38/11; [2011] VSCA 355

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v MARIJANCEVIC and ORS

Warren CJ, Buchanan and Redlich JJA

3, 11 November 2011

CRIMINAL LAW – APPEAL – INTERLOCUTORY APPEAL – EVIDENCE OBTAINED BY INVESTIGATING POLICE IN CONTRAVENTION OF S81 *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981 – EVIDENCE OBTAINED PURSUANT TO SEARCH WARRANTS – AFFIDAVITS IN SUPPORT OF WARRANTS – AFFIDAVITS SIGNED BUT NOT SWORN OR AFFIRMED – EVIDENCE EXCLUDED – WHETHER DISCRETION TO EXCLUDE WAS WRONGLY EXERCISED – GRAVITY OF IMPROPRIETY CONSIDERED – STATE OF MIND OF POLICE OFFICERS – WHETHER CONTRAVENTION WAS DELIBERATE, RECKLESS OR CARELESS – DEFINITION OF RECKLESS – APPEAL DISMISSED: *EVIDENCE ACT* 2008, S138.

During pre-trial argument in the County Court, it emerged that the police officer who signed certain affidavits in support of search warrants had not sworn as to the truth and accuracy of their content but rather had merely signed them in the presence of an inspector authorised to take affidavits. The trial judge found that the search warrants were invalid and that the entries purportedly pursuant to the warrants were unlawful and constituted a trespass. The judge refused the prosecutor's application to have the evidence admitted pursuant to s138 of the *Evidence Act* 2008 ('the Act') and ruled that all of the evidence gathered pursuant to the warrants inadmissible. The question raised in this interlocutory appeal was whether the decision to exclude the evidence on the ground that public policy relating to the administration of criminal justice outweighed the public interest of bringing conviction to the wrongdoer was one that was reasonably open.

HELD: Leave to appeal granted. Appeal dismissed.

1. The parties proceeded on the basis that the discretionary decision required by s138 of the Act did not essentially differ from that at common law save that s138 placed the onus upon the prosecution to establish that the evidence should be admitted notwithstanding the impropriety or contravention. The qualified proscription in s138(1) that 'the evidence is not to be admitted unless' indicated the importance of according appropriate weight to the effect of any impropriety or unlawfulness.

2. The discretionary judgment called for did not involve a simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, namely, the public interest in admitting reliable and probative evidence so as to secure the conviction of the guilty and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the system of criminal justice. The trial judge was right to emphasise as a relevant consideration the undesirable effect of curial approval being given to the unlawful conduct of those whose duty it is to enforce the law. In doing so he was drawing upon the implied power of the courts to protect the integrity of the judicial process.

3. It was accepted both before the trial judge and on appeal that for the conduct to be 'reckless', it must involve some advertence to the possibility of a breach of the obligation and a conscious decision or a 'don't care' attitude to proceed regardless of that possibility.

4. If the conduct was deliberate as the trial judge found, and it is assumed for present purposes that his Honour meant thereby that it was knowingly illegal, it was not conduct that fell at the most serious end of the range. It was not engaged in for the purpose of obtaining an advantage that could not by proper conduct have been obtained. However, the Court was not persuaded that his Honour intended by the use of the phrase 'impropriety of the highest order' to convey more than was submitted by the respondents, that the impropriety was 'of such a high order' as to justify the exclusion of the evidence. Accordingly, this specific error was therefore not made out.

5. It was for the applicant to demonstrate that it was not open to the trial judge to ultimately form the view that he did as to the officers' credibility. There was considerable force in the applicant's submission that the practice followed by the police officers was neither deliberate, in the sense of knowingly illegal, or reckless but was rather inadvertent. The evidence did not show that this was an intentional abuse of power or a wilful disregard of rights. Having regard to s142(2) of the Act and the requirement that the standard of proof is the balance of probabilities and keeping also in mind the principle in *Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; 12 ALJR 100, there were countervailing reasons to a finding that this was deliberate conduct.

6. Allowing for the view that the probabilities of the case were strongly against his Honour's finding and the other concerns expressed as to the reasoning employed by his Honour, it could not be said that the finding was glaringly improbable or was not one reasonably open. Accordingly, This error has not been established.

7. In relation to the contention that the discretion was wrongly exercised by the trial judge, s138(1) of the Act requires the trial judge to apply a very general standard, that is, to decide whether 'the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.' Moreover, the section calls for 'an overall assessment' in the light of the factors mentioned in s138(3). Because the assessment called for a value judgment in respect of which there was room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involved the exercise of a judicial discretion with which the Court was not entitled to interfere unless persuaded that it was an opinion that was not reasonably open. This was not an appeal where the Court could 'decide for itself' whether the desirability of admitting the evidence outweighed its undesirability.

8. Once it was accepted that it was open to the trial judge to find that the officer's conduct was deliberate in the sense that it was knowingly illegal, it followed that the applicant was unable to discharge the burden of establishing that it was not open to the trial judge to conclude that the desirability of excluding the evidence outweighed the desirability of admitting it. The decision was reasonably open because of the finding that the conduct was deliberate, meaning knowingly illegal, and that the gravity of the impropriety was of a high order.

9. Although the Court concluded that the appeal must be dismissed, the Court stated that they would not wish it to be thought that the discretion should necessarily be exercised in the same way were the same issues to arise again for consideration in similar circumstances. Whilst the Court identified error in his Honour's reasons and expressed their serious reservations as to various findings made by his Honour, it was not be assumed that the Court would have made like findings or would have exercised the discretion in the same way had a finding of inadvertent or careless conduct been made.

WARREN CJ, BUCHANAN and REDLICH JJA:

1. The respondents are charged with various offences related to drug manufacture and trafficking. Much of the evidence comprising the prosecution case was obtained by the execution of warrants issued under the *Drugs Poisons and Controlled Substances Act* 1981 ('the Act').

2. During pre trial argument it emerged that the deponent to certain affidavits in support of the warrants had not sworn as to the truth and accuracy of their content but rather, had merely signed them in the presence of an inspector authorised to take affidavits. The trial judge, in a ruling that is not in issue, found that the affidavits relied on to obtain the warrants had not been sworn, in breach of s81 of the Act, and that the magistrate who granted the warrant was not aware of the deficiencies. The trial judge accordingly found the search warrants were invalid and that the entries, purportedly pursuant to the warrants were unlawful and constituted a trespass.

3. The respondents objected to the admissibility of the evidence derived from the warrants. The prosecutor applied to have the evidence admitted pursuant to s138 of the *Evidence Act* 2008 (the *Evidence Act*). The trial judge refused that application on 18 October 2011, ruling all of the evidence gathered pursuant to the warrants inadmissible. Further evidence gathered pursuant to other warrants was ruled inadmissible under a second ruling by his Honour made on 25 October 2011. The reasons for excluding the evidence under each ruling were essentially the same. Although the ruling of 25 October was also the subject of appeal, it received little discrete attention in either the written or oral argument on appeal. The appeal was conducted on the basis that the arguments advanced by each party applied to all of the evidence gathered under all of the warrants the subjects of both rulings. Accordingly we have not dealt separately in our reasons with the individual warrants.

4. The Director of Public Prosecutions now seeks leave to appeal against both rulings by way of an interlocutory appeal, the trial judge having granted a certificate pursuant to s295(3) of the *Criminal Procedure Act* 2009.

5. The question raised in this interlocutory appeal is whether the decision to exclude the evidence on the ground that public policy relating to the administration of criminal justice outweighed the public interest of bringing conviction to the wrongdoer was one that was reasonably open.

Background

6. The police conducted two investigations of the respondents: 'Operation Falsie' and 'Operation Hotrod'. Operation Falsie was an investigation into the manufacture of methylamphetamine by the first respondent, one Glushak and one Adams. The first respondent and Adams both lived at Sunshine and Glushak at Essendon. These addresses were the focus of operation Falsie.

7. Operation Hotrod was an investigation of the manufacture of methylamphetamine at a Broadford address. The property had been purchased by the first and second respondents. The property included a shearing shed and cottage. Adams later lived for a time at the cottage on the Broadford property.

8. The first respondent faced trial on multiple counts of conspiracy to traffic in a commercial quantity of a drug of dependence, possession of items for trafficking in a drug of dependence and possession of precursor chemicals. The second respondent faced trial on one count of possession of items for trafficking. The third respondent faced trial on one count of conspiracy to traffic. By the time of trial, Glushak and Adams had pleaded guilty and had been sentenced. On the presentment relating to these respondents, the prosecution was proceeding with the charges relating to operation Hotrod.

9. The nature and seriousness of the charges was not in issue on the appeal nor was the probative value of the impugned evidence gathered pursuant to the warrants. It was not disputed that the exclusion of that evidence would substantially weaken the prosecution case against the respondents. It is therefore unnecessary to provide any detail of the prosecution case against the respondents or the detail of the evidence gathered under the warrants.

The issues on Appeal

10. The Director appeals the orders made by the trial judge on 18 and 25 October excluding the evidence pursuant to s138 on the ground that the finding pursuant to s138 of the desirability of admitting the evidence was outweighed by the undesirability of admitting evidence.

11. Section 138 of the *Evidence Act* is in these terms:

> **138 Exclusion of improperly or illegally obtained evidence**
> (1) Evidence that was obtained—
> (a) improperly or in contravention of an Australian law; or
> (b) in consequence of an impropriety or of a contravention of an Australian law—
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
>
> (2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—
> (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
> (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.
>
> (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—
> (a) the probative value of the evidence; and
> (b) the importance of the evidence in the proceeding; and
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
> (d) the gravity of the impropriety or contravention; and
> (e) whether the impropriety or contravention was deliberate or reckless; and
> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

12. In his statement of contentions the Director provided particulars of specific errors that it was submitted resulted in the trial judge erring in refusing to admit the evidence pursuant to s138 of the *Evidence Act*. The specific errors identified were:

(a) that the gravity of the impropriety or contravention was of the highest order.

(b) that the conduct of the police officers who signed the affidavit was deliberate.

(c) that the police officers' conduct was at the very least reckless behaviour of the highest order.

13. In *DPP v MD* an interlocutory appeal, in which the Crown sought leave to appeal a pre trial ruling that evidence be excluded under s138(1) of the *Evidence Act* 2008, Maxwell P, Nettle and Harper JJA concluded that the exclusion of an admission pursuant to s138 of the *Evidence Act* 2008 involves an exercise of discretion which, on appeal, attracts the operation of the principles in *House v The King*.[1] It was accepted by all parties on the present interlocutory appeal that we should proceed on that basis.

14. The Director sought to justify appellate intervention on the sole ground that an error in the exercise of the discretion could be inferred because the decision to exclude the evidence was plainly unjust or unreasonable. The circumstances in which we may intervene on an appeal against such a discretionary decision are limited. To infer such error the Director must demonstrate that the exclusion of the evidence was not reasonably open to the trial judge in a sound exercise of the trial judge's discretion.

15. The asserted specific error (b) challenges a finding of fact as to the state of mind of the relevant police officers at the time that the affidavits in support of the search warrants were signed by each of them. The asserted error (a) challenges a value judgment made by the trial judge as to the seriousness of the impropriety. Error (c) involves both a challenge as to a finding of fact as to the officers' state of mind and a value judgment as to the seriousness of the impropriety.

16. As to the alleged error as to a finding of fact, we would only be entitled to substitute our own findings of fact for those of the trial judge if he 'mistakes the facts.'[2] That will only be demonstrated if there is no evidence to support such a finding[3] or if the finding was not reasonably open on the evidence.[4] As to the attack upon the value judgment made by his Honour, we would not be justified in substituting our view if his Honour's view as to the seriousness of the impropriety was reasonably open. Moreover, as the applicant's reliance on specific errors must be considered in the context of its sole ground of appeal that the discretion was wrongly exercised, the applicant must therefore show that had such error as has been made out, not been made, it would not have been reasonably open to the trial judge to exercise the discretion as he did.

17. Little was said on the appeal concerning the principles which are attracted by s138 although they were fully ventilated before the trial judge. Both at trial and in this Court the parties proceeded on the basis that the discretionary decision required by s138 did not essentially differ from that at common law save that s138 places the onus upon the prosecution to establish that the evidence should be admitted notwithstanding the impropriety or contravention. The qualified proscription in s138(1) that 'the evidence is not to be admitted unless' indicates the importance of according appropriate weight to the effect of any impropriety or unlawfulness.[5] The exercise of the discretion calls for the balancing exercise to be undertaken that is discussed in cases such as *Bunning v Cross*[6] and *Ridgeway v The Queen*.[7]

18. The discretionary judgment called for does not involve a simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, namely, the public interest in admitting reliable and probative evidence so as to secure the conviction of the guilty and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the system of criminal justice.[8] The trial judge was right to emphasise as a relevant consideration the undesirable effect of curial approval being given to the unlawful conduct of those whose duty it is to enforce the law. In doing so he was drawing upon the implied power of the courts to protect the integrity of the judicial process.

The course of the proceedings

19. It is convenient to consider the manner in which these questions evolved before the trial

judge and to set out at some length the evidence bearing upon those questions. We shall also refer to the relevant submissions which were advanced before the trial judge.

20. The discovery of the impropriety which gave rise to the rulings the subject of appeal arose in the following way. Some objections had been taken to the form of various search warrants by counsel for the respondents. It was not at that time apparent that the content of the affidavit supporting that warrant had not been the subject of an oath or affirmation. Upon the prosecutor making enquiries from the relevant police officer, Senior Sergeant McIntyre, as to the objections that had been raised, he was informed by the officer that the truth and accuracy of the affidavit had not been sworn to on oath or by affirmation. The trial judge was then informed at the earliest opportunity of that development. Needless to say, the trial judge was very concerned as to the process that had been followed. The next day, the trial judge was further informed that it was a systemic practice that the deponent to an affidavit in support of a search warrant, and perhaps other types of warrants, did not swear to or affirm the truth and accuracy of the content of the affidavit. His Honour responded that the cases say if it's a systemic practice the Court shouldn't be approving it ... I don't want to pre-empt any findings but I'm sure you'll agree that it strikes at the very heart of the system to have affidavits not being sworn and pretending to be sworn because for example the person couldn't be charged with perjury.[9]

21. Over the following week the prosecution, with the approval of the trial judge and the respondents, called a number of witnesses who it was expected could give evidence relevant to this practice.

22. Detective Senior Constable Richards, the officer who eventually executed one of the search warrants testified that he drafted it and then gave it to Detective Senior Sergeant McIntyre. He believed that the affidavit in support of it was duly sworn. He, together with other officers entered the premises the subject of the warrant in the belief that the warrants authorised entry.

23. Detective Senior Sergeant McIntyre testified that the affidavit was prepared by staff, proofed and then signed in the presence of Detective Inspector Davies. McIntyre said he did not take the oath but that he thought signing the document committed him to the truthfulness of its contents. The practice employed with respect to these warrants was the only one he had ever experienced. He said he had never been required to swear on the bible or make a verbal utterance. He understood the expression 'sworn' was achieved by acknowledging what was in the document and that by signing he was 'swearing' it. McIntyre had no specific memory of police training on the point during his senior sergeant's course.

24. McIntyre's practice was to go into Davies' office and sign in front of him or sit at his desk on the other side of a glass petition, sign, drop the affidavit on the desk of Davies to witness. McIntyre said that although Davies could be in a different room by virtue of the glass petition, he was always able to see him, McIntyre, signing. McIntyre said he never thought about the oath. Because of the importance of his evidence we should refer to it in further detail.

25. In his evidence Senior Sergeant McIntyre testified as follows:[10]

> My understanding signing the affidavit in the manner that I did was of committing myself to the truthfulness of the content of the affidavit and it was part of the process to have that affidavit validated to submission to a court for the issue of a warrant.

His Honour then asked Senior Sergeant McIntyre the following questions:[11]

> HIS HONOUR: What's your definition of affidavit?---Well, in respect to a search warrant it's the – the Form 708A which is the Victoria Police Form that contains the information for, or in support of - - - Are you saying that you were unaware that an affidavit had to be sworn?---Well, I was of the belief the process I was going through was swearing the affidavit.
> MR PAPAS: Had you had any training in the course of your – either detective training or initial training or subsequent training, the one you mentioned, so that – I've identified three lots of training, but you tell us how many times you've been trained as a police officer?---I've been trained numerous times. I have got no specific recollection of training in respect to that particular aspect of taking out affidavits. The most like – well, my research in the last few days is there is information within various manuals in respect to it, and it may very well have been something that was touched upon.
> HIS HONOUR: Did you read the affidavit before you signed it?---Yes.

Doesn't it say, 'I, Stephen McIntyre, Detective Senior Sergeant, at the Clandestine Laboratory Squad, make oath and say'?---Yes.
What does 'make oath' mean?---Well, my interpretation at that point of time, and it has been up until today, or yesterday, that I was making oath by acknowledging that document.
How were you doing that? What did you want – to make oath, what does an oath mean to you? You've been in court, I'm sure, on countless occasions when people have gone into the witness box and taken the oath?---Yes.
Is that right?---I'd never considered the subject.
Of what an oath means?---In respect to the taking out of an affidavit for a search warrant, it's not something I had ever turned my mind to.
You understand when someone goes in the witness box, and you've done it no doubt yourself countless times, you're taking an oath when you swear on the Bible?---Yes.
That's what it means?---I understand that, Your Honour.
Well, how can you read this 'make oath and say' without understanding what oath means? It just beggars belief.
MR PAPAS: What did you understand - - -
HIS HONOUR: Well, no, could he answer the question, please?---I'm sorry, Your Honour, I was unaware of – what was the question?
I'm putting to you that I just can't understand how you wouldn't - - - ?---Okay.
- - - understand what oath means in affidavit, in the first three lines, four lines of it?---This is a practice, and the only process in respect to taking out affidavits I've ever experienced. I have never had to swear on a Bible or make a verbal utterance in the course of taking out hundreds of search warrants by way of an affidavit.
MR PAPAS: When would you have first started being the person who was the deponent for affidavits in relation to search warrants, just as best you can, which year?---Probably around about 1991, in respect probably at that stage to stolen good, search warrants. Later on when I was promoted to the rank of sergeant there would have been drug warrants and - - -
So that's a deponent?---Yes.
HIS HONOUR: Just – let's go back to the facts. Sworn at, that wasn't filled out. Why was that?---I have got no explanation as to why that wasn't filled out.
Or the date?---It should have been.
Well, the word 'sworn', what does that mean to you?---Well, my understanding that by acknowledging what was in that document, by way of signing it, I was swearing it.
Is there anything in what we call the jurat, as you know in witness statements - - -?---Yes.
- - - of acknowledgments, 'I hereby acknowledge this is true and correct in the belief if it's wrong I'm subject to the penalties of perjury', that sort of phrase?---Yes.
There's nothing like that there, is there?---No, there isn't.
There's nothing to indicate that it's true and correct, is there?---No, Your Honour.
Except it says the words 'sworn at'?---Yes.
You say the word 'sworn' has no meaning to you at all?---Well, I'd never turned my mind to the actual document as, as I said. But the process I always accepted, that by doing the signing of that document I was accepting the truthfulness of the document and the contents of the document, and that would suffice. At no stage had I even turned my mind to it, because it's the only practice I have ever seen.
MR PAPAS: What did you consider in relation perjury? Were you subject to perjury if you told a lie in any of these documents?---Yes, definitely.
HIS HONOUR: How?---By virtue of - - -
You hadn't taken an oath?---Well, in my mind I had.
How had you taken an oath?---By virtue of witnessing and signing on that - - -
All you've done is sign your name and someone's witnessed it. There's not even an attestation that this is true and correct?---That's my understanding as of yesterday, that's correct, Your Honour.
You were saying this is a common practice in Victoria Police?---I'm saying this is the only practice I've ever seen in Victoria Police.

26. Senior Sergeant McIntyre further told his Honour that he had followed this practice in obtaining every warrant he had ever been involved in, throughout his career. That led his Honour to suggest to the prosecutor that Inspector Davies, the person before whom the affidavit was signed, should also be called to give evidence and that someone of much higher rank should be called to explain to the court how the practice had evolved in the clear face of what the law required. Later the same day his Honour reiterated that he needed to have someone in authority from the Victoria Police that could explain such a practice and how it had evolved.[12]

27. Following the completion of Senior Sergeant's evidence-in-chief and further discussion with counsel, his Honour ruled that the relevant search warrant had been improperly or illegally obtained as there was no supporting affidavit as required by s81(1) of the *Drugs Poisons and Controlled Substances Act*. As the warrant was unlawful, the entry on to the land and premises,

the subject of the warrant, was in fact a trespass. His Honour then referred to the foreshadowed application under s138(1) of the *Evidence Act* that the evidence should be excluded because of that illegality. His Honour made a brief reference to the joint judgment of the High Court in *Ridgeway v The Queen*, in which the concept of impropriety was described as conduct 'inconsistent with minimum standards of acceptable police conduct in all the circumstances'. His Honour considered it had been established on the balance of probabilities that the trespass and the non-swearing of the affidavit constituted improper conduct.

28. Following lengthy discussions with counsel concerning the relevant warrant and other warrants that had been issued, the prosecutor then responded to the trial judge's earlier request and called Superintendent Guerin to testify that when he learned that Senior Sergeant McIntyre had not sworn on oath as to the truth and accuracy of the contents of the affidavit, he made enquiries from various working groups in the crime departments and ascertained from some 25 detectives that they all consistently followed a process similar to that described by Senior Sergeant McIntyre.

29. After discovery of what had occurred in this case, Guerin said that a bulletin was sent out to police concerning the requirements for the swearing of affidavits.

30. When asked by his Honour whether he was surprised to learn of the practice he said:

> On one level I was Your Honour but on another I wasn't. It just seems to be a practice that has inadvertently crept in. I don't want to use the term 'expediency', that seems rather flippant, but police officers working in an operational environment, where they know each other, the culture will be one whereby a senior constable would not necessarily feel obliged to raise a bible in front of his sergeant, but would nonetheless feel as if he's still bound by the rules of perjury by signing an affidavit. There seems to be a lack of an understanding the difference between a stat dec and an affidavit by some members.[13]

31. Later the superintendent stated that apparently a practice developed over time where 'a lot of officers do not swear an affidavit, they sign it, it's witnessed, they believe they're fulfilling the requirements of the law, notwithstanding that possibly they're not.'[14] In answer to further questions from his Honour, Superintendent Guerin said that he would expect a senior sergeant to understand what 'make oath' means and that the words 'sworn at' might suggest to a police officer that there should be a swearing.

32. On 6 October, in further response to the trial judge's earlier request, Acting Superintendent Hermans was called to produce documents and give evidence concerning police training in relation to the taking of affidavits. He said it was his practice to swear affidavits, and that it was a feature of police training. He said that most police spent time at police watch houses where they observed senior sergeants swearing affidavits. It was also a component of the senior sergeants exam.

33. In response to questions from cross-examining counsel, he said:

> You could also argue that the acknowledgement takes away the need for the affidavit because when they sign an acknowledgement, they do in their own mind, firmly believe that they've attested by that signature to the truth of the document. That may be part of the problem that's causing the confusion later on in their career.[15]

His Honour then asked the following questions:[16]

> HIS HONOUR: Mr Hermans, you're an intelligent man. You've risen to a high rank in the police force. You understand that it's fundamental to an affidavit that the person takes an oath?---I certainly understand, Your Honour.
> And you would expect a Sergeant in a crime squad to know that?---I understand it. My concern is for those that don't.
> Answer my question. You would expect a Sergeant in a crime squad to know that?---I would expect so, Your Honour, yes.
> And that Sergeant looks at the warrant and reads 'I make oath' or the affidavit 'I make oath and say' that a person who's attained a rank of Sergeant, with all the training that has happened, irrespective of whether he's been in uniform or not, would know that requires him to swear to the affidavit?---I agree with everything you say, Your Honour. My only reason - - -
> And at the end when it says 'sworn at' that a sergeant would understand that actually requires a swearing, correct?---Correct and the only reason I raised it is because I'm surmising what could

possibly lead to this poor work practice.
Let's get to that to what I would term 'corporate speak' of 'poor work practices'. You no doubt realise that it's much more than a poor work practice, it's a fundamental undermining of the affidavit?---It may be interpreted as that yes I understand that.
Well - - -?---It's not for me to make that decision Your Honour. I understand the complexities and I understand the importance. The evidence I'm giving relates to the - - -
You've used this word which I've termed 'corporate speak', 'poor work practice'. To a lawyer, it's inconceivable that an affidavit would be issued without it being sworn. Absolutely inconceivable. And if a solicitor were to do that, severe consequences would follow. Do you understand that?---I do understand that Your Honour.
I have the difficulty with a sergeant in an elite crime squad not having the same understanding of a fundamental of the criminal justice system, that is if you are taking out an affidavit to support a search warrant, you must swear it?---I agree with you, that is the context of our training - - -
And what - - -?--- - - - and it is the process that is - - -
Well it's fundamental isn't it?---Yes I would accept that.
Would you agree with this that if I substitute my face, familiarity breeds contempt, that might be a better way of trying to work out how this practice has arisen, that is - - -?---I'm not sure that I agree with that - - -
- - - I do so many of these that I just couldn't be bothered and once it starts, people get into the habit of 'couldn't be bothered'?---Look, that's one potential driver for - - -
Well given you say it's not intentional, that there's no grand plan to - - -?---I would – I would find that inconceivable because everyone understands we could all be exactly where I am now based on someone challenging an affidavit so the content - - -
So let's all accept - - -?--- - - -it's (indistinct) - - -
- - - that it's not intentional. The alternatives to that are, I'm in the Clandestine Laboratory Squad, I do warrants all the time, I'm raiding here, there and everywhere. I've got to have affidavits to support them, I've got to draw up the affidavit. For some reason a practice develops of they're not sworn?---I agree.
And it must be, surely, a reasonable conclusion to draw that's because there are so many. Familiarity breeds contempt?---Common error makes right I suspect this is one of the other ways to look at it. It just becomes so ingrained that the process is now as far as they're concerned - - -
And they don't even understand now, apparently, that according to Mr McIntyre that what they're doing is not taking an oath. His evidence is: 'If my signature is witnessed, that fulfils the requirement'?---And - - -
You would understand that - - -?---I do understand that - - -
- - - is completely wrong?---I don't disagree that you can draw a bow between that and sign an acknowledgement on the statement, where you are signing an acknowledgement to attest to the truth of the document and that's how that my answer came about that in the first place. I don't discount that it's not good enough. I'm only surmising that that's possibly where the mindset could've developed.

34. The following day, the 7 October, Senior Sergeant McIntyre was recalled. As his evidence-in-chief had been completed he was cross-examined on matters raised by the witnesses Guerin and Hermans. In cross-examination Senior Sergeant McIntyre said:[17]

You had not been uttering any oaths or affirmation when you signed those documents?---That's correct, I hadn't been.
Had you taken the opportunity to look back at any one of those number of documents created by the Victoria Police that now exists, you would see that there is a requirement to in fact swear?---I had no need to look at those documents.
When you became a sergeant did you become immediately aware that at that point in time you were competent to witness an affidavit?---I would've been aware of that, it would've been on the form.
One of the things that you've told us in your evidence so far is that you just had a belief in your head that the way you were doing things was right, is that a fair paraphrasing of what you said?---Yes.
What I want to ask you about is where did that belief come from?---Because that is the only process, process I have ever seen.
So it's part of an ongoing culture within the Crime Department the very least, is that correct?---I – I don't know if culture puts the right word – is the right word to use in that situation. From what I – I know I can only speak from my own observations of this process, this is the only process I've seen. Now, if it is a more widely held belief, I can't speak for what other people knew or believed, I can only assume that everyone else had the same belief as myself.
You haven't observed anyone in all of your years in the Crime Department actually going about properly swearing an affidavit?---That's correct.

35. Senior Sergeant McIntyre reiterated on a number of occasions during his cross-examination that at the time he was signing affidavits he was not conscious of the need to swear them. He did not accept that his practice had been careless. He said:

> I always thought I was doing the right thing, I had no knowledge of doing anything wrong, or I was unaware I was doing anything wrong. I wouldn't describe it as careless at all.[18]

36. The trial judge then sought to summarise Senior Sergeant McIntyre's evidence in the following series of questions:[19]

> HIS HONOUR: What you're saying is you failed to give any thought to the issue of whether you were swearing an affidavit or not?---No, the – I was certainly conscious of making sure it was filled out correctly with all the right information in there, that it was all lawful, that there was no perjury in there - - -
> But you failed to give any thought to the issue of what the word 'oath' means?---Yes.
> And what the words 'sworn at' mean?---No, I wouldn't say sworn – oh, well, yes, you're right. The word 'sworn', probably not 'at'.
> No, the word 'sworn', you failed to give any thought to the meaning of that word?---Yes, Your Honour. I believe, yep.
> Because if you had you would have realised it means more than just signing a document in front of someone witnessing it?---I believed that it had consequences attached to those words and it - - -
> No, no, the word 'sworn', when you go in the witness box you swear. To a police officer the word 'sworn' has a particular meaning, doesn't it?---I suppose it does, in some ways, Your Honour.
> Your whole working life is to do with giving sworn evidence, correct?---Yes.
> And if you'd given any thought to the meaning of 'sworn' when you're making these affidavits you would have understood that you weren't actually swearing?---That's correct, Your Honour.
> And if in fact you had given any thought to it and gone to the material that you now know is available, no doubt you wouldn't have continued the practice?---I can guarantee I wouldn't have, Your Honour.

37. Senior Sergeant McIntyre also stated a number of times that he knew it was important to get the process right as he knew that otherwise he could potentially lose the evidence if he had not done things properly.[20]

38. It was only in the final questions of counsel for the third respondent in cross-examination that the suggestion was made for the first and only time that it was untruthful for Senior Sergeant McIntyre to claim that he had never turned his mind to the way in which he should swear those affidavits. He said:

> I always thought I was appropriately swearing them and therefore I never thought any further of it. I have thought about it the affidavit process, I've thought about the appropriateness of the form itself but I have never thought about the oath.
> This is all a deliberate cutting of corners because in your own words you were just simply too busy to do it the right way? Correct?---No that's not correct.
> How easy would it have been to pull that bible out of your desk and do it properly?---Too easy for me not to have done it.[21]

39. Following the completion of Senior Sergeant McIntyre's evidence, his Honour, responding to a submission from the first respondent who was then unrepresented, made plain that on his view of the evidence so far it did not seem to be the case that the impropriety or behaviour was deliberate.[22] It can be inferred from those observations that in spite of the evidence of Guerin and Hermans, there was nothing in the demeanour or manner in which Senior Sergeant McIntyre gave his evidence that caused the trial judge to doubt the veracity of his explanation.

40. Inspector Davies was then called. He confirmed that his practice, like Senior Sergeant McIntyre's, was to sign the affidavit without requiring an oath to be administered. Inspector Davies said that he understood that in signing the document the person signing was swearing that it was true and correct. As had Senior Sergeant McIntyre, he testified that he had never seen an oath administered in relation to the swearing of a search warrant. He testified that swearing an affidavit for a search warrant only required what he did and that it was his understanding that in signing the document the police officers were attesting to the truthfulness of the content of the document and were swearing that it was true. He acknowledged he would have received training as a senior sergeant concerning affidavits. He said the affidavits would be signed by the deponent in his presence. He did not have a bible and was ignorant of specific instructions. He had an independent recollection of police at Moorabbin police station being required to swear affidavits. Davies said he knew how to take the affidavit of a member of the public but he had never sworn a policeman on an affidavit. He was unable to explain to the court the distinction between an affidavit made by a member of the public and an affidavit by a member of the police force.

41. Following the completion of Sergeant Davies' evidence the matter was adjourned for seven days to allow for written submissions to be prepared by the parties as to how the application under s138 should be determined. On 14 October the matter resumed and oral argument was advanced by all parties.

42. The prosecutor advanced five main reasons before the trial judge for seeking to invoke the discretion under s138 of the *Evidence Act*:

> (a) The offending was serious, involving a sophisticated arrangement. The seriousness of the offence was reflected by the maximum penalty imposed for the offence being level two imprisonment – 25 years maximum.
>
> (b) Without the evidence the prosecution case would be weakened significantly.
>
> (c) The case was one involving very serious offending in which the community expectation would favour conviction and punishment of guilty persons.
>
> (d) The warrant was not executed in bad faith – the police believed as to the truth of the contents and that they were liable to penalties of perjury. There was no deliberate misstatement before the magistrate as to the contents of the affidavit, rather, it was the non-effecting of the oath or affirmation.
>
> (e) The contraventions by the police were not deliberate and were not reckless, rather, were inadvertent. If the police had been aware of their error they would have sought a further warrant.

43. On appeal, senior counsel for the applicant submitted that the conduct of Senior Sergeant McIntyre and Inspector Davies was neither deliberate nor reckless. He said that the term 'deliberate' when used by the Crown meant 'knowingly illegal'. He submitted that the police officers' conduct did not involve a calculated disregard for the law[23] or a serious disregard of relevant procedures amounting to a deliberate undertaking of the risk that the rights of a suspect would be substantially prejudiced[24] or some advertence to the possibility of or breach of some obligation, duty or standard of propriety and a conscious decision to proceed regardless of that risk.[25] The applicant contended that the trial judge changed his view as to whether the conduct of Senior Sergeant McIntyre was deliberate. Relying upon the analysis of Vincent JA in *R v Jamieson*[26] the Director submitted that this was not an example of an intentional abuse of power. There was no wilful disregard of a suspect's rights or any deliberate adoption of an objectionable practice. The impropriety was neither deliberate nor reckless.' If it could be described as carelessness, it was not of an order that warranted the exclusion of the evidence.

44. The content of the respondents' written submissions before the trial judge warrant particular attention. The trial judge drew upon the form and substance of those submissions in his reasons for his ruling. By the time submissions were filed before the trial judge, the first respondent was represented by senior and junior counsel. In their written submission it was said

> On the evidence it is open to take the view that a culture of not swearing of affidavits has developed in the Victoria Police Force. Whether that is for reasons of expediency or simply because the police do not consider themselves bound by the law or for some other reason may be difficult to determine. But there can be no doubt that it is deliberate, at the very least reckless. It is an abuse of power and amounts to a grave example of the adoption of an objectionable practice. More tellingly, to adopt the words of Vincent JA in *Jamieson* it is 'conduct of such carelessness that the reception of the evidence can be seen to compromise the integrity of the legal process'.

45. So it can be seen that the submission contemplated a finding that the practice was deliberate or was at the very least reckless or was conduct of a particular order of carelessness. Later in their submission in addressing s138(3)(e), it was contended that this was a case of deliberate impropriety because:

> The police knew of the proper requirements of swearing affidavits; they complied with those requirements in relation to members of the public swearing affidavits but not police; Davies could not explain the differentiation; it was inconceivable that high command did not [sic] know or at least ought to have known of the practice; the practice was blatantly engaged in in many cases and over a long time.

46. In the alternative the first respondent submitted 'at the very least the conduct is reckless'.

Relying upon authorities, principally *Bunning v Cross* and *Ridgeway v The Queen*, it was submitted that where the conduct is deliberate or reckless and entrenched and it is serious, the balance will favour exclusion.

47. It was accepted both before the trial judge and on appeal that for the conduct to be 'reckless', it must involve some advertence to the possibility of a breach of the obligation and a conscious decision or a 'don't care' attitude to proceed regardless of that possibility.[27] The first respondent further submitted that the trial judge should find Senior Sergeant McIntyre's evidence to be incredible because it was inconceivable that he would not know of the requirements for an affidavit and the need for jurat particulars. Finally, it was submitted that 'his evidence that he was not at least careless should not be accepted'.

48. As to the gravity of the impropriety, the first respondent relied upon the fact that the practice of not swearing affidavits in the crime department had developed over many years; that there was training of officers in the proper swearing of affidavits; that there was a culture that as between police it was unnecessary to swear affidavits; that it may not be clear as to exactly why the practice developed; that the practice was engaged in by officers of senior rank and was known to officers of high authority; that the court should not accept that high ranking officers simply considered this 'poor work practices,' and in the instant case the affidavit of McIntyre had not been sworn because of that culture; that the court should not accept McIntyre's evidence that he was unaware that he was doing anything wrong. In conclusion it was submitted that the gravity of the impropriety was here 'of such a high order' that the evidence should not be admitted.

49. Counsel for the second respondent submitted that the contravention by members of Victoria Police was reckless and that such failures were 'systemic and endemic' and arguably stemmed from 'either or both flawed training and/or a culture that pervades within the crime department of the Victoria Police.' He submitted that the gravity of the impropriety was 'extreme' because the practice was endemic and systemic in the elite crime squads of Victoria Police, it struck at the heart of a legal system based upon the fundamental premise that evidence be given on oath and that it tainted and embarrassed the legal process and the courts of this State.

50. The third respondent was also represented by new counsel for the purpose of resisting an order to admit the evidence. The third respondent's submission was that the impropriety was deliberate, not reckless. It was submitted that McIntyre and Davies' evidence 'cannot be right'. It was submitted that their asserted belief could not have been honestly or reasonably held because both knew what an 'oath' was and both knew that an affidavit involved swearing an oath. Significantly, the written submission recognised that to ground a finding of deliberate or reckless conduct the trial judge would also have to reject the evidence of McIntyre that he had never given any thought to what 'oath' and 'sworn' meant in the affidavit and that he had at no stage turned his mind to it because that was the only practice he had known.

51. Following the receipt of the written submissions, his Honour heard substantial oral argument. On 18 October his Honour gave extensive reasons and ruled that the evidence obtained under the relevant warrants should be excluded.

Consideration of His Honour's reasons for decision of 18 October 2011

52. The substance of the trial judge's reasons for excluding the evidence is to be found in the conclusions to his reasons of 18 October. He considered that to admit the evidence derived from the warrants would be 'to ensure that the conviction of the accused is bought at too high a price by reasons of curial approval of the practice'. His Honour continued:[28]

> The issuing magistrate was deceived and the integrity of the court was undermined. To approve the bypassing of that requirement by sanctioning the witness of a signature as an equal replacement to an oath would devalue the meaning of an oath. To take an oath binds the conscience. Our whole court system relies on oath taking, whether in the witness box or by affidavit. To admit the evidence here, in the face of a systemic practice of avoiding the taking of an oath when making affidavits, would strike at the very heart of the system of taking evidence.
>
> So I have said it has not been satisfactorily explained to me why this practice had developed. Cutting corners or culture were mentioned. Either involves a state of mind that, in my view, devalues the significance of the oath. The swearing of an oath would take, at the most, 15 seconds. Was it

> embarrassing for the crime squad police to raise the bible or make an affirmation in front of other members? Was it considered that to require an oath cast doubt upon the veracity of the member? Was it an inconvenience to be disposed of?
>
> Whatever the reason it reflects poorly upon the police members involved. Police, and for that matter, lawyers should not sanction a culture that pays lip service to such a fundamental requirement as the swearing of an oath. The court, by a wink or a nod, should not undermine the protection given to a citizen by s81(1) of the *Drugs Poisons and Controlled Substances Act* and should not condone the integrity of the oath.
>
> To condone the practice of Senior Sergeant McIntyre and others, would be an acknowledgment that the taking of the oath is an inconvenient charade.

The practice of not requiring the affidavits in support of warrants to be sworn on oath or affirmed.

53. We should say something as to the endemic practice employed within certain sections of Victoria Police of not requiring the accuracy and truthfulness of the contents of affidavits in support of warrants to be sworn to on oath or by affirmation.

54. The importance of making an affidavit in order to obtain a search warrant can hardly be gainsaid. Trials in courts in Victoria and in all other states and territories proceed upon the basis that the evidence that founds the findings of fact, which determine the guilt or innocence of those accused of crimes, is given on oath or by affirmation. Similarly, the reasonable grounds of which a magistrate must be satisfied before he issues a warrant authorising a member of the police force to enter and search land, premises or a vehicle and seize any thing or document and carry it before the Court, can only be established by evidence on oath or by affidavit.

55. An affidavit is the written form of sworn oral testimony. It is an ancient method of providing evidence in court.[29] Until 1989, whenever police needed to obtain a warrant they were required to physically attend court and give sworn oral evidence before a magistrate as to the facts relied on to support the granting of a warrant. This was a clear and long standing indicator of the significance and gravity of obtaining a warrant. The 1989 Act amended the provision to enable evidence to be given orally on oath or on sworn affidavit.[30] The new alternative methods from 1989 onwards did not justify or contemplate a derogation of standards – the evidence was still required to be sworn.

56. The fundamental role which oaths and affirmations play in our system of criminal law is readily apparent. The requirements of s81 of the Act are not a mere technical ancillary to obtaining a search warrant. Just as courts proceed upon the basis of testimony sworn or affirmed, so do magistrates issue search warrants on the basis of testimony sworn or affirmed.

57. A search warrant authorises an entrance upon property and the seizure of property which would otherwise constitute an unlawful trespass. The common law has jealously guarded private property rights and has upheld the right of property owners to exclude other people and the state. Search warrants, which are obtained *ex parte*, displace those rights. As the Court said in *George v Rockett*:

> The enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to [property] interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.[31]

Similarly, Lockhart J in *Crowly v Murphy* said:

> Notwithstanding that Commonwealth and State legislation governs the law of entry, search and seizure in Australia today, it is necessary to bear in mind the fundamental legal conception of the freedom of the individual in his home or premises. It is the cardinal principle in the light of which the statutory authority for the issue and execution of search warrants is read. Even today, there is no right of common law to enter a person's home or premises for the purposes of search or seizure without the permission of the owner or occupier, except in the case of a search for stolen goods. Entry without such permission or authority of a valid warrant is to commit a trespass and to render the trespasser liable to damages.[32]

58. To proffer to a magistrate material which is not sworn or affirmed in order to obtain a search warrant has a tendency to subvert a fundamental principle of our law.

59. On appeal the parties adopted and amplified the submissions made before the trial judge. It is convenient to address the submissions in the course of our further examination of his Honour' reasons for excluding the evidence.

60. Section 138(3)(a) required the trial judge to take into account the probative value of the evidence. His Honour accepted the prosecution's submission that the evidence in issue had significant probative value. That finding was not contested on the appeal.

61. Next, sub-s(3)(b) required his Honour to consider the importance of the evidence in the proceedings. The trial judge accepted the prosecution's contention that the exclusion of such evidence significantly weakened the case against the first respondent. Although it had less importance in the proceedings against the second and third respondents, the trial judge found that the exclusion of the evidence would significantly weaken the prosecution case. Implicit in his Honour's reasons is the conclusion that this consideration advanced the public interest in admitting the evidence. His Honour's findings in this regard were not in issue on the appeal.

62. Sub-section (3)(c) required his Honour to take account of the nature of the relevant offences which the respondents faced. Counsel for the first respondent had conceded that the offences which the first respondent faced were serious. In accepting that these were serious charges, his Honour quoted a passage from the reasons for judgment in *R v Dalley* at which it was said:[33]

> As a general proposition, the more serious the charge, the greater the community interest in the conviction and punishment of the guilty. On the other hand, it may equally be said that the more serious the charge faced, the more rigorous should be the insistence on adherence to statutory provisions enacted to protect the rights of individuals.

63. His Honour said nothing as to the seriousness of the charges faced by the second and third respondents.

64. His Honour considered s138(3)(h), which required him to take into account the difficulty of obtaining the evidence without impropriety. The trial judge found that there would have been no difficulty in properly swearing the affidavits. Differing arguments were briefly advanced on appeal as to how this subsection should be construed. We do not consider it necessary to address this question, which should await an occasion when more substantial consideration can be given to the issue.

The finding that the gravity of the impropriety was of the highest order

65. We turn then to the requirement in s138(3)(d) that the Court take into account 'the gravity of the impropriety or contravention'. His Honour found that 'the gravity of the impropriety or contravention is of the highest order'. The trial judge referred to the following factors relied upon by the prosecution. First, that there was no deliberate misstatement as to the facts asserted in the affidavit. Second, that the officers who attended at the relevant premises were of the positive belief that they were authorised to enter and that there was no evidence of impropriety on their part. Third, that steps had been taken by the hierarchy of Victoria Police to ensure that this improper practice did not recur. The prosecution had submitted that the contravention was only a technical one brought about by oversight or error and that it should be regarded as a minor and not serious or grave contravention. His Honour rejected this submission. The trial judge considered that the procedures here adopted devalued the significance of the oath which is taken as an objective sign of binding to the maker's conscience. He accepted the defence submission that the swearing of evidence under oath is fundamental to the administration of justice and that the deception 'whether intentional or reckless undermined the whole process'. It appears that in oral argument senior counsel for the applicant conceded that the conduct was serious and grave. In reaching his conclusion he took into account that the practice was endemic within the crime squads of Victoria Police and that the fact that the practice had now been revealed and steps taken to correct it, did not lessen the seriousness of what had occurred. His Honour was right to take into account the fact that the improper conduct was widespread or entrenched as bearing upon the gravity of the impropriety.

66. The conclusion expressed by his Honour appears to draw upon the language employed by the first respondent in his written submission that the impropriety was 'of such a high order' that the evidence should not be admitted. If that is all his Honour intended, his Honour's conclusion could not be successfully impugned.

67. At the least serious end of the spectrum of improper conduct would be that which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety. In the middle of the range would be conduct which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal. At the most serious end of the range would be conduct which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct. Cases such as *Ridgeway* exemplify this category of impropriety. There are of course other factors which will bear upon how seriously the impropriety should be characterised such as the nature of the illegality and the extent to which it is widespread.

68. If the conduct was deliberate as the trial judge has found, and we assume for present purposes that his Honour meant thereby that it was knowingly illegal, it was not conduct that fell at the most serious end of the range. It was not engaged in for the purpose of obtaining an advantage that could not by proper conduct have been obtained. We are not, however, persuaded that his Honour intended by the use of the phrase 'impropriety of the highest order' to convey more than was submitted by the respondents, that the impropriety was 'of such a high order' as to justify the exclusion of the evidence. This specific error is therefore not made out.

State of mind of officers

69. Section 138(3)(e) required his Honour to take into account whether the impropriety or contravention was deliberate or reckless. His Honour found as follows:

> On the evidence before me, I do not accept this was not a deliberate practice by these two officers. I find that it reflected the general behaviour of members of the crime squads of the Victoria Police at the relevant time.
>
> In the alternate at the very least it is reckless behaviour of the highest order. The officers made a conscious decision to follow the practice that has been outlined. This did not include the swearing of an oath. The requirements of s81(1) of the *Drugs Poisons and Controlled Substances Act* and their experience as police officers should have indicated to them that the practice they were adopting was totally incorrect. A mere reading of the words of the affidavit would similarly suggest that to any junior police officer, let alone officers of such ranks and experience.
>
> The practice illustrates at the very least a 'don't care' attitude or conduct of such carelessness that the reception of the evidence could be seen to compromise the integrity of our legal processes.

70. The applicant contends that his Honour erred in his finding of fact that the officers' conduct was deliberate. These findings also give rise to the complaint that his Honour erred in finding the officers' conduct to be reckless. The applicant also contended that his Honour did not apply the correct test to determine whether the conduct was reckless and that his value judgment that it was 'reckless behaviour of the highest order' could not be supported by the evidence.

71. His Honour's findings as to the officers' state of mind are curiously expressed. The finding of deliberate conduct was expressed in terms of a 'deliberate practice' that 'reflected the general behaviour of members of the crime squads of the Victoria Police. The trial judge also said in his conclusions that it had not been satisfactorily explained to him why this practice had developed. He said, 'cutting corners of culture were mentioned.' But neither Senior Sergeant McIntyre or Inspector Davies proffered such an explanation for their conduct.

72. The affirmative finding of reckless behaviour was also rested upon a 'conscious decision to follow the practice that had been outlined'. Similarly, it was the practice which was said to illustrate the conduct involving carelessness. It is difficult to see how the existence of the endemic practice assisted his Honour in reaching a conclusion as to whether in following that practice, these officers knew that their conduct was illegal or were reckless or careless as to whether the practice they were following was illegal. If anything it appears to us that the longer standing the practice they had followed, the greater the likelihood that there would be inadvertence to the fact that an oath or affirmation was required. It is difficult to imagine why a police officer, to avoid the extra 20 seconds of taking an oath or making an affirmation, would knowingly undertake the risk of losing all of the evidence he obtained.

73. The form in which his Honour expressed his findings gave rise to the applicant's submission that it was not clear that his Honour found that the officers intended to subvert the legal requirement that the content of the affidavit be sworn to on oath or be affirmed. It led to the further submission that the conduct of other police members did not provide a basis upon which to elevate these officers' conduct to a deliberate contravention. The important consideration was the state of mind of these officers. In our view, these submissions had a certain force. A deliberate or conscious decision to continue to implement a practice of longstanding does not illuminate the question whether these officers knew the practice was illegal.

74. We have already referred to the respondents' submissions before his Honour and which were adopted and amplified on the appeal. It can be seen from the first respondent's written submission, to which we have referred, that his Honour adopted the submission of the first respondent, who invited a finding that the officers' practice was deliberate or was at the very least reckless or was conduct at the very least of a particular order of carelessness.

75. It should at the outset be observed that there was a logical difficulty about alternate findings of fact, particularly where the second and third findings both assert that 'at the very least' they are the findings that should be made. Leaving to one side that logical conundrum, we turn first to the applicant's contention that his Honour's findings could not be supported on the evidence.

Finding that the officers' conduct was deliberate

76. We have already mentioned that following the completion of Senior Sergeant McIntyre's testimony the trial judge had stated that he did not regard Senior Sergeant McIntyre's conduct as deliberate. The questions which his Honour put to Senior Sergeant McIntyre, which we have set out above, reflected his Honour's understanding of the effect of his evidence. The questions fully explain why his Honour thereafter expressed the view that he did not regard Senior Sergeant McIntyre's conduct as deliberate. His Honour also stated during final submissions that he did not suggest the police contrived to subvert the legal system by not swearing affidavits.[34] The first respondent's submission before his Honour also acknowledged that though McIntyre understood the 'oath' he had failed to give any thought to its meaning and that of the word 'sworn'. This was consistent with the view expressed by the trial judge during the course of submissions when he said, 'We can all come to the conclusion that their state of mind was that they were absolute dimwits.' Even in his reasons his Honour expressed a view about the practice not readily reconcilable with the conduct being deliberate when he said:

> In my view such practice is an indicator of, at least, a blatantly casual attitude to the responsibilities of a police officer applying for a search warrant.

77. The respondents' submissions which found favour with his Honour, that the evidence led from the witnesses Hermans and Guerin that McIntyre and Davies would, as part of their training and experience as police officers, have come to learn precisely what is meant by the words 'oath' and 'sworn', does not in our view advance the question as to whether the officers' evidence that they followed this practice without turning their mind to the requirement of the oath was truthful.

78. Be all that as it may, the applicant can derive only limited assistance from the views his Honour expressed prior to his ruling. A judge is entitled in argument to test counsel and also express preliminary views. He may change his mind.

79. On appeal the respondents submitted that the trial judge's finding as to the credibility of Senior Sergeant McIntyre could not be challenged as his Honour had the advantage denied to the Court of Appeal of observing the demeanour of the witness and the manner in which he gave his evidence. We must make allowance for the advantage which the trial judge has enjoyed in seeing and hearing the witnesses. The value and importance of that advantage, however, will vary according to the class of case.[35] Had there been something in the manner in which Senior Sergeant McIntyre had given his testimony that led the trial judge to doubt the truthfulness of McIntyre's assertion that he had given no thought to the fact that the affidavit was not sworn, one would not have expected his Honour to express the view which he did after McIntyre's evidence had been completed. We have reviewed the testimony of Senior Sergeant McIntyre and can well understand why his Honour then held the view that the conduct of Senior Sergeant McIntyre was not deliberate. That said, we note that his Honour had not yet heard the evidence of Inspector Davies nor had he the benefit of the substantial submissions made on behalf of the respondents.

80. It was for the applicant to demonstrate that it was not open to the trial judge to ultimately form the view that he did as to the officers' credibility. There is considerable force in the applicant's submission that the practice followed by McIntyre and Davies was neither deliberate, in the sense of knowingly illegal, or reckless but was rather inadvertent. The evidence did not show that this was an intentional abuse of power or a wilful disregard of rights.[36] Having regard to s142(2) of the *Evidence Act* and the requirement that the standard of proof is the balance of probabilities and keeping also in mind the principle in *Briginshaw*,[37] there were countervailing reasons to a finding that this was deliberate conduct.

81. The analysis by Mason and Deane JJ in *Norbis v Norbis*[38] of the characteristics of a discretionary decision emphasises the limitation on appellate intervention in these terms:

> The principles enunciated in *House v The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.

82. The finding of fact by the trial judge, if it was based to any substantial degree on the credibility of the two police officers, cannot be set aside because we may think that the probabilities of the case are strongly against that finding of fact. In such circumstances, as the joint judgment in *Devries v Australian National Railways Commission* states:[39]

> the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'.

83. Allowing for the view that the probabilities of the case are strongly against his Honour's finding and the other concerns we have expressed as to the reasoning employed by his Honour, it cannot be said that the finding was glaringly improbable or was not one reasonably open. This error has not been established.

Findings that the officers were at the very least reckless and that the recklessness was 'of the highest order'

84. Aspects of the manner in which his Honour dealt with the alternate finding that the officers were reckless are also problematic. His Honour cited a passage from the decision in *R v Helmhout* as setting out the appropriate test for recklessness:[40]

> Recklessness must involve as a minimum, some advertence to the possibility of or breach of some obligation, duty or standard of propriety or some relevant Australian law or obligation, and a conscious decision to proceed regardless, or alternatively a 'don't care' attitude, generally.

85. That passage accords with the conventional understanding of recklessness within the criminal law. Conduct would be reckless if the officer had foresight that it might be illegal but proceeded with indifference as to whether that was so. What is described as an alternative of a 'don't care' attitude expressed in the passage from *Helmhout* must be understood as meaning that the offender, recognising that the conduct might be illegal, did not care whether it was. As can be seen from the passage of his Honour's reasons quoted above, he employed the 'don't care' attitude in adopting the first respondent's written submission that the officers' conduct was of such carelessness that the reception of the evidence could be seen to compromise the integrity of the legal process. Any confidence that his Honour drew the necessary distinction between recklessness and carelessness is not enhanced by the observations that he made to counsel during argument that 'whether careless and reckless have the same meaning is probably neither here nor there.'

86. We also agree with the applicant's submission that nowhere does his Honour make clear what test he has applied. His Honour only stated that the officers made a 'conscious decision to follow the practice'. The reasoning leaves open the real possibility that there may have been a misuse of the alternative of a 'don't care' attitude expressed in *Helmhout* and that his Honour did not apply the correct test.

87. The concern we have as to his Honour's approach is exacerbated by the fact that his Honour in these critical findings, after adverting to the requirements of s81(1) of the Act and the experience of the officers, concludes that those matters 'should have indicated to them that the practice they were adopting was totally incorrect'.[41] That does not disclose whether his Honour was satisfied that they had in fact adverted to their conduct being illegal. Again the observations made during argument do little to allay concern. His Honour was to observe:[42]

> irrespective of what they thought about it ... it's purporting to be an affidavit and they should have known that it wasn't, given their training and they are deceiving the court, whether deliberately or recklessly or carelessly.

88. The applicant also submitted that the evidence could not support a finding that the officers were reckless or that it was recklessness of the highest order. Assuming that his Honour had applied the correct test, we are not persuaded, for the reasons that we have already given in relation to the attack upon his Honour's finding that the conduct was deliberate, that the applicant has discharged the high onus of establishing that a finding of recklessness was not reasonably open. We have already dealt with the difficulties arising from the use of the phrase 'of the highest order' with respect to his Honour's finding as to the gravity of the impropriety. For the reasons already given we are unable to conclude that a finding of that nature was not open.

89. As the applicant is unable to discharge its onus of establishing that it was not open to the trial judge to find that the conduct of the officers was deliberate, any error that his Honour made with respect to his finding of reckless behaviour will not advance the applicant's position.

90. We turn finally to the contention that the discretion was wrongly exercised. As the court in *MD* stated, s138(1) requires the trial judge to apply a very general standard, that is, to decide whether 'the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.' Moreover, the section calls for 'an overall assessment' in the light of the factors mentioned in s138(3). Because the assessment called for a value judgment in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion with which we are not entitled to interfere unless persuaded that it was an opinion that was not reasonably open. This is not an appeal where the Court may 'decide for itself' whether the desirability of admitting the evidence outweighs its undesirability.[43]

91. Once it is accepted that it was open to his Honour to find that the officer's conduct was deliberate in the sense that it was knowingly illegal, it follows that the applicant is unable to discharge the burden of establishing that it was not open to the trial judge to conclude that the desirability of excluding the evidence outweighed the desirability of admitting it. The decision was reasonably open because of the finding that the conduct was deliberate, meaning knowingly illegal, and that the gravity of the impropriety was of a high order.

92. Although we have concluded that the appeal must be dismissed we would not wish it to be thought that the discretion should necessarily be exercised in the same way were the same issues to arise again for consideration in similar circumstances. We have identified error in his Honour's reasons and expressed our serious reservations as to various findings made by his Honour. It should not be assumed that we would have made like findings or that we would have exercised the discretion in the same way had a finding of inadvertent or careless conduct been made.

93. We shall grant leave to appeal but dismiss the appeal.

---

[1] [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202.
[2] Ibid 504–5.
[3] *R v O'Donoghue* (1988) 34 A Crim R 397, 401.
[4] *Hopley v R* [2008] NSWCCA 105, [28]; *R v Merritt* [2004] NSWCCA 19; (2004) 59 NSWLR 557, 573 [61]; 146 A Crim R 309.
[5] *Parker v Comptroller-General of Customs* [2007] NSWCA 348; (2007) 243 ALR 574, [57]–[58]; 232 FLR 362;.
[6] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[7] [1995] HCA 66; (1995) 184 CLR 19; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1.

[8] *Bunning v Cross* (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[9] Transcript of Proceedings, *Director of Public Prosecutions v Marijancevic, Joseph*; *Preece, Caine; Preece, Nola* (Unreported, County Court of Victoria, Melbourne, Judge Montgomery, 18 October 2011 and 25 October 2011) 707–8 ('Transcript').
[10] Ibid 714.
[11] Ibid 714–717.
[12] Ibid 724, 727.
[13] Ibid 840–841.
[14] Ibid 848.
[15] Ibid 959.
[16] Ibid 959–962.
[17] Ibid 1029–1030.
[18] Ibid 1032–1033.
[19] Ibid 1034–1035.
[20] Ibid 1045.
[21] Ibid 1052.
[22] Ibid 1056.
[23] *R v Phan* [2003] NSWCCA 205, [16].
[24] *DPP v Nicholls* [2001] NSWSC 523; (2001) 123 A Crim R 66, [23].
[25] *R v Helmhout* [2001] NSWCCA 372, [33].
[26] [2003] VSCA 224; (2003) 9 VR 119.
[27] *R v Helmhout* [2001] NSWCCA 372, [33].
[28] Transcript 1260 - 1261
[29] Bolands and Sayers, *Oaths and Affirmations* (2nd Edition, Stevens) 1961, Chapter 4; *Allen v Taylor* (1870) 10 Eq. 52; *Eddows v Argentine Loan and Agency Co* (1890) 59 LJ Ch 392; *Regina v Howitt; Ex parte Walker* [1884] VicLawRp 10; (1884) 10 VLR 320.
[30] *Magistrates Court (Consequential Amendments) Act* 1989 Schedule cl 42.56.
[31] [1990] HCA 26; (1990) 170 CLR 104, [5]; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.
[32] [1981] FCA 31; (1981) 52 FLR 123, 142; 34 ALR 496;. See also *R v Burrell* [2001] NSWSC 120, [25].
[33] (2002) 132 A Crim R 169; [2002] NSWCCA 284, [95].
[34] Transcript 1141.
[35] *Devries v Australian National Railways Commission* [1993] HCA 78; 112 ALR 641; (1993) 67 ALJR 528; (1993) 177 CLR 472, 479 (Deane and Dawson JJ).
[36] *R v Jamieson* [2003] VSCA 224; (2003) 9 VR 119.
[37] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; 12 ALJR 100.
[38] [1986] HCA 17; (1986) 161 CLR 513; [1986] FLC 91-712; 65 ALR 12, 16; (1986) 60 ALJR 335; (1986) 10 Fam LR 819.
[39] *Devries v Australian National Railways Commission* [1993] HCA 78; (1993) 177 CLR 472, 479; (1993) 112 ALR 641; (1993) 67 ALJR 528;, (Brennan, Gaudron and McHugh JJ); *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531; (1979) 23 ALR 405; (1979) 53 ALJR 293; *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118; (2003) 197 ALR 201; (2003) 77 ALJR 989; (2003) 38 MVR 1; (2003) 24 Leg Rep 2.
[40] [2001] NSWCCA 372, [33].
[41] Transcript 1250.
[42] Ibid 1149.
[43] See for example *R v Zhang* [2005] NSWCCA 437; (2005) 227 ALR 311; 196 FLR 152; 158 A Crim R 504.

APPEARANCES: For the appellant DPP. Mr N Papas SC with Ms A Sampson, counsel. Mr C Hyland, solicitor for Public Prosecutions. For the first respondent Marijancevic: Mr P Tehan QC with Mr M Pena-Rees, counsel. Revill & Papa, solicitors. For the second respondent Caine Preece: Mr M Croucher with Mr M Gambleton, counsel. Victoria Legal Aid. For the third respondent Nola Preece: Mr L Baker, counsel. Chester Metcalfe & Co, solicitors.