11/82

SUPREME COURT OF VICTORIA

SIGNOROTTO v NICHOLSON

Fullagar J

13th November 1981 — [1982] VicRp 40; [1982] VR 413; (1981) 46 LGRA 141

EVIDENCE – BOARD OF INQUIRY – WITNESS MEMBER OF POLICE FORCE – PART OF EVIDENCE CONSISTED OF A STATEMENT BY PAID POLICE INFORMER – WITNESS NOT PREPARED TO DIVULGE IDENTITY OF INFORMER – COMPELLABILITY – *EVIDENCE ACT* 1958 SECTION 16 CONSIDERED – "LAWFUL EXCUSE" – "EXCUSE SUPPORTED BY THE LAW" – STRONG RULE OF LAW BASED ON PUBLIC POLICY NOT TO DISCLOSE IDENTITY OF INFORMER EXCEPT WHERE NON-DISCLOSURE CALCULATED TO LEAD TO WRONGFUL CONVICTION OF A PERSON ON TRIAL – RULE APPLIED BY SECTION 16 TO BOARDS OF INQUIRY: *EVIDENCE ACT* 1958, S16.

FULLAGAR J: The plaintiff is a Detective Senior Constable of the Victoria Police and he was called as a witness before a board of inquiry constituted by Mr Alastair Nicholson QC. The board was sitting *in camera* whilst the plaintiff gave evidence, and part of his evidence consisted of a statement of what a paid police informer had told the plaintiff of a conversation which the informer had overheard. ...

It is clear that the plaintiff knowing that the board wished to know the identity of the informer, stated to the board that he was not prepared to reveal his identity. The plaintiff thereupon commenced this action against the defendant (Mr Nicholson QC) by writ of summons, seeking a declaration that a proposed direction of the board that he disclose to it the name of the informer is contrary to law, and a declaration that he is not obliged to disclose the name of the informer to the board ...

The writ was issued on the 26th October 1981 and the plaintiff on the following day issued a summons for interlocutory injunction against the defendant restraining him, pending the trial of the action, from requiring the plaintiff to disclose the name of the informer. It was requested by counsel on each side that the return of the summons be treated as the trial of the action. ...

I have come to the conclusion that this court has jurisdiction to give relief by way of declaration if the plaintiff makes out his case that he is not compellable to name or otherwise disclose the identity of the informer. If the court were to hold its hand at this stage, the plaintiff clearly would maintain this position in the face of the direct command from the board in which case the question and issue to be decided by this court would be whether the plaintiff had, by refusing to answer, committed a criminal offence (a doubly serious matter for a policeman), or whether the plaintiff had acted in a way which is probably contrary to Standing Orders and identify the informer, in which latter event, if the plaintiff's contentions of law are correct, a breach of the law would have occurred, and possibly as well a substantial harm to the public interest.

In my view, the case is clearly one where the court ought to entertain and decide the question whether to grant a declaration and where, if it considers the plaintiff's submissions to be correct, it ought to grant the declaration requested. I have also arrived at the conclusion that, if the plaintiff's submissions are correct, an injunction would also go, although of course none would be necessary in the face of a declaration in this case. ...

Section 16(b) of the *Evidence Act* makes it quite clear that a person who has been required to attend for the purpose of giving evidence and who has been sworn, but who refuses to answer a clearly relevant question put to him by the board or commission, commits no offence whatever by his refusal if he has a "lawful excuse" for refusing to answer. ...

In my view, the expression 'lawful excuse' in s16(b) of the *Evidence Act* 1958 is used in the sense of excuse "supported by the law", and a person is permitted to refuse to answer (and is

thus not compellable to answer) where he produces an excuse which the law recognises as a valid excuse." ... As will appear, we are in this case not dealing with contractual duties of confidence but with what I take to be a strong rule of law based on public policy. ...

In the present case, I have concluded that there is a strong and long established rule of the common law, based upon paramount considerations of public policy, which at the very least requires that in any legal proceedings or analogous inquisitorial proceedings a policeman cannot be required indeed cannot be permitted to divulge the identity of a paid police informer who has given the Policeman information received in his character as a policeman and as part of his duties in upholding the law. This is probably not one of the rare exceptions to what Dixon J said would be otherwise:

> "an inflexible rule ... that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling could stand in the way of the imperative necessity of revealing the truth in the witness box".

– see *McGuinness v Attorney-General* [1940] HCA 6; (1940) 63 CLR 73 at pp102-3; [1940] ALR 110. It is I think a much more powerful exception from the duty of revealing the truth, dependent not upon mere obligations of honour, and not upon contracts or mere pursuits or callings, but upon the imperative necessity of keeping open the flow of information to the police from police informers.

[His Honour referred to the case of Marks v Beyfus *(1890) 25 QBD 494, in which case the plaintiff sued the defendants for conspiring to cause the Director of Public Prosecutions to institute an earlier prosecution for fraud against the plaintiff. The Director of Public Prosecutions in evidence in the action said the prosecution had been instituted by himself and, on being asked what were the names of his informers, declined to answer on grounds of public policy. The rule stated was that the informer, in the case of public prosecutions, should not be disclosed.] ...*

Of this rule, Lord Esher MR said (25 QBD at p498)

> "I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the Judge should be of opinion that the disclosure of the name of the informer is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the Judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness whether to answer or not. The learned Judge was therefore perfectly right in the present case in applying the law, and in declining to let the witness answer the question."

Lord Esher also said that

> "The rule as to non-disclosure of informers applies ... not only to the trial of the prisoner, but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted or brought about."

Lindley LJ and Bowen LJ agreed.

It is, I think, important to observe that the application of the rule to this civil trial which was the subject matter of the appeal in *Marks v Beyfus* meant that the plaintiff must necessarily be unable to prove his case, for the simple reason that he was not permitted to adduce evidence of the identity of the informers; there could hardly be a stronger example of the great strength of the rule, for this application prevented proof of or inquiry into a matter vital to the foundation of the whole legal proceedings; in every sense the question of identity touched the subject matter of the enquiry and brought the whole proceeding to a standstill; it aborted the proceedings altogether.

In a case where the facts have nothing to do with the present case, Mr Justice Wills said,

> "If a police officer, for example, were asked in court from what source he got his information in respect of an offence, it would ... as a general rule be the duty of the judge to direct him not to answer the question, since the mere possibility of having such information disclosed would operate as a powerful check upon persons disposed to give information in respect of such matters."

See *Hennessy v Wright* (1888) 21 QBD 509 at p519; 57 LJQB 530.

[After considering several decided cases, His Honour continued] ... In my opinion the rule of the common law, which of course related to legal proceedings and not to acts of the executive, is that the identity of a police informer may not be disclosed in proceedings, except where the tribunal is of opinion that non-disclosure is calculated to lead to the wrongful conviction in the proceedings of a person on trial before the tribunal for an alleged crime. I am further of opinion that the reference to "lawful excuse" in s16 of the *Evidence Act* operates to apply that rule *in toto* to any board of inquiry, whether or not conducted *in camera* and irrespective of what the scope or apparent importance of the board's inquiry may be, and whether or not the application of the statutorily conveyed excuse may in the case of a particular executive inquiry operate to abort it. Judgment for the plaintiff in the action.

[Ed Note: The judgment contains a lengthy consideration of:

(a) non-disclosure" as a strong rule of law based on public policy; and

b) the applicability of the rule to legal proceedings and analogous inquisitorial proceedings; and
(c) the applicability of the rule to *in camera* proceedings.

Cases which were considered in the course of the judgment included *McGuinness v Attorney-General* [1940] HCA 6; (1940) 63 CLR 73; [1940] ALR 110 per Dixon J, *D v NSPCC* [1977] UKHL 1; [1978] AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5 and *Marks v Beyfus* (1890) 25 QBD 494.]
