25/96; [1996] VSC 41

SUPREME COURT OF VICTORIA — COURT OF APPEAL

ELLIS v STEVENSON and ANOR

Brooking, Phillips and Charles JJA

9, 28 May 1996 — 86 A Crim R 368

CRIMINAL LAW – PROCEDURE – APPLICATION FOR PHYSICAL EXAMINATION OF PERSON – REFUSED BY MAGISTRATE – REQUIREMENTS OF STATUTORY PROVISION – WHETHER ERROR ON PART OF MAGISTRATE: *CRIMES ACT* 1958, s464T(3).

S., a police officer, applied to a magistrate for an order under s464T of the *Crimes Act 1958* ('Act') that E. undergo a physical examination in order to ascertain if E. had certain tattoos on her buttocks. A complainant alleged she had been raped during three separate incidents in which E. and her husband were the active participants. During one or more of these incidents the complainant claimed to have seen two tattoos, one on each side of E.'s buttocks. The magistrate dismissed the application on the grounds that identification was not an issue and the existence of the tattoos did not prove that the sexual assaults took place. Subsequently the dismissal was set aside by a Supreme Court judge who, instead of remitting the matter to the magistrate, made an order that E. undergo the examination forthwith. Upon appeal—

HELD: Appeal allowed. Order that the order made by the Judge that E. undergo the examination set aside. Remitted to the magistrate for determination according to law.
Section 464T of the Act was plainly not designed simply as an investigative tool towards the issue of identity, nor in this case was it necessary that the tattoos should in some way prove E.'s involvement in the alleged crime. Sub-section 464T(3)(f) is not limited to cases in which identification is an issue. All that sub-section 464T(3)(f) requires is that the conduct of the procedure on the person may tend to confirm or disprove her involvement in the commission of the offence. Even if the court is satisfied to the necessary standard of all the conditions otherwise spelled out in the various paragraphs of s464T(3), the court retains some general discretion to refuse an order for the compulsory procedure being sought.

BROOKING, PHILLIPS and CHARLES JJA: *[After setting out the facts, the judge's order under appeal and some detail of the proceedings before the magistrate, the Court continued:]*...**[4]** According to paragraphs 12 to 15 of the affidavit (of the prosecutor) (the correctness of which was not challenged either by affidavit or in argument before this Court), submissions were made in the following terms:-

> "12. Counsel for the defendant then submitted to the magistrate that the particular provisions of s464T under which the application had been brought were designed as an investigative procedure where identity was the key issue. He submitted that the object of the legislation was to assist the police to obtain material which could in some way prove or disprove a person's involvement in the commission of an offence where their identity or presence at a scene, for example, were in question. He submitted that identity in this instance was a complete non-issue, the victim having known the person for a period of 8 years. He submitted that there were any number of alternative means by which the victim could have knowledge of tattoos on the person's buttocks. He posed the question 'How does proof of any tattoos on the person's buttocks go towards proving her involvement in the commission of the alleged offences?' He submitted that it didn't. He submitted that the only gain which proof of the tattoos' existence afforded was in respect of the person's identity, which he had previously submitted was a non-issue.
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> 13. The learned magistrate then asked me [Hercus] the question posed by Mr Galbally, namely 'How does proof of the tattoos go towards proving the respondent's involvement in the alleged offences?'
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> 14. I submitted that if the tattoos were found to be present, and if they matched the description provided by the victim, then this fact was corroborative of the victim's allegations and it would bolster her credibility. I conceded that the identity of the respondent *per se* was not an issue because she was well known to the victim. I submitted that the victim had made certain assertions regarding her knowledge of the tattoos and how she came by this knowledge. I submitted that if at the end of the day a jury accepted the **[5]** victim's version of events, then proof of the existence of the tattoos went towards showing that the respondent had taken part in the alleged offences. I submitted that

whether or not the victim's version of events would be accepted as true is ultimately a matter for the jury, and not for this court in this application.

15. The learned magistrate then asked Mr Galbally if he had anything to say in response to my submissions. Mr Galbally submitted that I had got it wrong. He submitted that the legislation was not designed to provide corroborative evidence to bolster a witness's credibility. He again submitted that it was designed as an investigative tool towards the issue of identity, and that the finding of the tattoos did no more than prove the respondent's identity, which was not in issue, and that the finding of the tattoos did not in any way prove his client's involvement in the alleged offences."

The magistrate then dismissed the application. Although s464T(7)(a) did not require him to give reasons for dismissing the application, the magistrate said –

"It's an unusual application, I've never had one like this before. As identification is not an issue, and the existence of the tattoos do not prove that the sexual assaults took place, I am not going to allow the application."

*[After dealing with the question whether the learned Judge identified error on the part of the magistrate, the Court continued]...***[7]** Section 464T empowers the Magistrates' Court to make the order sought here in certain cases. So far as relevant, those cases are described thus in sub-s(3):

"(3) The Court may make an order directing a person to undergo a [physical examination] if the Court is satisfied on the balance of probabilities that—
(a) the person is a relevant suspect; and

(b) there are reasonable grounds to believe that the person has committed the offence in respect of which the application is made; and

(c) ...(d) ...

(e) in the case of an application to conduct a physical examination, the person who committed the offence had distinguishing marks or injuries, whether acquired during the commission of the offence or otherwise; and

(f) 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; and

(g) the person has refused to give consent to a request under s464R(1) ...; and

(h) in all the circumstances, the making of the order is justified."

It was not in dispute on this appeal that the magistrate should have been satisfied in this case in relation to paragraphs (a), **[8]** (b), and (g). Nor was it in issue that on the balance of probabilities the magistrate should have been satisfied on the material that was before him that the appellant had on her person "distinguishing marks" within the meaning of paragraph (e). The question raised by this appeal was whether the magistrate misdirected himself as to the requirements of paragraph (f).

It will be observed that paragraph (f) requires only that there be "reasonable grounds to believe that" (in this case) the physical examination of the buttocks of the appellant "may tend to confirm or disprove ... her involvement in the commission of" the offences alleged by the complainant. Plainly, where identification is an issue, the existence of "distinguishing marks or injuries" as mentioned in paragraph (e) may attract paragraph (f); however, as his Honour accepted below, paragraph (f) is not limited to cases in which identification is an issue. By the same token, where it is not an issue, if the application for an order under s464T is to be granted, the justification for the making of that order must necessarily be sought elsewhere.

The appellant's principal argument in this Court was that the magistrate had not erred in refusing the application, still less was any error to be identified on the face of the record. Mr Walters, for the appellant, conceded that the case fell within paragraph (f) since he accepted that the existence of anything which might tend to make it more or less probable that the appellant was involved in the commission of the offence would fall within paragraph (f), a concession which implicitly accepts that the argument advanced by counsel for the appellant before the magistrate (referred to in paragraphs 12 and 15 of the affidavit quoted above) was wrong. Mr Walters did not

[9] resist the conclusion that if the magistrate's reasons were to be understood as an adoption of that argument, error was shown on the face of the record which would have entitled the Judge to grant relief in the nature of *certiorari*. His argument was however that the magistrate's reasons were to be interpreted as meaning that although the requirements of paragraph (f) had been satisfied, his rejection of the application was based upon an exercise of discretion on his part under paragraph (h) of s464T(3); that is to say, his reasons should not be taken as an exhaustive statement of why he rejected the application. Mr Walters submitted that the magistrate was entitled to take into account the significance of the evidence to be obtained before deciding whether to grant the application; and that the magistrate's reasons indicated that he found that the relevant tattoos did not go sufficiently to the heart of the issues which would arise at any subsequent trial and he therefore was not prepared to grant the application. Mr Walters submitted that the probative value of the evidence was likely to be low and that the qualified usefulness of the evidence could legitimately be weighed by the magistrate as one of the relevant circumstances in deciding whether to exercise his discretion to grant the application. On this basis, he submitted, the exercise of discretion could not be shown to have miscarried. His argument continued that, if the magistrate's reasons were thus interpreted, the learned Judge was himself in error in finding that the magistrate had been wrong.

A subsidiary aspect of the argument was that the submissions of counsel before the magistrate did not form part of the record, and error on the part of the magistrate could not be established on the basis of those submissions. As to this, it may be accepted that the submissions of counsel do not form **[10]** part of the record; but clearly submissions of counsel may be used by a court, in circumstances such as the present where the magistrate's reasons are so shortly stated, as a legitimate aid to the proper interpretation to be given to those reasons - and subject to the benevolent construction that is in any event their due.

The applicant's response to these submissions was that the magistrate's reasons, properly understood and allowing for a benevolent interpretation, nevertheless demonstrated that his Worship had misconstrued the whole of s464T, that he had misdirected himself as to the purpose of the section and that he had failed to assess whether the allegedly tattooed buttocks were distinguishing marks tending to prove or disprove the involvement of the suspect in the commission of the offences. Mr Hill for the applicant submitted that the test posed by counsel for the appellant before the magistrate and set out in paragraphs 12 and 15 of the affidavit quoted above, was clearly the test which the magistrate had adopted, and that this was not the test which should be applied under paragraph (f). He submitted that the test so phrased imposed a higher standard than that which was required by paragraph (f). Mr Hill submitted that the purpose of s464T was to provide a helpful tool for police investigating crime, one which was neither wholly concerned with proof of the crime nor principally concerned with obtaining evidence that will be used at trial. He submitted that if no such tattoos could be shown to exist on the appellant's buttocks and if there was evidence that the tattoos could not have been removed without its being apparent that such removal had occurred, those facts in themselves would tend to disprove the involvement of the appellant in the commission of any offence. Mr Hill drew attention to the fact that the Crown and the public interest are **[11]** just as much concerned in the assistance given by a physical examination in disproving involvement of a suspect in the commission of a crime, as in the implication of the suspect. He submitted that it was manifest that the magistrate did not turn his mind to these aspects of the operation of paragraph (f) at all. On the question whether the magistrate could have been regarded as exercising his discretion Mr Hill submitted that no mention of paragraph (h) had been made during argument, as can be seen from an examination of the paragraphs of Constable Hercus's affidavit quoted above; that the magistrate had not turned his mind to the existence of a discretion independently of paragraph (f); and that paragraph (f) did not require the evidence to be logically probative of the suspect's involvement in or the commission of the offence.

In our view the submissions of the applicant are to be preferred. The fact that identity was not in issue was a matter conceded by Constable Hercus at the hearing of the application. That the question of identity was not relevant to the applicability of paragraph (f) in the circumstances of the present application is underlined by the appellant's concession both to the learned Judge and in this Court that the existence or non-existence of the tattoos was a matter within the ambit of paragraph (f). The argument made by the appellant's counsel to the magistrate made no attempt to call in aid the discretion in paragraph (h), but was explicitly based on what the

appellant concedes is an erroneous view of paragraph (f). It is obviously not necessary to bring the matter within paragraph (f) that the physical characteristics sought to be examined in some way prove the suspect's involvement in the commission of the alleged offence. All that the sub-section requires is that the conduct of the procedure on the person may tend to confirm or disprove her **[12]** involvement in the commission of the offence.

The question asked by the magistrate of Constable Hercus, and set out in paragraph 13 quoted above suggests, not that his Worship was considering an exercise of discretion, but rather that he had adopted the incorrect view of the ambit of paragraph (f) submitted by the appellant's counsel. The submissions made by Constable Hercus in response met the substance of what had been argued by the appellant's counsel but did not address those submissions as to the legal question involved in the interpretation and operation of paragraph (f) or s464T as a whole. The magistrate then asked the appellant's counsel for his reply, and again a submission was made which was incorrect both in its statement of the purpose of s464T and in imposing a higher standard for the application of s464T than that which was contemplated by paragraph (f). The section was plainly not designed simply as an investigative tool towards the issue of identity, nor was it necessary that the tattoos should in some way prove the appellant's involvement in the alleged crime.

The reasons pronounced by the magistrate immediately after the conclusion of these submissions in this context demonstrate that his Worship had accepted and applied the incorrect interpretation of s464T which the appellant's counsel had just put to him and that the error involved in that interpretation of s464T was apparent on the face of the record. This construction of the magistrate's reasons follows naturally from their wording and the fact that their phrasing implies acceptance of the incorrect submissions which the appellant's counsel had just advanced. Furthermore the magistrate was unfamiliar with the section (he had "never had one like this before") and had permitted the appellant's counsel to cross-examine the complainant, notwithstanding the apparently clear dictate of s464T(5)(b). All these matters, taken with the **[13]** absence of any reference in argument or in his Worship's reasons to paragraph (h) or to questions of discretion, lead to the conclusion that the magistrate cannot be said to have been refusing the application in an exercise of discretion independently of the view he formed about paragraph (f).

We observe that the existence of a general discretion to refuse an order is perhaps a question in itself, but for the sake of the argument we have been prepared to assume its existence in favour of the appellant, the more especially as Mr Hill was not disposed to argue to the contrary. The most recent analysis by the High Court, in *Mitchell v R* [1996] HCA 45; (1996) 184 CLR 333; (1996) 134 ALR 449; (1996) 70 ALJR 313 at 319-320; (1996) 85 A Crim R 304; [1996] 3 Leg Rep C1, raises the possibility that the term "discretion" is not altogether apt in this situation and that sub-s(3) is to be read as doing no more than conferring a power upon the Court and spelling out the conditions for its exercise, with the result that if there is any "discretion" in the Court it stems from the operation of paragraph (h) as a condition attached to the exercise of the power and not, as the argument in this case tended on occasion to suggest, from the word "may" in the conferring of the power.

But the point was not argued and so we do no more than note that it remains unresolved. In this instance we have proceeded upon the assumption that, even if the Court is satisfied to the necessary standard of all the conditions otherwise spelled out in the various paragraphs of s464T(3), the Court retains some general discretion (whether founded in paragraph (h) or arising elsewhere) to refuse an order for the compulsory procedure being sought; since, for the reasons we have given, the appellant's submission, which depends upon the significance of that "discretion" in this case, falls to be rejected in any event.

[14] Accordingly the learned Judge was entitled to find that the magistrate was in error and that that error appeared on the face of the record, and was entitled to make an order in the nature of *certiorari* quashing the order of the magistrate on 15 August 1995. The appellant's principal submission therefore fails.

[After dealing with the question whether the judge had the power to make the order rather than remitting it to the magistrate, the Court continued]:...**[16]** Accordingly, we would allow the appeal, set aside paragraph 3 of his Honour's order and order in lieu that the application under s464T of the *Crimes Act 1958*

be remitted to the Magistrates' Court (constituted, if practicable, by the magistrate who heard the application on 15 August 1995) for determination according to law. Since the matter was fully argued before us, including as to matters going to the discretion of the magistrate under paragraph (h), we would merely observe that no matter was raised by appellant's counsel which would persuade us that the magistrate should not now make an order granting the application.

We make one final comment. The procedure authorized by s464T was clearly enough intended to be ancillary to an investigation by the police and therefore in practice it should, one would think, be both expeditious and final in practical operation. Although since the decision in *Loughnan v Melbourne Magistrates' Court* [1993] VicRp 49; [1993] 1 VR 685, the section has undergone some amendment, it is to be regretted, as in that case, that the procedure found in s464T has once again been used as ground for **[17]** extensive litigation which must have interrupted and perhaps delayed the timely investigation and proper resolution of the complainant's allegations. This observation is no reflection on counsel for either of the parties, all issues in this case having been particularly well argued by both counsel.

APPEARANCES: For the Appellant: Mr BE Walters, counsel. Solicitors: Galbally Fraser & Rolfe. For the First Respondent: Mr ID Hill, counsel. Solicitor: Victorian Government Solicitor.
