09/87

SUPREME COURT OF VICTORIA

R v THE MAGISTRATES' COURT AT MELBOURNE; Ex Parte CROSS

Gobbo J

10 March 1987

EVIDENCE – WITNESS – PRIVILEGE AGAINST SELF-INCRIMINATION – PRIVILEGE CLAIMED BY WITNESS – REQUEST BY WITNESS FOR LEGAL REPRESENTATION – WHETHER WITNESS HAS RIGHT TO COUNSEL – WHETHER COURT HAS DISCRETION TO PERMIT COUNSEL TO APPEAR: *EVIDENCE ACT* 1958, S29.

1. The privilege against self-incrimination allows a witness to decline to answer a question once it is asked. But, a witness has no right to have a legal representative present to advise on the possible exercise of the privilege. However, in an appropriate case, the court may grant leave for such legal representation.

***R v The Coroner; Ex parte Alexander* [1982] VicRp 73; [1982] VR 731, observation by Gray J at p736, distinguished.**

2. C. a witness, was called by the Prosecution as part of its case in committal proceedings. A number of charges laid against C. had been disposed of, C. had provided material to the National Crimes Authority and negotiations were proceeding to grant him an indemnity. Where the court refused to grant C. legal representation, no error was shown in the exercise of its discretion.

GOBBO J: **[1]** This is an urgent application for an order nisi for prohibition or, alternatively, for a writ of mandamus to show cause why the Magistrates' Court of Melbourne should not be required to permit counsel for one Peter Cross to have leave to appear on his behalf to take objection to questions which might tend to incriminate him and to require the court to caution the witness Cross according to law when he is asked a question, the answer to which might tend to incriminate him.

The background of the matter is as follows: There is now in progress a committal proceeding involving a number of persons and the applicant, Peter Cross, has been called by the Director of Public Prosecutions as a witness, as part of the prosecution case. Although this does not appear on the material before, I am prepared to act upon the submissions made by **[2]** counsel for Mr Cross to the effect that Cross has had a number of charges laid against him which have been disposed of, and that he has provided material to the National Crimes Authority and to the police which forms the basis of some of the evidence that has been adduced from him in these committal proceedings I have just referred to. This applicant has completed his evidence-in-chief and it is his cross-examination by the defendants that has given rise to this application.

I was further informed that negotiations are proceeding for an indemnity in relation to matters that might be the subject of possible charges against Mr Cross, but that it was decided that the question of indemnity should be held over and that Mr Cross should give evidence at these proceedings without the benefit of such indemnity but seeking, however, to have legal representation for himself, primarily to assist him in taking objections to questions that might incriminate him.

When the applicant Cross was called to give evidence his counsel sought to appear on his behalf to take objection, as he said, to questions which might tend to incriminate him. After some argument, His Worship deferred a ruling and it appears that there was some limited participation by counsel. Ultimately His Worship refused to give leave. It is said that His Worship gave no reasons for refusing leave.

It is further stated on affidavit before me that on a number of occasions counsel for the applicant requested His Worship to caution the applicant that he need not answer questions, but that His Worship administered such caution **[3]** only on one occasion following such application

by counsel. It is further indicated in the material that His Worship did on a number of occasions, without being asked to do so, administer a warning to the witness when questions of a clearly self-incriminatory nature were put to the witness.

It is argued on behalf of the applicant that leave to appear should have been given. It is said that a witness cannot properly exercise the right to refuse to answer incriminating questions unless he understands all the legal principles involved and that for this purpose he should be afforded separate legal representation. It is put that counsel, having been briefed in the background of matter and being appraised of matters that might form the basis for some form of incrimination of the witness, would be in a position to advise the witness where, for example, neither His Worship nor counsel for the Director of Public Prosecutions would be able to provide the same assistance.

Reliance was placed principally upon a statement in *R v The Coroner; Ex parte Alexander* [1982] VicRp 73; [1982] VR 731, in particular the reference at p736 to the possible taking of an objection as to incrimination by the witness's legal representative. I am not persuaded that this observation as to a matter which was not an issue in the case was intended to displace the general rule that ultimately it is for the witness to object on oath to answer if the Court is to be satisfied that the answer may tend to incriminate.

It needs to be stated at the outset that the self-incrimination privilege is not a privilege that enables **[4]** objection to be taken to giving evidence at all or to the asking of the question. The privilege relates to being able to decline to answer a question once it is asked. In other words, the privilege is not a prohibition upon the witness being sworn. Rather, it is a privilege to enable the witness to decline to answer a question once that question has been asked and it is then able to be said that the question may tend to incriminate the witness.

The relevant statutory provision is s29 of the *Evidence Act* 1958 which provides:

> "No witness shall on the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or proceeding whether civil or criminal be permitted to refuse to answer any question which is relevant and material to the matter in issue on the ground that the answer may expose him to any penalty or forfeiture or may disgrace or criminate himself, unless the court or person having by law or by consent of parties authority to hear receive and examine evidence is of opinion that the answer will tend to subject such witness to punishment for treason or an indictable offence."

The nature of the privilege is one that does not entitle objection to be taken to questioning. It appears on the material before me that the application may have been one that was so perceived by His Worship. It is clear, in my view, that there is no right to object to any questioning, but rather that there may be a right to refuse to answer a question once asked.

At the same time, it would appear that His Worship's ruling was intended not only to preclude counsel appearing to object to questions but to preclude counsel being able to intervene, when a question was asked, to speak for the witness or more particularly to advise the witness as to **[5]** whether or not the question should be answered. It appears also that what was sought by counsel was the right to address His Worship from time to time in relation to particular questions and to seek warnings from His Worship on such occasions to the witness that the question might incriminate him and that he was not bound to answer.

It is clear, as has been said in a number of authorities, including *Alexander's case*, that it is not necessary that the very question asked should itself incriminate or have the capacity to incriminate the witness, for it may be that a process of questioning would inevitably lead to incrimination. In those circumstances, one does not simply look at the final question but considers the effect of a chain of questions.

The critical question in this matter is whether a witness is entitled as a matter of right in any type of proceeding to have the benefit of legal representation to advise the witness or in some other fashion to protect the witness in relation to questions that may tend to incriminate him. In this regard I refer to the wide category of witnesses in any type of proceeding as opposed to parties. I know of no authority that establishes the existence of such a right and, although I stood the matter down to afford further time to counsel to research the matter, no authority has been able to be found for this wide proposition. The only support is the passage at p736 that I have

already referred to in *Alexander's case* where there is reference to objection being able to be taken by the witness's legal representative. I do not regard **[6]** that statement as providing authority for the wider proposition that I am being asked to recognise. In *Alexander's case* the hearing was a Coronial Inquiry where counsel had been granted leave to appear for the witness in question. That was within the discretion of the Coroner. It is a discretion which is invariably exercised in favour of a witness who may be the subject of possible charges in relation to the subject matter of the inquest. In the present case, however, no leave to appear was given and it is therefore altogether different from a situation where the witness has a legal representative present who has been given leave to appear for the very purpose of protecting that particular witness in that inquest.

The proposition that is sought to be recognised in the application before me is of much wider import. Taken literally, it would enable any witness in any proceedings to seek to have legal representation for the purpose of securing intervention from time to time and advice on any matters that might be the subject of the privilege of self-incrimination. In some ways one understands why that would be a reasonable course in certain cases for, as was argued before me, it seems unfair that a witness has the right to invoke the privilege, but through lack of knowledge of its existence does not do so. Here, of course, it is not suggested that the witness does not know of the privilege. Indeed, it is clear that he was appraised of it, both by his own counsel and by His Worship.

But I am still somewhat troubled by further argument that there might be circumstances where **[7]** a witness might not apprehend the consequence of a line of questioning and would therefore be unable to do himself justice in the matter of invoking a privilege that he enjoyed, both at common law and by statute. At the same time it needs to be remembered that it is the Court that must be satisfied that an answer may tend to incriminate and that this may be difficult when the significance of a question rests on matters not mentioned or obvious and present to the mind only of the witness or his counsel. See in this regard *Jackson v Gamble* [1983] VicRp 51; (1983) 1 VR 552 at 555-556; (1982) 7 ACLR 652; *Controlled Consultants Pty Ltd v Comm'r for Corp Affairs* [1984] VicRp 11; (1984) VR 137 at 151; (1983) 8 ACLR 458. See too, *R v Adey* (1831) 1 M & R 94; *Osborn v London Dock Company* [1855] EngR 162; (1855) 10 Exch 698 at 701; 156 ER 620; 24 LJEx 140; *Boyle v Wiseman* (1855) 1 Jur NS 115.

I have come to the conclusion that although there might be good grounds on occasions for allowing a witness the right to have a legal representative present to advise him on the possible exercise of his privilege against self-incrimination, it is not in my view a right that must be granted by any court, but it is a discretion that resides in the particular court. Like all discretions, it must be exercised judicially.

In the present case His Worship heard argument and decided against granting leave to counsel for the applicant to appear for him. Assuming that I read the application as one that was intended to operate in narrower terms than appears on the material before me, nonetheless I am not able to say that His Worship has failed to exercise the discretion that resided in him, or that he relied upon **[8]** improper or irrelevant considerations in reaching his decision.

It follows that as I am not satisfied that there has been any error in the exercise of the discretion by the presiding Magistrate in relation to whether to grant legal representation, the application for a prerogative writ should be refused.
