42/91

SUPREME COURT OF VICTORIA

WALSH v LOUGHNAN (No.2)
(sub nom Glare and Another v The Magistrates' Court of Victoria and Another)

Southwell J

1, 10 July 1991 — [1992] VicRp 7; [1992] 1 VR 91

PROCEDURE – CRIMINAL LAW – APPLICATION FOR BLOOD SAMPLE TO BE TAKEN FROM SUSPECT – SUB-POENAS ISSUED FOR POLICE TO PRODUCE VARIOUS DOCUMENTS – WHETHER SUB-POENAS VALID – WHETHER APPLICATION "A CRIMINAL PROCEEDING": *MAGISTRATES' COURT ACT* 1989, S43; *CRIMES ACT* 1958 S464U.

An application under s464U of the *Crimes Act* 1958 for an order that a blood sample be taken from a person believed to have committed an offence is a "criminal proceeding" within the meaning of s43 of the *Magistrates' Court Act* 1989. Accordingly, sub-poenas which required police to produce various documents were validly issued.

SOUTHWELL J: **[1]** The defendant is suspected by the police of having raped and murdered Heather Joy Nelson at Geelong on 24 June 1988. He has not been charged with the offence. Semen was found in the vaginal area of the deceased. The police wish to obtain an order from a Magistrates' Court pursuant to s464U of the *Crimes Act* 1958 (s464U") (a section inserted by the *Crimes (Blood Samples) Act* 1989) that a blood sample be taken from Paul Gerrard Loughnan ("the defendant"). It was said that scientific testing, known as DNA would establish whether or not the defendant was the offender.

On 14 June 1990 application was made by Sen Sgt Walsh to the Magistrates' Court at Melbourne for such an order. Sen Sgt Walsh and the defendant were represented by counsel. The application was dismissed, upon the basis that the Magistrate was not satisfied as to proof of certain matters required to be proved under s464U.

On 13 December 1990 Vincent J made absolute an order nisi to review that decision, and the matter was remitted to the Magistrates' Court. It was eventually called on for hearing on 13 May 1991. In the meantime, summonses to produce various documents were served upon the Chief Commissioner of Police and Sen Sgt Walsh ("the plaintiffs"). On 13 May 1991 the question of the validity of those summonses ("the subpoenas") was argued as a preliminary issue. The question was whether the application made by the plaintiffs under s464U was "a criminal proceeding" within the meaning of s43 of the *Magistrates' Court Act* 1989 ("the Act"). If it was, the subpoenas were validly issued; if it was not, the question then arose **[2]** whether the Magistrates' Court had inherent power to issue a subpoena.

The subpoenas called for the production of a very wide range of documents, not only in relation to the scientific testing of articles found at the scene, of articles seized from the possession of the defendant, and of articles belonging to all other suspects, but also "all documentation relevant to the investigation ... including all statements from any person interviewed by the police ... and ... all notes of all investigating police officers".

So it appears, compliance with the subpoenas will involve the production of voluminous police files. The question whether the Court should first sift the material was not argued in this Court (see *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97; and *R v Saleam* (1989) 16 NSWLR 14; 39 A Crim R 406) although that matter was raised in the Court below, and the Magistrate in the result held that he should examine the material, and in accordance with the quoted authorities, release to defendant's counsel those documents in respect of which he believed it to be "on the cards" that they would materially assist the defence – see

per Gibbs CJ in *Alister* at CLR p414. The Magistrate had held that the subpoenas were validly issued, in that the application under s464U was a "criminal proceeding" within the meaning of s43 of the Act, which provides:

> "Any party to a criminal proceeding in the Court may apply for the issue of a witness summons."

The plaintiffs took out an originating motion, and summons thereon, with the Magistrates' Court at Melbourne as the defendant, seeking, *inter alia*, a declaration that the **[3]** application was not a "criminal proceeding" within the meaning of s43 of the Act, and an order setting aside the subpoenas. On 29 May 1991 Master Barker, by consent, ordered that Loughnan be joined as a defendant. [*His Honour then set out part of s464U of the* Crimes Act *1958 and continued*] ....

[4] Pursuant to s464W the Court may issue a warrant for the arrest of the suspect to enable the police (under sub-section (1)) "to bring the person before the Court for the hearing of the application" and (under sub-section (j)) "if that application is granted, to detain the person for so long as reasonably permits the taking of a blood sample". Reasonable force may be used by the police "to assist a medical practitioner to take the sample" (s464Y(1)); the taking of the sample must be video-recorded (s464Y(3)); the sample must be analysed in accordance with prescribed procedures (s464Z); the **[5]** forensic report must be provided to the suspect or his legal practitioner (s464 2B); other than in exceptional circumstances, evidence in respect of the blood sample is not admissible if the various requirements have not been met (s464(2C).

Before turning to the submissions of counsel, it should be said that Mr Faris QC, who appeared with Mr Szabo for the defendant, did not dispute the submission of Mr Nash QC, who appeared with Mr McArdle for the plaintiffs, that the refusal of the Magistrate to set aside the subpoenas constituted an order in respect of which the declaratory relief here sought would lie, should it be shown that the subpoenas should not have been issued.

Mr Nash submitted that the requirement of s464U(4) that the order could not be made unless the suspect was present did not carry with it any implied power to subpoena; that s464U is a section dealing with a special type of search warrant, in the investigative stage; it was said that even if the section contemplates a hearing in which the suspect has a right to participate, nevertheless there is no power to issue subpoenas; that power was to be found only in s43.

It was said that there was no right in a suspect to apply for the issue of subpoenas until a "criminal proceeding" has commenced; that could only be accomplished under s26 of the Act, which provides that "a criminal proceeding must be commenced by filing a charge ...". It was said that s26 is crucial to the argument; that since the application did not constitute the "laying of a charge", no "criminal proceeding" was on foot. [*His Honour then referred to further submissions, part of the* Coldrey report*,* Hansard *and two decisions said to be relevant, and continued*] ... **[12]** Finally, Mr Faris submitted that the Court should approach the construction of the legislation with the rules of natural justice in mind; he relied upon a case to which Mr Nash had referred – *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651, where the High Court considered the refusal of a coroner to permit counsel (who represented the parents of a boy whose death was under investigation) to make final submissions to the coroner. The Court considered the application of the rules of natural justice. In the judgment of Mason CJ, Deane and McHugh JJ at CLR p598, it is said:

> "It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment."

Later, on CLR pp598-599, it is said that the question is whether the terms of the Act there under consideration:

> ".. display a legislative intention to exclude the rules of natural justice and in particular the common law right of the appellants to be heard in opposition to any potential finding which would prejudice their interests."

And at CLR p599:

> ".. the appellants have a common law right to be heard in opposition to any potential adverse finding in relation to themselves and the deceased unless by express terms or necessary implication the Act has excluded their common law right to be heard."

Before referring to Mr Faris' final submission on the question of the applicability of the rules of natural justice in construing the relevant legislation, I should say that Mr Nash had conceded that if there was a right to **[13]** appear, and to cross-examine witnesses, and to call the suspect as a witness, then there must also be a right to call witnesses. Mr Faris submitted that the latter right was illusory unless there was a power to subpoena witnesses. Mr Faris submitted that the quoted observations from *Annetts v McCann* are important; that in the present case, there is an open court hearing, with the suspect present, perhaps involuntarily, and where adverse findings could be made leading to the taking of a blood sample. It should follow that the suspect has the normal rights of a party in adversarial court proceedings, which must include the right to subpoena.

In my opinion, the first-quoted observations in *Annetts v McCann* provide solid support for the principal contentions of the defendant. The power here conferred is, of course, not directly upon a public official, but upon the Court. However, the effect of the order granting the application is to give power to police and to a medical practitioner gravely to interfere with the ordinary rights of a suspect. Highly intrusive actions are authorised, including the arrest of the suspect, and the possibly forceful insertion of a needle into his person to enable the blood sample to be taken. These considerations lead me to the view that any ambiguity in the legislation should be resolved in favour of those whose personal rights are so seriously affected. I reach that conclusion notwithstanding an acute awareness of the fact that someone in 1988 so savagely interfered with **[14]** the rights of the late Miss Nelson, including her right to live. I agree with the submission of both counsel that if Parliament had wished to make the matter clear, it could easily have done so. It is as if Parliament had either legislated ambiguously so that the courts could fill the difficult gaps or, and perhaps more probably, had simply not turned its attention to the question whether an application under s464U is a "criminal proceeding" within the meaning of s43 of the Act.

If the defendant's contention is upheld, the hearing of an application under s464U may become a long and expensive forerunner to a long and expensive committal proceeding. I doubt whether Parliament had that in mind, – it would appear that the Coldrey committee did not have that in mind. However, if Parliament thought it "essential to ensure that the interests of the suspect are protected", it failed to spell out how that might be achieved. It left it to the courts to do so; and, as it seems to me, the Court should, in the absence of plain words in the legislation excluding the rules of natural justice, so construe the legislation as to give suspects the full protection of those rules. Accordingly, I am of opinion that the Magistrate was correct in holding that an application under s464U is a "criminal proceeding" within the meaning of s43 of the Act; it follows that the subpoenas were properly issued, and that the plaintiffs are not entitled to the relief sought. It is unnecessary to consider the question whether the Magistrates' Court has inherent power to issue subpoenas. The originating motion must be dismissed with costs.

Solicitor for the plaintiffs: Victorian Government Solicitor.
Solicitors for the second defendant: Gargan and Roache.
