34/03; [2003] VSC 488

SUPREME COURT OF VICTORIA

MARKS v BUICK & ANOR

Hansen J

20 November 2003

CRIMINAL LAW – PRACTICE AND PROCEDURE – APPLICATION FOR ORDER THAT A PERSON UNDERGO A COMPULSORY PROCEDURE – MAGISTRATE TO BE SATISFIED THAT THERE ARE REASONABLE GROUNDS TO BELIEVE THAT THE PROCEDURE MAY TEND TO CONFIRM OR DISPROVE THE PERSON'S INVOLVEMENT IN THE COMMISSION OF THE OFFENCE – TEST TO APPLY – APPLICATION GRANTED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958 S464T(3)(f).

Section 464T(3)(f) of the *Crimes Act* 1958 requires satisfaction that there are reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence. The magistrate is entitled to consider regarding the evidence objectively, and it is sufficient that the conduct of the procedure may tend, not that it will, not that it must, not that it probably will, but merely that it may tend to confirm or disprove the involvement of the subject person in the commission of the offence. A positive or a negative might come out of the test. It does not matter. It is an investigative tool. Admissibility is not the decisive issue nor is the fact that evidence of the test may not aid the Crown case at trial. It is whether the test may tend to confirm or disprove. The magistrate was not in error in granting the application and making the order sought.

HANSEN J:

1. Only last week, on 13 November, did a magistrate have before him an application for an order directing an adult person to undergo a compulsory procedure under s464T of the *Crimes Act*. The magistrate made an order that the procedure, being a mouth swab, be conducted. The matter was mentioned to me on 17 November, when the applicant who obtained the order undertook not to enforce it until the hearing of an originating motion, upon which I have heard argument today.

2. The originating motion is by way of a proceeding under Order 56 of the Supreme Court Rules. It seeks, in terms not as directly expressed, that the order be set aside and states two grounds. They are, one, that the magistrate erred in granting the order in that he failed to consider the requirements of s464T, in particular the provisions of para.(f) of sub-s.(3); and, secondly, that he erred in denying the plaintiff natural justice on the basis that he was not informed of the evidence proposed to be led by the prosecution, which evidence directly impacted on the exercise of the magistrate's discretion pursuant to sub-s.(3).

3. The course of argument has better identified the points that are relied upon under the second ground. Basically, that ground, as I apprehend it, contends that, after counsel for the respondent addressed the magistrate pursuant to the right to do so contained in sub-s.(5), the magistrate heard from the solicitor appearing to prosecute and retired to consider his decision without hearing further from counsel on the point that was then made, and came back and gave his decision, still without hearing from counsel for the respondent on that point. Furthermore, I think, it is said that the point made by the prosecutor was one upon which no evidence had been given and which could not be relied upon in the absence of such evidence. That is an outline of the application that has been made.

4. The Magistrates' Court application is dated 13 November 2003. The applicant for the order is Detective Senior Constable Boris Buick. The respondent is Matthew Joseph Marks. He has been committed for trial on one count of murder of Margaret O'Toole, who was found deceased in her unit in Sorell Street, East Malvern on 17 May 2002. It was found on post mortem examination that she had been killed by being struck repeatedly to the head and throat with a blunt instrument.

5. Those facts are referred to in the affidavit sworn by the applicant in support of the

application. The affidavit refers also to three items which have been taken by the investigating police, and they are referred to in the affidavit and in the evidence and submissions before the magistrate as samples A, B and C. Sample A is a swab of material located on a couch at the deceased's unit, sample B is a pair of scissors taken from Marks's possession, and sample C is a swab of material located on the floor of Marks's bedroom at his address. The evidence indicates that the samples, which have been tested, apparently sample A having been tested at a time subsequent to samples B and C, indicate a uniform profile but the profile is not that of the deceased.

6. On 29 October 2003 investigators requested a mouth swab from Marks pursuant to s464R of the *Crimes Act.* The request was refused. That gave rise to the application made to the magistrate.

7. I have referred to the evidence in the affidavit and I will refer to evidence that was before the magistrate. I say that because I am cognisant that this is an application for relief in the nature of *certiorari*, in particular on the ground of error of law on the face of the record. I have been referred to a number of cases which address the principles applicable to the availability of the remedy, including what is meant by the expression "the record". I find it unnecessary in the resolution of this case to refer to those principles. A particular feature of this case is that the materials comprising the application are the application itself and the short affidavit in support, and then there is the order recorded in the records of the court which incorporates by reference the tape of the proceeding. It does so by reference particularly to the reasons of the magistrate contained on the tape, but those reasons themselves refer to the evidence without any deal of elaboration, and to understand what is being said by the magistrate one must attend to the evidence itself. It was for those reasons that I said to counsel in the course of argument that I thought that, subject to anything they may say, in the end the resolution of this case did not turn on any fine distinction as to what was and what was not to be included in the record for the purpose of the remedy.

8. In the circumstances that the respondent to the application, Marks, has been charged with murder and has been committed for trial, counsel for Marks sensibly and correctly, both before the magistrate and me, focused attention only upon para.(f) of sub-s(3) of s464T, in terms of contending that there was error in respect of that element. She also addressed a submission as to whether the magistrate had complied with para.(b) of sub-s(7), but that raises a different issue. It was said by counsel that there was both an error of law on the face of the record and a denial of natural justice. That much in outline is apparent from the grounds of relief stated in the originating motion, but in the presentation of argument counsel for the plaintiff raised what seemed a new point concerning the failure of the magistrate to comply with the requirements of sub-s.(7)(b). That was that he did not state the evidence on which he was satisfied of the matters referred to in sub-s.(3).

9. I deal now with each basis of relief. As far as error of law on the face of the record is concerned, this was, if I may refer to it summarily, put in this way. It was said, in relation to para.(f), that the evidence before the magistrate did not cover all aspects of the section; that it did not disclose the grounds upon which the element in para.(f) might be considered satisfied; and it did not disclose grounds as to why, in respect of para.(f), the procedure was necessary. The submission was developed by reference to the decision earlier this year of Ashley J in *O'Sullivan v Victoria Police*[1] and to another case, a decision of the Court of Appeal in *Ellis v Stevenson and The Magistrates' Court at Melbourne*[2].

10. Essentially, as I understood it, the contention is that there was no material before the magistrate on which he could have been satisfied as to the element in para. (f). There was a lack of evidence. All that the magistrate had was an assertion. This I think was an assertion that appears in the transcript of the proceeding as having been made by Mr Cecil, who appeared for the prosecution, when he said: "What if the defence is raised that it wasn't the respondent who committed the act, but somebody that he knows who did." That is the statement that I mentioned earlier in relation to which counsel for the plaintiff said she had not had an opportunity to respond before the magistrate gave his decision.

11. In the course of her submission today, counsel developed the matter of the lack of evidence that was before the magistrate. I take account of all that was said but summarise as follows. In particular, there was said to be a lack of evidence in terms of satisfying para. (f). It was not

disclosed that the analysis of sample A had been carried out after the analysis of samples B and C. That evidence, it was said, would have enabled the magistrate to determine what had changed since the initial testing and gave rise to the application. Then, it was said, there was a lack of evidence as to the relationship between the deceased and the defendant. It was stated in the oral evidence that there was a family relationship between the deceased and Marks; it was believed the deceased was a great aunt to Marks. The Crown case is that the defendant admitted going to the deceased's home in the days before her death. That might be expected. In the circumstances the evidence of the test would remain neutral to the Crown case. Thus the test, if conducted, would not have the tendency to confirm or disprove the involvement of Marks in the commission of the offence. The result is that there were no reasonable grounds for the belief required to satisfy para. (f). I may not have done full justice to the way in which counsel so competently addressed her submission, but I think that is the essence of it.

12. In the first instance one has to attend to the section itself. It required the magistrate to be satisfied on the balance of probabilities of a number of things. As I have said, it is only the element in para. (f) that is said to suffer from an error of law in the magistrate's decision. It requires satisfaction that there are reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence. This the magistrate is, in my opinion, entitled to consider regarding the evidence before him objectively, and it is important to note that it is sufficient that the conduct of the procedure may tend, not that it will, not that it must, not that it probably will, but merely that it may tend to confirm or disprove the involvement of the subject person in the commission of the offence. A positive or a negative might come out of the test. It does not matter. It is, as Mr McArdle correctly observed, in my view, an investigative tool, notwithstanding that in this case Marks has already been charged with murder. But the trial has not yet occurred.

Moreover, it is a very difficult thing, I think, and it certainly is in the circumstances of this case, to speculate or hypothesise as to the reason or reasons why, in the future, depending on the result of the test, it may be said of it that it may tend to confirm or disprove his involvement. That is not to say that it can not be said now that it may have that consequence. It is rather to say that it is difficult to hypothesise or speculate as to a particular reason why it will have that consequence. The magistrate was rather pressed in that way in the submissions made to him, and in that way, I consider, the submissions were not correctly put in terms of reflecting the issue in para. (f). In the end the magistrate, having retired to consider his decision, returned and in the reasons which he gave and which are contained in the transcription which has been typed and is before me and which is incorporated by reference in the order, he referred to the evidence which had been given on oath by a member of the Homicide Squad. He did not recite that evidence. Plainly enough it was given also in relation to the matters referred to in the affidavit in support.

The evidence was of very short compass indeed, and it seems to me to be somewhat artificial to say that in addition to the magistrate saying that he had heard evidence on oath from the witness setting out the circumstances and the background to the application and in relation to the obtaining of the samples and their analysis, and that they had been shown to be not from the deceased, that it was necessary for him to refer to everything said in the evidence. He referred to the evidence in a summary way and in a way that indicates to me that he considered all of the evidence. He then went on and referred to the section and to the various sub-sections, and in particular to para. (f), and he did so in terms which clearly indicate that he had that paragraph and the requirement of it in mind. He said this towards the end of his reasons:

> "I put to Mr Cecil for the Crown the proposition that the obtaining of a positive match by way of the DNA test would not advance the prosecution cause. He put to me a proposition whereby it is discovered, hypothetically, that on the conduct of the test that is currently sought under this application it is confirmed that the samples do not belong to the defendant and that the samples may belong to somebody known to him. If that proposition came to fruition, that evidence 'may tend to confirm or disprove his involvement in the commission of the offence'. And on the basis on that general power, that is the balance of probabilities, and that interpretation of sub-section (f), I do propose to grant the application."

He then went on to say that the reasons would be incorporated in the record of the court.

13. Mr McArdle said, well, in what he said there, he may or may not have been correct in

the sense that he may have said something that might, on an appeal as distinct from review by prerogative process, have committed an error, but it could not be said, he submitted, that he had not considered the evidence, not considered the relevant paragraph, or that he had misapplied it. He was, in short, entitled to come to that conclusion, even if it might be said in an appeal sense that it was infected by error.

14. I think it is too artificial a point to submit, as counsel for the plaintiff did, that there was a want of evidence, a failure of any materials before the magistrate that could have led him to the conclusion that para. (f) could be considered satisfied. I do not agree. The magistrate was entitled to take account of all of the materials that he had before him and to consider whether, on those materials, he was satisfied, on the balance of probabilities, that there were reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence. The error, I think, at least in part, in the submission is in the attempt it makes to demonstrate a lack of utility in the test in terms of aiding the Crown case at trial. Admissibility, let alone a prognostication as to it, is not the decisive issue in my view. It is whether the test may tend to confirm or disprove. It seems to me that it was open to the magistrate to conclude as he did that there were reasonable grounds in terms of para. (f). In a way, it seemed to me, as I said in the course of argument, that the statement that Mr Cecil made and which I quoted earlier was in a sense a statement of an obvious possibility. Even if the magistrate's reliance on that statement was considered erroneous, it yet remained that the magistrate could otherwise have been satisfied as to para. (f). In that circumstance I would not as a matter of discretion grant relief on account of error of law on the face of the record.

15. The second ground, broadly speaking, that the plaintiff has relied upon was a want of natural justice. I put aside in considering this matter the point taken by Mr McArdle that the rule of procedural fairness relied upon by Ms Randazzo may not be applicable in the circumstance of the unique provision in sub-s(5). I put it aside without finding the need to consider it. Assuming that the magistrate was bound to afford procedural fairness in the relevant sense that is the subject of the submission, that is to say, a reasonable opportunity for counsel to have addressed a point made by the opponent, it seems to me that the answer lies in the fact that there was no attempt made at the time to address a submission in relation to it. It is true that, following the statement, the magistrate said "Thank you" and that he wanted about ten minutes to consider it, and the court was adjourned, and the transcript picks the matter up later when he returned and gave his reasons; but neither immediately following Mr Cecil's statement and before the magistrate left the bench, or when he returned to the bench, did counsel seek the opportunity to respond to the statement, and I think that it does not lie appropriately now to contend that the magistrate, who had been careful first to obtain a submission from the prosecutor and then to hear from counsel for Marks, denied natural justice. I reject the submission.

16. The third ground which has been argued is that the magistrate failed in making the order to state the evidence on which he was satisfied of the matters referred to in sub-s(3). This is the requirement of sub-s(7)(b). It seems to me that, for reasons I have already given, this requirement is seen to be satisfied in the reference by the magistrate to the evidence and in the way that he dealt with the contention in relation to para. (f), and in the incorporation of his reasons in the order of the court. Accordingly I reject that part of the submission.

17. I think I have dealt with the various matters argued, and the result is that the originating motion will be dismissed. (Discussion ensued re costs.) 18. The order will be –

1. That the proceeding be dismissed.

2. That the plaintiff pay the first defendant's costs including reserved costs.

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[1] [2003] VSC 45.
[2] (1996) 86 A Crim R 368.

APPEARANCES: For the plaintiff Marks: Ms C Randazzo SC, counsel. Victoria Legal Aid. For the first defendant Buick: Mr JD McArdle QC and Ms M Williams, counsel. Office of Public Prosecutions.
