30/91

SUPREME COURT OF VICTORIA

CHIEF COMMISSIONER of POLICE v BIRTLES

Nathan J

25 March, 27 September 1991

PROCEDURE – CRIMINAL PROCEEDINGS – SUBPOENA FOR PRODUCTION OF STATEMENTS – CLAIM OF PUBLIC INTEREST IMMUNITY – TEST TO BE APPLIED IN ALLOWING ACCESS TO DOCUMENTS – WHETHER MAGISTRATE SHOULD CONTINUE WITH HEARING – COSTS – WHETHER POWER TO ORDER COSTS AGAINST A NON-PARTY: *MAGISTRATES' COURT ACT* 1989, S131.

Following the laying of charges, B. made a complaint to the Police Internal Investigation Division (IID) which investigated the matter obtaining statements from a number of persons. When the charges came on for hearing, B. caused the issue of a subpoena for the statements to IID to be produced. Objection to production was claimed on the ground of public interest immunity; however, without inspecting the statements, the magistrate ordered that they be produced and the Chief Commissioner of Police to pay the costs of the hearing to that time. Upon appeal—

HELD: Appeal allowed. Matter remitted for hearing before another magistrate.
(1) Where an objection to the production of documents is made on the grounds of public interest immunity, generally speaking a magistrate should read or examine the material prior to adjudicating upon the existence or extent of the immunity.
***Waind v Hill and National Employers Mutual General Association* 3 ATR 726; [1973] 1 NSWLR 372; [1973] AEGR 66, followed.**

(2) Generally speaking a magistrate who deals with an objection to the production of documents should proceed as the final adjudicator unless it would be unjust to do so.

(3) Having regard to the provisions of s131 of the *Magistrates' Court Act* 1989, a magistrate is empowered to order costs against a non-party.

NATHAN J: [1] Alan Birtles (Birtles) was involved in a fracas with members of the police force, including the informant (Benwell) on 10th October 1989 at Dromana. Benwell charged him with various street offences including assault. Birtles complained, almost immediately, about Benwell's behaviour to Inspector Dainton (Dainton) of the Internal Investigation Division (the IID). Birtles counter-charged Benwell with assault. An IID investigation ensued. On 6th June 1990, Birtles, to the informations laid by Benwell issued a subpoena addressed to Dainton as follows:

> "Produce all statements in respect to the investigation of complaints by Birtles including records of interview of Birtles and any police officers involved in the complaint ... and ... any other documents in relation to the complaint".

On 8th August 1990 an adjourned hearing of the informations came on before the Dromana magistrate. As a preliminary matter the potency of the subpoena was argued. The magistrate ordered all the IID material, including some 30 hours of tape recordings and transcripts thereof (the tapes and transcripts) be produced, and that the Chief Commissioner of Police (Glare) pay the costs of the hearing to that time.

This is an appeal from the Magistrates' Court at Dromana, it has two aspects. The first deals with the extent, if any, of the public interest immunity of the IID material, and the second is whether a non-party, in this case Glare, can be ordered to pay costs in a criminal proceedings.

I need to elaborate the happenings before the magistrate, and the grounds upon which Dainton contended the subpoena could not, in its entirety, be complied with. **[2]** Dainton's counsel tendered to the magistrate an affidavit sworn by the Chief Superintendent of the IID (Ryan). The magistrate read and referred to this affidavit, although he acknowledged that part of its contents were attenuated hearsay and other parts scandalous and prejudical about and to Birtles. Ryan referred to the IID as being divorced from the ordinary police force. However, he also swore that the

IID material contained comments from other persons, adverse to Birtles. He scheduled a number of IID documents for which immunity was not claimed. However, in respect of other unspecified documents, immunity from production was claimed on the following grounds:

(1) Witness Protection: Some documents would enable Birtles to identify persons who had adversely spoken to police about him and thus expose themselves to retribution from him. This ground I shall refer to as Witness Protection in the public interest.

(2) Breach of Confidentiality: Some material was raised by the police after giving undertaking to their sources their identities would not be disclosed. To respond to the subpoena would breach those undertakings and prejudice any subsequent enquiries. This I shall refer to as Breach of Confidence, being the public's interest in maintaining confidence in its police force.

(3) Informer Protection: It was put unless the people who give information to the police can do so without fear of being revealed, then very little information could be expected to be forthcoming.

I shall **[3]** refer to this as Informer Protection, that is the public's interest in maintaining a flow of information to the police. Ryan swore it was not possible to edit the material without distorting it, or to do so because of the enormity of the task would amount to "oppression" in the relevant legal sense. Another ground of immunity was then raised.

Class Immunity: Ryan claimed the tapes and the transcripts arising from the IID investigation including an interview with Benwell, were protected from production absolutely. The basis for such claim arose from the *Police Regulation Act* 1958 No. 6338 s86Q, which it was said created a class of documents, namely those raised as a result of internal police investigations, which were totally immune. The Act controls and regulates the functioning of the police force, s86Q falls within Part IVA which deals with a Police Ombudsman and the mode of dealing with complaints made about the police by the public. It comes within the Division dealing with "Investigation of Complaints". It is sub-headed "Power to require answers etc. of a member of the force". As appropriately edited, it reads:

> "s86Q(1) For the purposes of an investigation into a complaint under s88 ... the Deputy Ombudsman or the Chief Commissioner ... may direct any member ... to answer any relevant question.
> (2) A member who does not comply ... is guilty of an offence ... under s88.
> (3) Except in proceedings for perjury ... s88 ... any answer given pursuant to a direction is not admissible in evidence before any court ... .

Section 88 creates statutory disciplinary offences.

[4] Birtles' counsel conceded the tapes and transcripts could not be used in respect of police disciplinary offences, but said they could in ordinary criminal cases. Counsel for Dainton submitted that a public interest immunity arose because the Act compelled a member to answer enquiries under Part IVA, but otherwise did not abrogate the common law privilege not to incriminate oneself. If the subpoena were to be answered then the tapes and transcripts arising from an IID investigation would subvert a police member's right to protection from self-incrimination, a burden not shared with ordinary members of the community.

The magistrate was then invited to listen to the 30 hours of the four tape recordings. Although not expressly declined the invitation was not taken up. The magistrate then ruled, as there was nothing unusual about the case (*inter alia*) the IID documents should be produced in response to the subpoena. He said there was no public interest immunity attaching to them. As to the tapes and transcripts, the magistrate said s86Q(3) only operated to prevent them being tendered to him for inspection and then, if appropriate, being made available to defence counsel for forensic purpose other than being tendered in evidence.

It is from these rulings and the orders flowing therefrom that this appeal and Notice of Motion, seeking orders that the magistrate's orders be quashed and be prohibited from proceeding further is now before me. The issues of law for adjudication are recited as being, should the magistrate have upheld the public interest immunity claimed on the basis of witness **[5]** protection, breach of confidentiality, informer protection and the class protection claimed for the IID transcripts because of s86Q(3) of the Act? Also, was he empowered to award costs against Glare?

Mr Shaw with Mr Gebhardt, for Dainton, contended the magistrate ought to have examined and read the material. He could then have concluded whether the immunity existed, at least to the extent that it was required to prevent a wrongful conviction of Birtles. This is the nub of the argument before me, it can be put succinctly: where a *bona fide* claim is made in criminal proceedings to resist the production of documents or material upon public interest immunity grounds is a magistrate required to read or examine the material prior to adjudicating upon the existence or extent of the immunity? The answer is Yes, but I shall detail some necessary qualifications that give rise to the next question: should the magistrate who examined the material continue as the adjudicator? The answer is generally Yes, but I shall detail some even more necessary qualifications.

A more important question arises out of the answer to the first, and that what documents fall within the class for which absolute immunity is claimed? This question was not put to the magistrate, but does arise and will be answered when I deal with the class immunity claim. The affirmative answer to the first question, is not so axiomatic as appears. Firstly as to *bona fides*, a claim must be genuine and not for the purposes of obstruction, obfuscation or saving the embarrassment of public officials. Secondly the nature of the criminal proceedings is relevant. Witness **[6]** protection may be importance in all cases, but informer protection in a dispute about after-hours shop trading, less so. The magistrate, and this applies to all judicial officers and tribunal members, have an important threshold issue to consider. Is the claim for immunity made *bona fide*? If it is not, it does not mean that the claim ought to be dismissed. It is the public's interests which must be protected, not punishment of the person who improperly makes the claim. That said, it must follow that a claim not made *bona fide*, requires special consideration because that taint must not be allowed to infect the public's interest. If the taint stems from a claim made to secure anonymity or freedom from embarrassment of public officials, it will fail on that basis. However, if it is otherwise justified it will succeed, subject to such non-immunized disclosure as to the Court may seem appropriate.

These remarks apply equally to a claim, whether made in response to a subpoena, upon Discovery, or Interrogation, or during the hearing. The public's interest is the prime concern, not the stage or step in the judicial process. The power of a magistrate to examine the material upon which a general public interest immunity is claimed, such as witness protection, to prevent a breach of confidentiality, or informer protection is undoubted. *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122 and *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532; (1984) 56 ALR 82; (1984) 59 ALJR 6. Immunity claimed on the basis of witness protection is the least attractive of the general grounds. At some time or another the witness may have to appear in open court, and hence disclose later rather than sooner the identity which is sought to be hidden. Also there are other avenues by which witnesses **[7]** can be protected, for example, bail could be revoked, additional charges laid, or outright police protection.

Breach of confidentiality, is not as unattractive as witness protection, but care must be taken in immunizing material on this basis. Simply making the assertion does not establish it. The administration of justice cannot revolve around individual assurances given by a police member. That which may seem to be a reasonable assurance given in limited circumstances, cannot dictate what may be reasonable in the general conduct of criminal proceedings. Always the paramount concern must be to ensure a fair trial. It cannot be that the frankness and candour which a person may give to a police member following an assurance of confidentiality can outweigh the right of a person to a defence, which might be embedded in those confidential documents. The current of judicial authority is moving in the direction of diminishing the scope of the immunity, not enlarging it, especially in criminal matters (see *Sankey v Whitlam ibid*, *Alister & Ors v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97; (1984) 154 CLR 404, *A & Ors v Hayden & Ors, ibid*, *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1; [1978] AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5, *Science Research Council v Nasser* [1979] UKHL 9; [1980] AC 1028; [1979] 3 All ER 673; [1979] IRLR 465; [1979] ICR 921; [1979] 3 WLR 762, *Pollard v ASIO and Commonwealth* (1987) Magistrates Cases No. 46/87 and for civil matters see *Neilson v Laugharne* [1981] QB 736; [1981] 1 All ER 829; [1981] 2 WLR 537.

Informer protection, is the most cogent of the grounds upon which immunity should be considered. It has a long history within the common law, the basis being that disclosure of material revealing the identity of informers will often be of no importance for the defence, but may be highly

prejudicial to the public by deterring other persons from making similar **[8]** disclosures, (see the Annotation 76 American Law Reports 2nd 262, particularly IIIA para 19). This general principle is subject to the important exception that if it is necessary to disclose the identity of the informer in order to protect the innocence of the accused, then the immunity must be dissolved. (*Scher v United States* 305 US 251; 83 L Ed 151; 59 SCt 174 and *Sankey v Whitlam* and *National Crime Authority v Gould* [1989] FCA 477; (1989) 23 FCR 191; (1989) 90 ALR 489; (1989) 46 A Crim R 1; 18 ALD 721. In all those cases the Court examined the documents to verify the claim. In the case before me, the magistrate did not. He ruled, upon the basis of Dainton's and Ryan's affidavits, that the claim simply could not be made out. He stated that similar claims had been previously rejected and the rights of an individual should not be compromised, by withholding an answer to the subpoena.

With respect to the magistrate, (and I do not use that phrase here merely as a platitude) he should have followed, as I choose to do, the procedure set out in *Waind v Hill and National Employers Mutual General Association* 3 ATR 726; [1973] 1 NSWLR 372; [1973] AEGR 66. The procedure as there set out and expanded by me to fit the exigencies of this case is as follows. First ensure that there has been obedience to the subpoena. Second, ascertain whether the public interest immunity is genuinely sought, and not being pursued for an ulterior purpose, extraneous to that interest. However, even if pursued in part *mala fide*, the documents may still need to be examined in order to protect the public interest. If their bulk imposes an oppressive burden, that may be evidence of an extraneous purpose. Third, receive the disputed material and then fourth, hear the objections to the production thereof and **[9]** any counter arguments. Fifth, decide whether the claim for immunity is made out. Sixth, in those cases where the claim has been rejected, to decide when inspection of the material may be had and on what terms.

Here the magistrate rejected the claims of immunity, probably having been daunted by the 30 hours of tapes referred to in the claim for class immunity. The magistrate is not to be criticized for this. The following facts, about Magistrates' Courts must be acknowledged. They are by far the busiest courts within the hierarchy, more than 90 percent by number, of criminal cases are despatched by them. The sheer volume of business and the need for expedition must be taken into account. Next, the system imposes upon them a double responsibility, they are the adjudicators of both facts and the law. They customarily sit alone and do not have the assistance of assessors or fellow tribunal or board members. These considerations make the magistrate immune from criticism in this case.

I continue now to spell out the appropriate procedure to be pursued by magistrates, a method which is probably suitable for other non-jury tribunals. Seventh, if the claim of immunity displays even the slightest merit, or as it was put in *Alister's Case* "is on the cards" (per Gibbs CJ) the magistrate has a legal obligation to examine its merits. This may require the adduction of further evidence on the part of the party claiming the immunity, and that evidence should be subject to cross and re-examination. It may be there will be circumstances where that evidence should be heard *in camera*, when the usual principles will apply.

[10] The next issue to arise is whether the magistrate who has heard the application should proceed as the final adjudicator? In most cases the answer would be Yes. There is little authority about this point as the cases deal mostly with jury actions (except *Sankey*). Even though the evidence in support of the claim could be the wildest hearsay or simply scandalous or disparaging, as was the latter in this case, a magistrate can be expected to put such matters aside and proceed to despatch the case on its merits. There will be some cases, hopefully rare and exceptional where a magistrate who has heard the application for immunity may feel so compromised by evidence either accepted or rejected in that hearing, that she or he may direct that the merits of the case be heard by another magistrate. Or there may be cases where the parties feel their interests have been ruled upon in the immunity hearing, or that to proceed before the same magistrate would create an impression in the mind of an untutored observer, the appearance of injustice. In these cases a further application to have the matter referred to another magistrate would be justified. In my view, due to the extended argument before the Dromana magistrate, which it is not necessary for me to detail here, this is a case which now should be referred to another magistrate. I will so order.

Class Immunity: I turn now to the class immunity claim. This appears to be restricted to the tapes

and transcripts of the interviews with police members raised as a result of the IID investigation of Birtles' complaints. In my view the **[11]** construction of the Act does not present difficulty, (and certainly none of the kind which confronted Gallop J when he had to consider Northern Territory and ACT legislation in *Liddle v Owen* (1978) 21 ALR 286 and *Ninness v Graham* (1986) 70 ACTR 1; (1986) 86 FLR 138 respectively). Section 86Q(1) creates a power of direction vested in the Deputy Ombudsman or Chief Commissioner. This power obliges a member of the police force during the course of a complaint investigation to respond to any relevant question. Sub-Section (2) creates an offence of failing to comply with a direction, and sub-s(3) creates an immunity for those responses to directions, by making them inadmissible in any court. (The exception perjury is not relevant here). Only those responses to a direction become inadmissible, not those which are given voluntarily even if reluctantly. However, admissibility of the transcripts is not the critical issue here: which is, whether the transcripts as a class whatever they contain, are immune from production? The answer is Yes, subject only to the inchoate right of the maker of the response with the consent of the Deputy Ombudsman or Chief Commissioner to waive it. The Ombudsman and Commissioner would have the same right, subject to the makers consent.

The Act establishes an internal method of enquiring into the public's complaints about the police, the right to resist self-incrimination is abrogated. In these circumstances the Act requires the "unreserved communication" between enquirer and interviewee, especially within the police force, which is a criterion of the class to which public interest immunity adheres. In my view the line of judicial authority is now **[12]** overwhelming, see from *Smith v East India Co* (1841) 1 Ph 50 at 55 to *Conway v Rimmer* [1968] UKHL 2; [1968] AC 910 per Lord Reid at 953 see p28; [1968] 1 All ER 874; [1968] 2 WLR 998:

> "It has never been denied that they (i.e. the results of internal police enquiries) are entitled to Crown privilege with regard to documents and it is essential that they should have it".

and *Rogers v Home Secretary* [1973] AC 388; [1972] 2 All ER 1057 per Lord Simon of Glaisdale at AC 407, *Hehir v Commissioner of Police* [1982] 2 All ER 335; (1982) 1 WLR 715 per Lawton LJ who at p721 in reference to *Neilson v Laugharne* [1981] QB 736; [1981] 1 All ER 829; [1981] 2 WLR 537 said:

> "The inference which I draw from all three judgments is that the court was throwing the mantle of public interest immunity over *all* statements made in the course of a section 49 investigation". (his emphasis)

In the judgments of Gallop J already cited in *Liddle v Owen*, he upheld a claim for privilege in like circumstances to these. He was dissuaded from examining the documents, on the ground that the administration of justice would not be frustrated. In *Ninness v Graham* the subpoena was of a "fishing" character. Some authorities suggest that if Benwell were minded to he could waive the immunity in respect of his statements to the police investigation. The power to do so seems to be implied in Lord Glaisdale's opinion in *R v Lewes Justices; Ex parte Secretary of State for the Home Department* [1973] AC 388 at 408; [1972] 2 All ER 1057. However, as it is a public interest immunity and not one personal to the maker of the statement, I do not consider that the police member alone should have the authority to waive the immunity. It must, in my view, be supported by the authority to whom the statement was addressed in the first place.

Under this Act that is either the Deputy Ombudsman or the Chief **[13]** Commissioner. The immunity is for the public benefit not that of the police member, it is against that benefit, the capacity to waive must be assessed. I make these comments cognisant of the judicial authority that a claim for immunity is less likely to be upheld in criminal rather than civil proceedings (see *Sankey v Whitlam*, *Conway v Rimmer* and also *Australian National Airlines Commission v Commonwealth* [1975] HCA 33; (1975) 132 CLR 582; (1975) 6 ALR 433; (1975) 49 ALJR 338). It follows that the immunity created by s86Q is restricted to those IID documents which come into being as a result of a direction given under the section. The class does not include all IID documents, in respect of which an ordinary claim for public interest immunity based upon, what I have called the general consideration, may be made. The distinguishing feature which creates the absolutely immune class of documents, is that they arise out of the unreserved communications between police members, in this case "unreserved" because the recorded answers have been given statutory protection in circumstances where the right to silence has been abrogated.

In my view there is only one exception to the class immunity and that is if an accused can show the tapes and transcripts, if produced would, or at the lowest be very likely to establish innocence. The onus of establishing this likelihood must rest upon the person who seeks to upset the immunity. Very cogent reasons, as to likelihood would need to be advanced. Mere assertion or declarations of lack of faith in the police force on the particular member would not be enough. The reasons for this exception are obvious and stem from our criminal justice system which would prefer to see a **[14]** guilty person free than an innocent person convicted. The authorities to which I have referred to throughout support these propositions.

In this case nothing suggests such an attack could be made upon the s86Q transcripts, and it follows that the claim for class immunity appears to have been well founded. However, that argument was not run before the magistrate and I should not preempt it. I will remit all matters to another magistrate at Dromana for further hearing in accord with this judgment. The motion seeking orders in the nature of *certiorari* and prohibition is granted and I will discuss with counsel its actual terms. The answers to the issues are as follows:

(1) The question of whether the general immunity exists cannot be answered until the material for which immunity was claimed is examined. Those documents for which a class immunity was claimed should not be produced and to that extent the answer is Yes.

(2) A magistrate would now be empowered to order costs against a non-party in this case the Commissioner (*Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 and *Magistrates' Court Act* 1989 s131). However, as the issue upon which costs were awarded has been referred to another magistrate, so too must this question because a general discretion must be exercised, and I cannot pre-empt it.

APPEARANCES: For the appellants Glare & Dainton: Mr B Shaw, QC with Mr SP Gebhardt, counsel. For the respondent Birtles. Mr P Goldberg, counsel. Richmond & Bennison, solicitors.
