and the rest was rejected and returned. I think the defence is entitled to test the evidence that will be given by those experts by examining the selections that have been made by them from the entirety of the material collected. To use the language of human rights, only then will there be equality of arms between the prosecution and the defence.

123. The record shows that the magistrate applied the correct governing principle and made no error of law in the rulings that he made. The application for judicial review will therefore be dismissed.

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[1] Section 10 of the *Administrative Law Act* 1978.
[2] [1983] HCA 45; (1983) 154 CLR 404.
[3] [2005] VSC 410.
[4] [2007] VSC 244.
[5] [2003] NSWSC 327; (2003) 57 NSWLR 310.
[6] See [1983] HCA 45; (1983) 154 CLR 404, 414.
[7] A crime report is a report about a crime going from one part of the AFP to another.
[8] Paragraphs 3 and 4 were not in issue and paragraph 5 was dealt with in later submissions.
[9] Paragraphs 11 and 12 were not in issue.
[10] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[11] [2007] VSC 337.
[12] Ibid [72] (footnotes omitted).
[13] Ibid [73] (footnotes omitted).
[14] Ibid [74].
[15] [2007] VSC 489; (2007) 18 VR 241. The decision is subject to appeal, on the sentence I imposed but not on the correctness of the principles I applied, which I here discuss.
[16] Ibid [49].
[17] See *Tomasevic v Travaglini* [2007] VSC 337, [73]-[74]; (2007) 17 VR 100 and *In re TLB* [2007] VSC 439, [16]-[20].
[18] *TKWJ v R* [2002] HCA 46; (2002) 212 CLR 124, 158; (2002) 193 ALR 7; (2002) 76 ALJR 1579; (2002) 133 A Crim R 574; (2002) 23 Leg Rep C8; *RPS v R* [2000] HCA 3; (2000) 199 CLR 620, 630; (2000) 168 ALR 729; (2000) 113 A Crim R 341; (2000) 74 ALJR 449; (2000) 21 Leg Rep C1.
[19] See generally Lord Lester QC and David Pannick QC (eds), *Human Rights Law and Practice* (2nd ed, 2004) 224-226.
[20] [1997] ECHR 13; (1998) 25 EHRR 234, [34] (footnotes omitted).
[21] Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 *International Criminal Law Review* 513 (footnotes omitted).
[22] Joseph Jacob, *Civil Justice in the Age of Human Rights* (2007) 106.
[23] Martin Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25 *Criminal Law Journal* 121.
[24] Human Rights Committee of the United Nations, General Comment No 32, 21 August 2007, Geneva.
[25] Ibid [13].
[26] Ibid [33] (footnotes omitted).
[27] *Delcourt v Belgium* [1970] ECHR 1; (1979-1980) 1 EHRR 355, [28]; *Foucher v France* [1997] ECHR 13; (1998) 25 EHRR 234, [34].
[28] *Jespers v Belgium* (1983) 5 EHRR CD305, [54].
[29] Ibid.
[30] (1983) 5 EHRR CD305.
[31] Ibid [55].
[32] Ibid [56].
[33] Ibid [58].
[34] See generally Ben Emerson QC, Professor Andrew Ashworth and Alison Macdonald (eds), *Human Rights and Criminal Justice* (2ed, 2007) 14-114 – 14-124.
[35] [1992] ECHR 77; (1993) 15 EHRR 417.
[36] Ibid [36].
[37] See at [33]-[34]. Applied in *IJL, GMR and AKP v United Kingdom* [2000] ECHR 421; (2001) 33 EHRR 11

and *Dowsett v United Kingdom* [2003] ECHR 314; (2004) 38 EHRR 41, [46], where there was full adversarial argument on appeal, and distinguished in *Rowe and Davis v United Kingdom* [2000] ECHR 91; (2000) 8 BHRC 325; (2000) 30 EHRR 1, [81]-[82], where there was not.

[38] [2000] ECHR 89; (2000) 30 EHRR 480.

[39] Ibid [44] (footnotes omitted).

[40] Ibid [45]. See further *Chahal v United Kingdom* [1996] ECHR 54; (1996) 23 EHRR 413 [131]; (1996) 1 BHRC 405, (restricting access to confidential material not necessarily a breach of human rights). The issue has been much considered in recent decisions in the United Kingdom, where the *Human Rights Act* 1998 (UK) has domesticated the European *Convention* and thus equality of arms: see generally *R v H* [2004] UKHL 3; [2004] 2 AC 134; [2004] 1 All ER 1269; [2004] All ER (D) 71; 16 BHRC 332; [2004] 2 WLR 335; [2004] HRLR 20; [2004] 2 Cr App R 10; *A v Secretary of State for the Home Department* [2004] EWCA Civ 324; [2004] QB 335; [2004] 2 All ER 863; *Secretary of State for the Home Department v MB* [2006] EWCA (Civ) 1140; [2006] All ER (D) 201; *Roberts v Parole Board* [2005] UKHL 45; [2005] 2 AC 738; [2004] EWCA Civ 1031; [2005] QB 410; [2004] 4 All ER 1136; [2005] 2 WLR 54; [2004] All ER (D) 518.

[41] The authorities, including some of those I have dealt with here, were reviewed by Martin CJ in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49, [10]-[57] (Martin CJ, Steytler P and Wheeler JA); (2007) 33 WAR 245; (2007) 208 FLR 403. Special leave to appeal has been granted by the High Court from the decision in that case. See also *Osenkowski v Magistrates Court of South Australia* [2006] SASC 345; (2006) 96 SASR 456, [33]; 204 FLR 419; 168 A Crim R 152.

[42] [2005] HCA 68; (2005) 224 CLR 125.

[43] Ibid 155.

[44] [1993] ECHR 49; (1994) 18 EHRR 213.

[45] Ibid [32]-[33].

[46] Ibid [32].

[47] Ibid [33]. See generally Joseph Jacob, *Civil Justice in the Age of Human Rights* (2007) Chapter 3.

[48] [1964] AC 1254, 1357; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145.

[49] [2002] VSCA 84; (2002) 5 VR 317, 339-340; [2002] Aust Torts Reports 81-669.

[50] Ibid 339.

[51] *R v Lucas* [1973] VicRp 68; [1973] VR 693, 696 per Smith ACJ; *Richardson v R* [1974] HCA 19*;* (1974) 131 CLR 116, 119; 3 ALR 115; (1974) 48 ALJR 181; 18 ALT 275.

[52] *R v Lucas* [1973] VicRp 68; [1973] VR 693, 705 per Newton J and Norris AJ; *King v R* [1986] HCA 59; (1986) 161 CLR 423, 426; 67 ALR 379; 21 A Crim R 436; 60 ALJR 685 per Murphy J approving *R v Bathgate* (1946) 46 SR (NSW) 281, 284-285; 63 WN (NSW) 173.

[53] *R v Lucas* [1973] VicRp 68; [1973] VR 693, 705 per Newton J and Norris AJ.

[54] *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657, 663-664; 49 ALR 448; (1983) 57 ALJR 809; 9 A Crim R 107 per Deane J (emphasis added, as it was when this passage was cited with approval by Gaudron and Hayne JJ in *Dyers v R* [2002] HCA 45; (2002) 210 CLR 285, 293; 192 ALR 181; 76 ALJR 1552).

[55] [2002] VSCA 84; (2002) 5 VR 317, 340; [2002] Aust Torts Reports 81-669.

[56] *Dyers v R* [2002] HCA 45; (2002) 210 CLR 285, 292-293; 192 ALR 181; 76 ALJR 1552; *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657, 674; 49 ALR 448; (1983) 57 ALJR 809; 9 A Crim R 107.

[57] *Richardson v R* [1974] HCA 19; (1974) 131 CLR 116, 119; 3 ALR 115; (1974) 48 ALJR 181; 18 ALT 275.

[58] *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563, 575; 53 ALR 445; (1984) 58 ALJR 371; 15 A Crim R 88 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

[59] *Cannon v Tahche* [2002] VSCA 84; (2002) 5 VR 317, 339-340; [2002] Aust Torts Reports 81-669; *Clarkson v DPP* [1990] VicRp 65; [1990] VR 745, 755.

[60] *Richardson v R* [1974] HCA 19; (1974) 131 CLR 116, 121-122; 3 ALR 115; (1974) 48 ALJR 181; 18 ALT 275*; R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563, 575; 53 ALR 445; (1984) 58 ALJR 371; *Lawless v R* [1979] HCA 49; (1978-1979) 142 CLR 659, 678; 26 ALR 161; 53 ALJR 733.

[61] See *Clarkson v DPP* [1990] VicRp 65; [1990] VR 745, 755; *Cannon v Tahche* [2002] VSCA 84; (2002) 5 VR 317, 338-340; [2002] Aust Torts Reports 81-669; *Carter v Hayes* [1994] SASC 4477; (1994) 61 SASR 451, 456; 72 A Crim R 387.

[62] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 71; *R v TSR* [2002] VSCA 87; (2002) 5 VR 627, 650; (2002) 133 A Crim R 54.

[63] *R v Ward* [1993] 2 All ER 577; [1993] 1 WLR 619, 674; (1992) 96 Cr App R 1; approved *Mallard v R* [2005] HCA 68; (2005) 224 CLR 125, 153 per Kirby J; 222 ALR 236; (2005) 80 ALJR 160; 157 A Crim R 121; *Carter v Hayes* [1994] SASC 4477; (1994) 61 SASR 451, 456; 72 A Crim R 387.

[64] *R v Ward* [1993] 2 All ER 577; [1993] 1 WLR 619, 674; (1992) 96 Cr App R 1; approved *Mallard v R* [2005] HCA 68; (2005) 224 CLR 125, 153 per Kirby J; 222 ALR 236; (2005) 80 ALJR 160; 157 A Crim R 121.

[65] *R v Ward* [1993] 2 All ER 577; [1993] 1 WLR 619, 674; (1992) 96 Cr App R 1; approved *R v Brown* [1997] UKHL 33; [1998] AC 367, 376; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.

[66] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 74.

[67] *R v Brown* [1997] UKHL 33; [1998] AC 367, 377; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.

[68] *Clarkson v DPP* [1990] VicRp 65; [1990] VR 745, 755; *Carter v Hayes* [1994] SASC 4477; (1994) 61 SASR 451, 456; 72 A Crim R 387.

[69] *Dallison v Caffery* [1965] 1 QB 348, 369; [1964] 2 All ER 610; [1964] 3 WLR 385 per Lord Denning MR, approved *R v Brown* [1997] UKHL 33; [1998] AC 367, 375; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.
[70] *Dallison v Caffery* [1965] 1 QB 348, 375-376; [1964] 2 All ER 610; [1964] 3 WLR 385 per Diplock LJ, approved *R v Brown* [1997] UKHL 33; [1998] AC 367, 375.
[71] *Clarkson v DPP* [1990] VicRp 65; [1990] VR 745, 759.
[72] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 73; *R v Garofalo* [1998] VSCA 145; [1999] 2 VR 625, 634-635.
[73] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132; *Dallison v Caffery* [1965] 1 QB 348, 375-376; [1964] 2 All ER 610; [1964] 3 WLR 385, approved *R v Brown* [1997] UKHL 33; [1998] AC 367, 375; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.
[74] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132; 75; *R v Ward* [1993] 1 WLR 619, 674, approved *R v Brown* [1997] UKHL 33; [1998] AC 367, 376; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.
[75] *R v Brown* [1997] UKHL 33; [1998] AC 367, 379-380; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.
[76] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 71; *R v TSR* [2002] VSCA 87; (2002) 5 VR 627, 650; (2002) 133 A Crim R 54.
[77] *R v Keane* [1994] 2 All ER 478; [1994] 1 WLR 746; [1995] Crim LR 225; (1994) 99 Cr App R 1, 6, approved *R v Brown* [1994] 1 WLR 1599; [1995] 1 Cr App R 191, 199.
[78] *R v Brown* [1994] 1 WLR 1599; [1995] 1 Cr App R 191, 199.
[79] *R v H* [2004] UKHL 3; [2004] 2 AC 134, 155.
[80] *R v Ward* [1993] 2 All ER 577; [1993] 1 WLR 619, 674; (1992) 96 Cr App R 1.
[81] See generally Martin Hinton, 'Unused Material and the Prosecutor's Duty of Disclosure' (2001) 25 *Criminal Law Journal* 121.
[82] [2004] UKHL 3; [2004] 2 AC 134; [2004] 1 All ER 1269; [2004] All ER (D) 71; 16 BHRC 332; [2004] 2 WLR 335; [2004] HRLR 20; [2004] 2 Cr App R 10.
[83] Ibid 147.
[84] Part I of the *Constitution Act* 1982 (Can), being Schedule B of the *Canada Act* 1982 (UK), c ll.
[85] [1991] 3 SCR 326; (1991) 68 CCC (3d) 1; [1992] LRC (Crim) 68; 18 CRR (2d) 210; 8 CR (4th) 277.
[86] [1991] 3 SCR 326; (1991) 68 CCC (3d) 1; [1992] LRC (Crim) 68; 18 CRR (2d) 210; 8 CR (4th) 277.
[87] *R v Taillefer* (2003) 1 SCC 70; [2003] SCJ No 75; [2003] 3 SCR 307, [59].
[88] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 76; *Cannon v Tahche* [2002] VSCA 84; (2002) 5 VR 317, 340; [2002] Aust Torts Reports 81-669.
[89] *Cannon v Tahche* [2002] VSCA 84; (2002) 5 VR 317, 341; [2002] Aust Torts Reports 81-669.
[90] *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292, 325-326, 353, 361, 362; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176; *Tomasevic v Travaglini* [2007] VSC 337 [86]; (2007) 17 VR 100.
[91] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 73.
[92] *Carter v Hayes* [1994] SASC 4477; (1994) 61 SASR 451, 456; 72 A Crim R 387; *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 73; *Sobh* [1994] VicRp 2; [1994] 1 VR 41; (1993) 65 A Crim R 466, 473.
[93] [1994] 1 WLR 1599; [1995] 1 Cr App R 191, 198.
[94] [2000] UKHL 71; [2001] 1 All ER 577; [2001] HRLR 16; [2001] Crim LR 394; [2001] 2 WLR 56; [2001] 1 Cr App R 34; [2000] Po LR 386; [2001] 2 AC 91, 118.
[95] See *DPP v Toomalatai* [2006] VSC 256; (2006) 13 VR 319, 335; (2006) 163 A Crim R 192; *R v Tofilau (No 2)* [2006] VSCA 40; (2006) 13 VR 28, 62; (2006) 160 A Crim R 549.
[96] *R v H* [2004] UKHL 3; [2004] 2 AC 134, 146, 155; [2004] 1 All ER 1269; [2004] All ER (D) 71; 16 BHRC 332; [2004] 2 WLR 335; [2004] HRLR 20; [2004] 2 Cr App R 10.
[97] Ibid 155.
[98] *Clarkson v DPP* [1990] VicRp 65; [1990] VR 745, 759; approved *R v TSR* [2002] VSCA 87; (2002) 5 VR 627, 650; (2002) 133 A Crim R 54.
[99] John Phillips QC, 'The Responsibilities of the Prosecutor', Richard Read (ed), *Preparation of Criminal Trials in Victoria* (1984) [1.3] citied with approval in *R v TSR* [2002] VSCA 87; (2002) 5 VR 627, 650; (2002) 133 A Crim R 54.
[100] [2005] HCA 68; (2005) 224 CLR 125; 222 ALR 236; (2005) 80 ALJR 160; 157 A Crim R 121.
[101] Ibid 157.
[102] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1985-1986) 162 CLR 24, 39; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109.
[103] *R v Saleam* (1989) 16 NSWLR 14, 19-20; 39 A Crim R 406; *Sobh* [1994] VicRp 2; [1994] 1 VR 41; (1993) 65 A Crim R 466, 473; *Clarkson v DPP* [1990] VicRp 65; [1990] VR 745, 759.
[104] [2005] VSC 410, [33]-[42].
[105] Ibid [42].
[106] *Hunt v Wark* (1985) 40 SASR 489, 493-495.

[107] [2005] VSC 410, [41].
[108] [1983] HCA 45; (1984) 154 CLR 404, 414; (1983) 50 ALR 41; (1984) 58 ALJR 97.
[109] Ibid 414-415.
[110] *R v Higgins* ((1994) 71 A Crim R 429, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994), BC9406132, 77.
[111] (1989) 16 NSWLR 14, 17; 39 A Crim R 406.
[112] [1983] HCA 45; (1984) 154 CLR 404.
[113] See *Roads and Traffic Authority of New South Wales v Conolly* [2003] NSWSC 327; (2003) 57 NSWLR 310; (2003) 38 MVR 444; *DPP v Selway* [2007] VSC 244; (2007) 16 VR 508; (2007) 212 FLR 243; (2007) 172 A Crim R 359.
[114] [2007] VSC 244, [4]-[7]; (2007) 16 VR 508; (2007) 212 FLR 243; (2007) 172 A Crim R 359.
[115] [2003] NSWSC 327; (2003) 57 NSWLR 310.
[116] *Principal Registrar of the Supreme Court of New South Wales v Tastan* (1994) 75 A Crim R 498, 504 per Barr A-J (as he then was).
[117] *Roads and Traffic Authority of New South Wales v Conolly* [2003] NSWSC 327; (2003) 57 NSWLR 310, 315.
[118] [2006] VSC 12.
[119] Ibid [52].
[120] [2007] VSC 244; (2007) 16 VR 508; (2007) 212 FLR 243; (2007) 172 A Crim R 359.
[121] Ibid [10] (footnotes omitted).
[122] *Tomasevic v Travaglini* [2007] VSC 337, [21]-[24]; (2007) 17 VR 100.
[123] [1983] HCA 45; (1984) 154 CLR 404, 414; (1983) 50 ALR 41; (1984) 58 ALJR 97;.
[124] [2001] VSC 348.
[125] Ibid [31].
[126] *ACC v Brereton* [2007] VSC 297, [16]; (2007) 173 A Crim R 572; (2007) 69 ATR 173 per Smith J.
[127] *Felice v County Court of Victoria & Anor* [2006] VSC 12, [52].
[128] *R v Brown* [1997] UKHL 33; [1998] AC 367, 377; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.
[129] *R v H* [2004] UKHL 3; [2004] 2 AC 134, 155; [2004] 1 All ER 1269; [2004] All ER (D) 71; 16 BHRC 332; [2004] 2 WLR 335; [2004] HRLR 20; [2004] 2 Cr App R 10.
[130] *R v Mokbel (Ruling No 1)* [2005] VSC 410 [71].
[131] [2000] QCA 469; [2001] 2 Qd R 686, 690; 117 A Crim R 101.
[132] [1993] 2 All ER 577; [1993] 1 WLR 619; (1992) 96 Cr App R 1.
[133] Ibid 645, approving *R v Hennessey (Timothy)* (1978) 68 Cr App R 419, 426.
[134] [1993] 1 WLR 619, 645; (1992) 96 Cr App R 1; approved *R v Brown* [1997] UKHL 33; [1998] AC 367, 375-377; [1997] 3 All ER 769; [1998] 1 Cr App R 66; [1997] 3 WLR 447.
[135] [1983] HCA 45; (1984) 154 CLR 404, 414; (1983) 50 ALR 41; (1984) 58 ALJR 97;.

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